This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HL 2TRU /

STR. S

HARVARD LAW LIBRARY

Received MAR 17 1910

Cases

HEARD AND DETERMINED

IN

HER MAJESTY'S SUPREME COURT

OF THE

Straits Settlements.

Supreme Court

1808—1890.

EDITED AND REPORTED

WITH A JUDICIAL-HISTORICAL PREFACE FROM 1786 TO 1890

AND THE

RULES AND ORDERS OF COURT

IN FORCE.

BY

JAMES WILLIAM NORTON KYSHE, Esq.,

OF LINCOLN'S INN, BARRISTER-AT-LAW, ACTING REGISTRAR OF THE SAID COURT AND COMMISSIONER OF THE COURT OF REQUESTS IN MALACCA.

Law is beneficence acting by rule.
Burke.

VOL. IV.

1885—1890.

CIVIL,

ECCLESIASTICAL,

HABEAS CORPUS, ADMIRALTY AND BANKRUPTCY CASES.

CRIMINAL RULINGS AND MAGISTRATES' APPEALS.

Copyright.

SINGAPORE:

PRINTED AT THE "SINGAPORE AND STRAITS PRINTING OFFICE."

1890.

MAR 17 1910

TO

HIS HONOUR

EDWARD LOUGHLIN O'MALLEY, M.A.,

Chief-Justice of the Straits Settlements, &c., &c., &c.

This Work

IS, WITH PERMISSION,

RESPECTFULLY DEDICATED

BY

THE AUTHOR.

JUDGES

OF

THE SUPREME COURT.

His Honour EDWARD LOUGHLIN O'MALLEY, Chief-Justice of the Straits Settlements.

His Honour THOMAS LETT WOOD.

His Honour ETIENNE PELLEREAU.

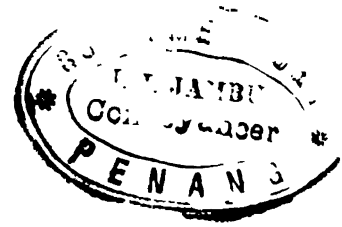
His Honour JOHN TANKERVILLE GOLDNEY.

ATTORNEY-GENERAL.

The Hon. JOHN WINFIELD BONSER.

SOLICITOR-GENERAL.

DANIEL LOGAN, ESQ.



PREFACE

TO

THE FOURTH VOLUME.

THE favourable reception which the preceding Volumes of this work, published five years ago, has met with from the Judicial and Executive Authorities, the profession and the public, renders it unnecessary for me to say more as a Preface to the present one than that the same care has been bestowed in preparing it to render the work worthy of being still considered a standard authority on the subjects of which it treats.

The numerous important cases which have been adjudicated upon since the first appearance of this work* have been carefully reported in the present Volume, in the preparation of which I have had to rely, apart from such Reports as are entirely my own—the materials of which I continued collecting after the manuscript of my first three Volumes had been completed before my previous transfer to this Settlement—upon Reports and in some instances mere notes furnished to me [the correctness of which however cannot be impugned] by some of the leading members of the profession at whose suggestion principally, apart from the late Chief Justice and other Judges, this work is now continued, and to whom I beg to tender my most grateful acknowledgments.

For the majority of the cases decided at Singapore, I have been guided to a great extent by such Reports as have appeared

---

* No particular mention is made in this Preface of the cases reported, but a point argued before the Court of Appeal in Singapore, in June last, [*Regina* v. *Pantalani*—infrà, p. 605] as to the right of reply by the Attorney-General even when no witnesses are called for the defence, may be here mentioned. Their Lordships as will be seen, while holding that the "right of reply was a prerogative of the Crown from of old, and was exerciseable by the Attorney-General" did not decide whether such privilege could be claimed by the Solicitor-General or by private Counsel prosecuting for the Crown. Mr. Montagu Williams, however in his interesting work recently published has the following passage on the subject :—"*The Attorney-General is the only man at the Bar, save his representative, the Solicitor-General, who has a prescriptive right to reply to a defence where no witnesses are called* ....."—Montagu Williams, Q.C.—[*Reminiscences*, 1890, Chap. XLVI., p. 283.] This quotation would have been inserted in its proper place had not the passage been met with only after the case in question had gone through the press.—J.W.N.K.

in the daily press, from time to time, but only after all doubt as to their correctness had been removed have the important ones alone been accepted, and most of these have been greatly abridged and judiciously condensed. The cases decided in Penang, where I have been stationed the longest, will therefore be found to be in excess of those reported from the other Settlements.

Such important cases as have been decided in this Settlement or transferred hence to Singapore for decision, and which I have been able to rely upon—for accuracy throughout has been my constant aim and it is but right, I should say, I have not shrunk from any pains to secure it—will also be found duly reported herein. This stated, I shall now proceed—in continuation of the Judicial-history contained in Volume I. of these Reports—to note such changes in our local laws, and in the constitution or *personel* of the Courts as have been effected since its publication.

CHAPTER VIII.*

CONTENTS.

1885—1890.

Number of Judges increased—location of Judges—two Judges no longer required to reside ordinarily in Penang—Appeals—Judge not to sit on appeal of his own decision—Appeals how decided—Courts of Appeal when held—Jurisdiction of Supreme Court on vacancy in the office of Judge—Rules and Orders—Commissions to Justices of the Peace—District Delegates—Advocates and Solicitors—Taxation, recovery and scale of Costs—Costs recovered by Crown—Conveyancing—Bills of Sale—Bankruptcy Laws—Shortening of language in Ordinances—Orders of the Queen in Council—Wigs—origin—Mr. Serjeant Robinson's book—Indian Acts—Oaths in Judicial Proceedings—Jury—Law of Evidence—Bankers' Books—Distraints for rent—Fees in Courts of Requests—Changes amongst Judges—retirement of Sir Thomas Sidgreaves, C.J.—Chief-Justice ceases to be a Member of the Legislature—other mutations among Judges.

By the "Courts Ordinance Amendment Ordinance" 15 of 1885, the number of Judges of the Supreme Court has been increased to four, that is to say, a Chief-Justice and *three* Puisne-Judges. The location of the Judges is dependent on arrangements made by them with the concurrence of the Governor, but the Chief-Justice is required ordinarily to reside in Singapore and the Senior Puisne-Judge for the time being in Penang, and now by the "Courts Ordinance Amendment Ordinance" 19 of 1889, Section 3, it is no longer required that if there be more than two Judges present in the Colony, two Judges should ordinarily reside in Penang as was provided for in the former Ordinance. By the same Ordinance [19 of 1889, s. 6], Appeals are required to be heard before not less than three Judges, provided that a Judge shall not sit at the hearing of an appeal against his own decision, but when there are only three Judges in the Colony, one of whom is the Judge whose decision is appealed against, the appeal is to be heard before the two other Judges. Appeals are to be decided by a majority of votes, but when the votes are equal, the decision appealed against is to stand, and Courts of Appeal instead of being held twice a year as before are now held at such times and places as the Chief-Justice may appoint [Ordinance 15 of 1885, s. 5].

The "Courts Ordinance Amendment Ordinance" 19 of 1889 also lays down that the jurisdiction of the Supreme Court shall be deemed duly constituted during and notwithstanding a vacancy in the office of a Judge [s. 21] and by Section 7 the Court is empowered to make certain Rules and Orders as therein provided for, the Governor under Section 4 having power to issue Commissions to fit persons to act as Justices of the Peace, such Commissions being filed of record in the Supreme Court.

By Ordinance 12 of 1887, provision is made for the appointment of "Delegates" for the Judges of the Supreme Court, to grant Probate and Letters of Administration to Estate of deceased persons not exceeding $500 in value, and who at the time of death were permanent residents within the local limits or District of

* For the previous Chapters of this Judicial-Historical Preface, see *Vol. I.* of these Reports.—J.W.N.K.

the Delegates. Several such appointments have recently been made and confined to District Officers under the Boundaries Ordinance and other recent legislation.

By Ordinance 17 of 1886, certain rights, privileges, and duties are conferred on Advocates and Solicitors of the Court in reference to the taxation and recovery of their costs, and Section 52 of the Supreme Court Ordinance, 1878, is repealed and substituted by this Ordinance. A new scale of costs chargeable by Solicitors has also been passed, and these are given *in extenso* in this Volume.*

Costs recovered by the Crown are dealt with by Ordinance 22 of 1886.

The laws relating to Conveyancing, Bills of Sale, and Bankruptcy have also been repealed and greatly modified by recent legislation—the Ordinances dealing with these respective subjects being Ordinance 6 of 1886, 12 of 1886, and 2 of 1888.

By Ordinance 1 of 1888 as amended by Ordinance 9 of 1888, the shortening of the language used in Ordinances and other written laws is provided for and "judicial notice" is required to be taken of all Orders of the Queen in Council published in the *Government Gazette*. The latter provision, doubtless, being due to a recent decision of the Court in an Extradition Case.†

Early in 1889, a learned Judge of the Court in Singapore, endeavoured to introduce the time-honoured custom of wearing wigs in Court, and which it may be added is in vogue in many of the Colonies. The custom however, not meeting with full approval here and not being made obligatory was allowed to be discontinued.‡

Under the provisions of Ordinance 8 of 1889, the Governor was empowered to appoint Commissioners to determine what Indian Acts were in force in the Colony and for revising and publishing the same. The result of this Commission composed of the Hon'ble J. W. Bonser, Attorney-General, and His Honor Mr. Justice Goldney, has been the publication issued early this year of one of the most useful compilations ever published in the Colony.

The law relating to oaths in Judicial proceedings has also been greatly amended. Ordinance 5 of 1890 empowers the Court to tender oaths to witnesses in any form common amongst, or held binding by persons of the race or persuasion to which the witness belongs, a matter not altogether novel in the annals of the

---

* *See* Rules and Orders of Court, *infrà*, p. 31.

† *In re* Rajah Samsudin Tunku Jaksa, *infrà*, p. 346.

‡ The origin of the wig as part of the dress of a Lawyer has given rise to much controversy, especially locally when it was attempted to be introduced.—the following paragraph on the subject from the late Mr. Serjeant Robinson's book will therefore not prove out of place: "The wig or peruke was invented by the courtiers of Louis XIV., in order that they might appear with the fine flowing locks which nature had bestowed on the head of their monarch; and, when these began to grow scant, he followed the example of his subjects, and wore a wig too. The fashion was adopted by the Court of Charles II., and when all who thought themselves respectable did the same. The Bench and the Bar, deeming themselves of course in that category, followed the mode, to which they have adhered ever since.. ....." *Bench and Bar Reminiscences*—Serjeant Robinson, London, 1889.

Colony.* Otherwise existing forms of oaths† are to continue until determined by Order of Court. Summary punishment for perjury in open Court is also dealt with.

An important alteration in the Jury law [Ordinance 11 of 1890] causes a fusion of the Special with the Common Jurors, the Court having power however, in any case it may deem it necessary, to draw a Special Jury from a smaller class; the first trial under the new law, viz., a murder case, hitherto triable only by a Special Jury, and therefore the first since the foundation of the Colony [though it may be mentioned two of the Jurymen happened at one time to be on the list of "Specials"] taking place under the presidency of the present Chief-Justice, in Malacca, on the 17th December, 1890.

The Law of Evidence with respect to Bankers' Books has undergone modification, by their production in Court no longer being compulsory [Ordinance 12 of 1890] and the English Arbitration Act, 1889, has also been adapted to local requirements by Ordinance 13 of 1890, the Civil Procedure Ordinance therefore undergoing amendment in that respect.

Of the lower Courts, one measure passed by the Legislature [Ordinance 8 of 1890] introduces a new scale of fees to be levied in Courts of Requests in distraints for rent under the Distress Ordinance 14 of 1876. It may be added that the Ordinance relating to Oaths above alluded to extends also to the Inferior Courts.

The following are the changes that have taken place among the Judges. In February, 1886, the Chief-Justice Sir THOMAS SIDGREAVES retired on pension; and on his retirement, the Chief-Justice, who had been a Member of the Legislature since the transfer of the Colony in 1867, ceased to be one. He was succeeded in March following by the first Puisne-Judge Sir THEODORE THOMAS FORD‡ whose post of Senior Puisne-Judge was filled by the next Judge in rank Mr. Justice WOOD, the latter being re-placed by Mr. Justice SHERIFF, Chief-Justice of the Colony of British Honduras. SIDGREAVES, C.J. FORD, C.J. WOOD, J. SHERIFF, J.

In consequence of the increase in the number of Judges as stated above, it became necessary to appoint a fourth Judge, the post being conferred in June, 1886, on Mr. Justice PELLEREAU, Procureur and Advocate-General of the Mauritius. With the sanction of the Secretary of State, in March, 1887, an exchange of stations was effected between Mr. Justice SHERIFF and Mr. Justice GOLDNEY, Puisne-Judge of the Supreme Court of British Guiana, whereby the latter became the third Puisne-Judge of this Colony. PELLEREAU, J. GOLDNEY, J.

On the retirement of the Chief-Justice Sir THEODORE FORD early this year, the Hon'ble EDWARD LOUGHLIN O'MALLEY, Attorney-General of Hongkong was appointed his successor, and assumed duties as Chief-Justice of the Straits Settlements in February, 1890. O'MALLEY, C.J.

---

* *Vide* Judicial—Historical Preface, Vol. I. of these Reports, p. xxxv.

† *In re* Native Witnesses, Cr. Rulings, Vol. II. of these Reports, p. 15.

‡ Knighted 1st June, 1888.

A classification of the Reports into different parts as in the previous Volumes has not been found practicable in the present one, owing to the small number of important decisions given on some of the sides of the Court, and I have followed a plan similar to that adopted in the home *Law Times* and *Weekly Reporter*, of a general intermingling of the Cases. The head-notes at once shew the nature of the Cases, and the general and copious Index provided, remedies at once any such apparent defect at non-classification.

The plan also adopted by old Reporters and still continued by the Incorporated Law Society of publishing as an Appendix to the Law Reports such Rules and Orders of Court as are in force, or are promulgated, from time to time, and are difficult to obtain, as an addition to the usefulness of their work, has been likewise followed by me, and herein re-produced *in extenso* with references and explanatory notes wherever found necessary, which I have no doubt will be duly appreciated.

The usual Tables of Cases Reported and Cited will also be found in their proper places.

This Volume having been published in the year wherein it purports to end, obviously it was impossible to delay its publication till the last month of the year in anticipation of important decisions to be delivered. On the last completed Report being reached—such important cases as were determined, from time to time, being added to the work as it progressed through the press—the work necessarily had to come to an end: it therefore concludes in November, 1890.

The favour shewn to the previous issues of this work—begun only when the lapse of time seemed to render it hopeless that the task would be performed by other hands—may I hope be extended to the present one. At all events it possesses one claim to indulgence; it offers to the official and the public, to the practising Lawyer especially, easy possession at a moderate cost, of that which has long borne a high value, but was not in this Colony to be procured without the utmost difficulty, and in some cases, difficulty upon any terms.

J. W. N. K.

MALACCA, S.S.
31st December, 1890.

List of Advocates and Solicitors admitted to practice in the Colony of the

[*Novem*

Name.	Date of Admission.	Settlement wherein Admitted.	
		Penang.	Singapore.
Samuel Robert Groom	4th January, 1886	...	Singapore.
Charles Goodricke Garrard ...	18th January, 1886	...	Do.
William Nanson, B.A.	10th May, 1886	...	Do.
James Power Everard, B.A. ...	1st November, 1886	...	Do.
Swinford Leslie Thornton, B.A. ...	2nd November, 1886	...	Do.
Herbert Henry Hudson	7th April, 1887	...	Do.
Arthur Robert Adams	8th July, 1887	Penang.	...
Samuel Bright Bailey	26th March, 1888	...	Singapore.
Edaljee Jamsetjee Khory, B.A. ...	7th May, 1888	...	Do.
Arthur James Sisson	3rd September, 1888	...	Do.
Edward Charles Harte	1st October, 1888	Penang.	...
Edwin Rowland Koek	15th October, 1888	...	Singapore.
John Frederick Wreford	28th February, 1889	Penang.	...
John Parsick Joaquim	28th February, 1889	...	Singapore.
Walter John Napier, M.A., B.C.L. ...	4th March, 1889	...	Do.
Thomas Gawthorne	1st May, 1889	Penang.	...
Harry Scott	10th May, 1889	Do.	...
Joseph Alexander Shearwood, B.A.	17th June, 1889	...	Singapore.
Ernest Farrer-Baynes	19th November, 1889	Do.	...
George Clement De Souza ...	6th January, 1890	...	Singapore.
Charles Duncan Gurney	9th April, 1890	Penang.	...
George Herbert Maylor	16th May, 1890	Do.	...
Russell Ardagh	28th July, 1890	...	Singapore.

* By Ordinance 5 of 1878, the Members of the Bar are styled "Advocates and Solicitors"—No preface, &c., Volume I. of these Reports, p. xlii.—J.W.N.K.

Members of the Home Bar in the Colony,

Name.	When called, &c.
O'Malley, His Hon. Edward Loughlin,	Of the Middle Temple, 26th January, 1866
Pellereau, His Hon. Etienne, ...	„ do. 6th June, 1860
Goldney, His Hon. John Tankerville,	„ Inner Temple, 30th April, 1869
Kyshe, James William Norton, ...	Of Lincoln's Inn, 13th June, 1888

*Straits Settlements since the publication of Volume I. of these Reports.—ber, 1885.**]

Remarks.
Of the Middle Temple, called 17th November, 1879.
Solicitor of the Supreme Court of Judicature in England—admitted 4th April, 1884.
Do. do. do. —admitted 19th May, 1876.
Of the Middle Temple, 27th January, 1879.
Of Lincoln's Inn, 31st May, 1886. Is Registrar of the Supreme Court, &c., at Malacca—appointed 6th June, 1887.
Solicitor—admitted in England, 27th November, 1877. Is Deputy-Registrar of the Supreme Court in Singapore—appointed 6th December, 1888.
Solicitor of the Supreme Court of Judicature—England—admitted 25th April, 1884.
Do. do. do. —admitted in December, 1887.
Of the Inner Temple, 3rd May, 1882.
Solicitor—admitted in England—18th November, 1881.
Do. do. —10th April, 1883.
Of the Middle Temple—called 13th June, 1888.
Solicitor of the Supreme Court of Judicature, England—admitted 28th April, 1885. Is Assistant Official Assignee in Penang—appointed 1st October, 1889.
Of the Middle Temple, 29th November, 1888.
Of Lincoln's Inn, 29th June, 1881.
Of the Inner Temple, 28th January, 1889.
Solicitor—admitted in England—23rd July, 1884.
Of Lincoln's Inn, 17th November, 1869.
Solicitor of the Supreme Court of Judicature, England—admitted 10th February, 1885.
Of the Middle Temple, 13th June, 1888.
Solicitor—admitted in England—26th March, 1886.
Solicitor, Supreme Court of Judicature, England—admitted 15th May, 1885.
Do. do. do. —admitted 3rd February, 1890.

distinction whatever has ever existed in this Colony between the two branches of the profession—See

not included in above List.

Remarks.
Chief-Justice, S.S., see List of Judges, *Infrà*.
Puisne-Judge, S.S., ... do.
Puisne-Judge, S.S., ... do.
Deputy Registrar of the Supreme Court, S.S.

LIST

OF

RULES AND ORDERS OF COURT.

PAGE.

No. I.—Table of Fees as authorised by the Court of Judicature of Prince of Wales' Island, Singapore and Malacca.—*4th October*, 1827* 1

„ II.—Rules and Orders for the guidance of Sheriffs and Deputy Sheriffs in the execution of the duties of their office.—*1st November*, 1866 2

„ III.—Rules and Orders made by the Supreme Court in pursuance of the Debtors' Ordinance, 1870.—*31st December*, 1870 5

„ IV.—Rules and Orders for the admission of Advocates and Attorneys in the Supreme Court, and for granting Certificates to persons to practice as Conveyancers.—*12th August*, 1874 7

„ V.—Rules and Orders made, and Table of Fees fixed, by the Supreme Court under the Courts' Ordinance, 1878.—*29th September*, 1879* 10

„ VI.—Rules and Orders made, and Table of Fees fixed, under the Courts' Ordinance, 1878.—*29th June*, 1880* 11

„ VII.—Rules and Orders as to Procedure in the Registry.—*27th January*, 1881... 16

„ VIII.—Fees to be taken in the Registry of the Supreme Court at Singapore under Section 58 of "The Conveyancing and Law of Property Ordinance, 1886."—*4th August*, 1886* 25

„ IX.—Rules and Orders for regulating the Practice and Procedure of the Supreme Court in its Appellate Jurisdiction.—*27th May*, 1887 ... 26

„ X.—Rules and Orders on [Solicitors'] Costs under "The Courts' Ordinance, 1878."—*22nd June*, 1887† 31

„ XI.—Rules and Orders for regulating the Practice and Procedure of District Delegates of the Judges of the Supreme Court.—*26th January*, 1888 ... 47

„ XII.—Rules and Orders by the Judges under "The Courts' Ordinance, 1878," and Table of Fees fixed on grant of Probate or Letters of Administration in non-contentious matters.‡—*18th October*, 1888 55

„ XIII.—Rules and Orders for regulating the Practice and Procedure of the Supreme Court at Singapore in Appeal Cases from Her Majesty's Consular Court in Bangkok in the Kingdom of Siam.—*23rd April*, 1889. 56

* Besides the Tables of Fees here given, there are other fees chargeable in the Registry of the Supreme Court under certain Schedules to Ordinances or Orders in Council [*e.g.* Sch. A. Ord. 14 of 1876—Distraints for Rent; Sch. 54, Ordinance 8 of 1880, [Sec. 31 c. Small Causes]; and Order in Council, 8th April, 1889 [Scales of Fees in Bankruptcy] G. G. 1889, p. 662], but these not being *Orders of Court* do not appear herein.

† In Bankruptcy matters, subject to the provisions of the Bankruptcy Ordinance [2 of 1888] and the Rules thereunder "the fees and percentages to be charged in respect of proceedings under the Ordinance, the costs to be allowed to Solicitors.....shall for the time being be such as would be charged and allowed in like cases in England according to the scales now in use there, the dollar being taken for the purposes of this Rule [76 § 1] as being of the value of three shillings and four pence" and by § 3 of the same Rule, "in all cases not specially provided for.....the Regulations as to Solicitors' costs for the time being in force with regard to civil proceedings in the Supreme Court shall apply as far as the same are applicable"—*see also* § 2 of the same Rule—*Government Gazette*, 1888, p. 2360, and *Wms. Bank. Prac.* [4th Ed.] p. 510.

‡ See also 'Rules and Orders,' *infrà* p. 15—heading: Probate.

RULES AND ORDERS OF COURT.

ORDER OF COURT. 1827.

4th October, 1827.

Table of Fees as authorised by the Court of Judicature of Prince of Wales' Island, Singapore and Malacca.*

Civil Matters.

FEES TO REGISTRAR. †

	$	cts.
.....	...	...
.....	...	...
.....	...	...
Reading every Exhibit, Document or Paper produced in evidence, unless the Court or Judge at the time direct a larger sum to be paid	...	50
.....	...	...
.....	...	...

J. T. CLARIDGE.

* Abolished by Ordinance 6 of 1868, and re-constituted under the title of "*The Supreme Court of the Straits Settlements.*"

The power under the different Charters "to frame process and make Rules and Orders" was vested in the Court composed of the Governor, the Recorder and the Resident Councillor in each Settlement. By Rules and Orders, dated 29th June, 1880—Rule 4 [*infrà* p. 12]—it is laid down that in all cases not provided for by the said Rules, "such fees shall be charged as have been charged under previous Rules or by customary practice." The above Order of Court is now retained as containing it is believed the only fee still claimed in the Registry of the Supreme Court, and not to be found in any other Order of Court.

† See Judicial—Historical Preface, Vol. I. of these Reports, p. xcv—also *Letters Patent*, 28th November, 1860, G. N. 18th March, 1861, G. G. 1861, p. 107; and Sec. 81 § 9 of Ordinance 3 of 1878.—J.W.N.K.

1866. ORDER OF COURT.

1*st November*, 1866.

Rules and Orders for the guidance of Sheriffs and Deputy Sheriffs* in the execution of the duties of their Office† passed by the Court of Judicature of Prince of Wales' Island, Singapore and Malacca.‡

I.

The Sheriff shall, unless he shall conceive that he has good cause to the contrary, return all Writs delivered to him for service or execution as follows, that is to say:—

[*a*] Every Writ of Summons, if completely executed, within twenty-four hours after execution; and if only partially executed, within twenty-four hours after the service of a written Notice from the plaintiff on him to return it.

[*b*] Every Writ of *Habere Facias Possessionem* within four days after the execution thereof.

[*c*] Every Writ of Execution against property, if completely executed within four days after such complete execution; and if only partially executed within four days after service of a written Notice from the Execution-Creditor on him to return it.

[*d*] Every other Writ of Execution and every other Writ of whatever description, except Subpœnas to Witnesses if no time has been fixed in the Writ for its return, within twenty-four hours after the execution or service thereof; and if a time has been fixed at the time so fixed.

II.

The Sheriff shall, after the complete or any partial execution of every Writ, pay or deliver over to the Execution-Creditor, all moneys or property levied or seized by or paid to the Sheriff under the Writ, and to which the Execution-Creditor is entitled, within eight days after such complete or partial execution.§

---

* The Sheriffs were appointed under the Charter by the Governor yearly, and they in turn appointed their own Deputies—the latter since done away with and a permanent official styled Sheriff alone appointed by Government. The old practice however of appointing the Sheriff yearly at each of the Settlements has recently been revived. See *Preface, &c.*, Vol. I of these Reports, pp. xcvii., xcviii.

† Vide *Veerappah Chetty* v. *Koh Soon Liat & Anor.*, *infrà*, *p.* 614.

‡ *Vide* foot-note 1, *antè* p. 1.

§ See now however the Bankruptcy Ordinance 2 of 1888, Sections 43, 44 & 124 —J.W.N.K.

III.

If the Sheriff shall conceive that he has good cause for not returning any Writ or making such payment or delivery, he shall within four days after service of a written Notice on him so to do from the party who issued the Writ serve such party with a written Notice stating that the Sheriff refuses to make such return payment or delivery, and setting out fully the causes on which he intends to rely for his not so doing; and shall also within the said time affix a copy of such Notice on a conspicuous part of his Office and another copy thereof on a conspicuous part of the Registrar's Office, which said copies shall be kept so affixed for eight days.

IV.

The Sheriff shall, within two days after application by the Execution-Creditor or Debtor or any adverse claimant of the property seized by him, furnish to such applicant a memorandum intituled in the cause or proceeding in which the seizure was made and stating the date of the delivery for execution of the Writ under which the seizure was made, the amount of the judgment-debt for which the Writ was issued, the gross proceeds of the sale of the property seized, the amount of the Sheriff's fees, poundage and expenses which he is entitled to retain therefrom and the balance available for the Execution-Creditor's debt.

V.

The Sheriff shall, upon application in office hours, allow the Execution-Creditor or Debtor or any adverse claimant full liberty from time to time to inspect and copy free of expense, the inventory of the property seized, the account sale or other disposal thereof, the particulars of the Sheriff's fees, poundage and expenses, with all vouchers respecting the premises or any of them, and also to inspect and copy all copies of such inventory in the Sheriff's possession, and the rough drafts, original memoranda or notes first made by him or any of his subordinates in the matter.

VI.

The Sheriff shall also, on application, give or cause to be given by his subordinates to the Execution-Creditor all information in his power respecting the property seized, the time, place and particulars of the seizure, all adverse claims thereto and all other particulars in his or their knowledge, information or belief which may be demanded.

VII.

The Sheriff shall annex to his return to all Writs, a detailed account of the property seized under it, the sale price thereof, the Sheriff's fees, poundage and expenses, and the disposal of the net proceeds or of the property itself under the Writ, with the original receipts vouching such disposal; and until such return, shall allow the Execution-Creditor or Debtor or any such adverse claimant, on application, full liberty to inspect and make copies thereof free of expense.

1866.

VIII.

Any person conceiving himself aggrieved by any non-observance by the Sheriff of any duty imposed on him by these Rules may, on application to the Registrar, obtain a Rule *Nisi* as of course calling on the Sheriff to do or perform the act or duty required or to show cause to the contrary within two days after the service thereof. The Sheriff shall within that time file a detailed statement of the cause or causes of his refusing compliance, otherwise the Rule shall be made absolute with costs. Affidavits in support of the Rule must be filed within four days from the filing of the said statement and affidavits in opposition to it within four days from notice to the applicant of the filing of the affidavits in support of it; and the Registrar will at the expiration of the last-mentioned period, deliver to the Recorder or other acting Judge, the said Rule *Nisi*, the Sheriff's statement, and the affidavits, and will notify to the parties the day which shall be fixed for the hearing of the said Rule.

IX.

The times fixed in the foregoing Rules for doing or performing any act or duty may be enlarged from time to time as occasion may require if the Court or Recorder or other acting Judge shall think fit to do so.

X.

When the Sheriff shall seize under a Writ of Sequestration any property of a perishable nature, or live stock, or there shall be any expense for warehousing or guarding the same, he shall forthwith on such seizure, make and file in Court a report intituled in the cause or proceeding in which the Writ shall have issued, stating the quantity and description of the property, the expenses aforesaid with all other particulars respecting the same and shall take the instructions of the Court or Recorder or other acting Judge thereupon.

XI.

Whatever the Execution-Creditor or Debtor or adverse claimant may do or has a right to have done to or for him by the Sheriff may be done by or shall be done to or for his professional or private agent or the Registrar or any of his Sworn Clerks acting in his behalf when no such agent is employed.

XII.

All applications and notices to the Sheriff under any of the foregoing Rules made or served during office hours at the Sheriff's Office shall be deemed sufficiently made or served on the Sheriff.

XIII.

The term Sheriff includes in the foregoing Rules the Officers who discharge the duties of Sheriff whether as Sheriff or as Deputy Sheriffs.

It is ordered that the foregoing Rules shall take effect from the 1st day of November, A.D. 1866. 1866.

ORFEUR CAVENAGH, *Colonel*,
Governor of Prince of Wales' Island, Singapore and Malacca. *

P. BENSON MAXWELL,
Recorder of Singapore. †

ORDER OF COURT. 1870.

31st December, 1870.

Rules and Orders made by the Supreme Court in pursuance of the Debtors' Ordinance, 1870.‡

I.

Applications to commit to prison under the 7th section of the Debtors' Ordinance shall be made by summons specifying the date and other particulars of the judgment, decree, or order for non-payment of which the application is made, together with the amount due.

II.

Proof of the means of the debtor may be given by affidavit, or *viva voce*; if it appear expedient to the Judge, either before or at the hearing. For this purpose, the debtor or any other person may be commanded to attend for the purpose of being examined touching the matter in question, and for the production of any document, subject to such terms and conditions as to the Judge may seem fit.

---

* President of the Court—After the transfer of the Colony, by Ordinance 30 of 1867, Section 1, the Governor ceased to be a Judge of the Court—*see also* Preface, &c., Vol. 1 of these Reports, pp. cii, ciii.

† Styled Chief Justice of the Straits Settlements on the transfer—Ordinance 3 of 1867, Section 4, & G. N. 1st April, 1867.

‡ These Rules seemingly have reference to certain Sections [4, 7 and 8] of the Debtors' Ordinance, 1870, which have since been repealed by Ordinance 8 of 1880, but the Rules themselves have not been cancelled. As the repealed sections are practically re-enacted in the Civil Procedure Ordinance 5 of 1878, Chapters 34 and 36, as amended by the abovementioned Ordinance 8 of 1880, and as in practice these Rules are still carried out [*ex. gr.* Rule 4 as security under Section 422 B.], they are retained by me among the Rules of Court now in force.—J.W.N.K.

1870.

III.

Upon payment of the sum or sums mentioned in the Order and the Court fees, the creditor or his Attorney shall give the debtor a certificate stating that the debt, costs, and fees have been paid.

The certificate shall be attested by either the Keeper of the Jail, the Sheriff, the Registrar, or one of the sworn clerks.

IV.

The security to be given by the defendant under the 4th or 8th section may be a deposit in Court of the amount mentioned in the Order, or a bond to the plaintiff by the defendant and two sufficient sureties, or, with leave of a Judge, more than two, or, with the plaintiff's consent, any other form of security.

V.

The plaintiff may, within four days after receiving the particulars of the names and addresses of the proposed sureties, and the form of the proposed bond, give notice that he objects thereto, stating therein in what particulars; and in case of his so doing, the sufficiency of the security shall be determined by the Registrar, who shall have power to award to either party the costs of such reference. If the plaintiff does not apply for an appointment for this purpose within four days after giving notice of objection, the security shall be deemed sufficient.

VI.

The money deposited, and the security, and all proceedings thereon, shall be subject to the Order and control of the Court.

VII.

Unless otherwise ordered, the costs of, and consequent on an order to arrest, shall be costs in the cause.

VIII.

Upon payment into Court of the amount mentioned in the Order, a receipt shall be given by the Registrar; and upon receiving the bond or other security, a certificate to that effect shall be given, signed, or attested by the plaintiff's Attorney, or if he has not an Attorney, by the plaintiff; and the delivery of such receipt or certificate to the Sheriff shall entitle the defendant to be discharged out of custody.

IX.

The Sheriff or other officer named either in an order of committal, or an order to arrest under the 4th or 8th section shall, within two days after the arrest, indorse on the Order the true date of such arrest.

P. BENSON MAXWELL,
Chief-Justice.

WILLIAM HACKETT,
*Judge of Penang.**

---

* See *Preface, &c.*, Vol. I. of these Reports, pp. ciii & civ.

ORDER OF COURT. 1874.

12*th August*, 1874.

Rules and Orders for the admission of Advocates and Attorneys [*a.*] in the Supreme Court, and for granting Certificates to persons to practice as Conveyancers.

In pursuance of the powers and authorities vested in us by the "Courts' Ordinance, 1873" [*b.*], We, Sir *Thomas Sidgreaves*, Knight, Chief Justice, *George Phillippo*, and *Theodore Thomas Ford*, Judges of the Supreme Court, have framed the following Rules and Orders.

The General Rules and Orders passed on the 21st day of January, 1852, relating to the admission of General Agents for the suitors of the Court are hereby repealed, and in lieu thereof, the following shall be from the date hereof, "the General Rules and Orders regulating the admission and enrolment of Advocates and Attorneys of the Supreme Court," and the admission and enrolment of persons approved of as competent and fit to act as Conveyancers at each of the Settlements:—

I.

Every person who shall apply to be admitted and enrolled as Advocate and Attorney of the Supreme Court, or as a Conveyancer at any of the Settlements, shall do so by petition to the Court with testimonials of his good character annexed, and shall file the same in the Registrar's Office accompanied with a notice intimating that he has so applied, which notice shall be posted and continue posted in the Registrar's Office for one month before any Order shall be made by the Court on his petition.

II.

No examination shall be necessary in the case of applicants for admission as Advocates and Attorneys of the Supreme Court, who have been called to the Bar of England or Ireland, or the Faculty of Advocates in Scotland, or have been admitted Attorneys, Solicitors, or Writers to the Signet in one of the Superior Courts at Westminster, Dublin, or Edinburgh, or who have been admitted as Proctors in any Ecclesiastical Court in England.

[*a.*] Styled "Advocates and Solicitors" by Ordinance 5 of 1878.

[*b.*] The Courts' Ordinance 5 of 1873, was repealed by Ordinance 6 of 1878, as from the 1st January, 1879, the date the Courts' Ordinance 3 of 1878 came into operation. These Rules however are preserved under Section 83 of the new Ordinance. There have been no further Rules and Orders on this subject since.—J.W.N.K.

1874.

III.

Every person who has been so called or admitted as aforesaid, shall, at the time of giving the notice hereinbefore required, file in the Office of the Registrar, the Certificate of such previous call or admission. He shall also file a declaration signed by him in the presence of the Registrar, who shall subscribe his name as a witness thereto, which shall contain a statement that the certificate of his admission so filed as aforesaid is a true certificate, that the applicant is the person named therein, and that he is still a member of the Bar of England or Ireland, or that his name has not been struck off the Roll of any Court, and that he has done no act or thing which would cause him to be disbarred, or which would cause his name to be struck off the Roll.

IV.

In the case of Law Clerks who have served as such for a period not less than five years [*a.*] in the Office of an Attorney and Advocate of the Supreme Court, and who shall apply to be admitted as Advocates and Attorneys of the Supreme Court, such application shall be made to the Judges, or "Judge for the time being, if only one," of the Division of the Court wherein the applicant resides, in manner hereinafter mentioned, and the Court shall thereupon appoint fit persons, not less than two in number, to examine in writing the said applicants as to their competency to act as such Advocates and Attorneys of the Supreme Court.

V.

No person, not previously admitted elsewhere as aforesaid, shall be admitted to act as such Advocate and Attorney, until he shall produce the certificate of the Examiners that he is a fit and proper person to be admitted as an Advocate and Attorney of the Supreme Court, unless he shall have appealed as next hereinafter provided.

VI.

The applicant may appeal to the Judges, "or Judge for the time being, if only one," of the Division of the Supreme Court wherein he presented his petition against the decision of the Examiners, and the Court may thereupon, if it thinks fit, call for the examination papers, and may, in its discretion, admit and enrol him as an Advocate and Attorney of the Supreme Court.

VII.

Any persons desiring to be admitted and enrolled as a Conveyancer at any Settlement, shall make his application, in

---

[*a.*] Under the Courts' Ordinance 3 of 1878, Section 49, the Court "on the ground of special fitness and capacity," is empowered to dispense with the remainder of a Law Clerk's term after he has served for three years. This Rule will probably be considered modified by that provision—[see Section 83.]—J.W.N.K.

1874.

the manner hereinafter mentioned, to the Judges, "or Judge for the time being, if only one," of the Division of the Supreme Court, and the Court shall thereupon appoint not less than two persons to examine the said applicant as to his competency to act as such Conveyancer, and also to report as to his character, and no person shall be admitted and enrolled as such Conveyancer in the said Settlement until he shall produce the certificate of the Examiners that he is a fit and proper person to be permitted to act as such Conveyancer; provided always that the applicant shall have the same right to appeal to the Judges of the said Division of the Supreme Court as is hereinbefore given to persons applying to be admitted and enrolled as Advocates and Attorneys of the Supreme Court.

VIII.

Any person admitted and enrolled as such Conveyancer as aforesaid at one of the said Settlements, may be admitted and enrolled as such Conveyancer at any other of the said Settlements, at the discretion of the presiding Judge of that Division of the Court in the said Settlement without further examination.

IX.

Every person before he be admitted and enrolled as Advocate and Attorney of the Supreme Court shall take the Oath of allegiance.

Every person admitted and enrolled as a Conveyancer at any of the Settlements shall be subject to the control of the Court, and shall be liable, on due cause shewn, to be suspended from practice or struck off the Rolls of the Court by the Judges of the Court in which he has been so admitted, as aforesaid, in the same manner as Advocates and Attorneys are by the 34th Section of the Courts' Ordinance, 1873 [*a*.]

Certified by me and transmitted to His Excellency the Governor, the 12th day of August, 1874, to be laid before the Legislative Council, in accordance with the provisions of the Section 100 of the Courts' Ordinance, 1873 [*b*.]

THOMAS SIDGREAVES,
Chief-Justice
of the Straits Settlements.

[*a*.] Repealed—See foot-note, [*b*.] *antè* p. 7.—"34th Section of the Courts' Ordinance, 1873," will probably be now read as "50th Section of the Courts' Ordinance, 1878"—[See Section 83.]

[*b*.] See previous note—"Section 100" being probably now read as "Section 82" of the Courts' Ordinance, 1878.—J.W.N.K.

1879. ORDER OF COURT.

29th September, 1879.

Rules and Orders made, and Table of Fees fixed, by the Supreme Court under the Courts' Ordinance, 1878.

I.

No notice of trial shall be countermanded except by consent or by leave of the Court, which leave may be given subject to such terms as to costs, or otherwise as may be just.

[*Chap. 27, Ordinance V. 1878.*]

II.

The practice in respect of serving Citations upon persons entering a Caveat against the Grant of Probate or Letters of Administration, shall be the same in cases of Caveats entered after filing Petition as in those entered before filing Petition.

[*Chap. 43, Ordinance V. 1878.*]

III.

Every specially endorsed Writ under Section 90 of Ordinance V. 1878, shall be endorsed with the following notice:—

"Take notice that, in default of your entering an appear-"ance hereto, final judgment may be entered at once against "you for the above amount, and the further sum of $——, for "costs."

IV.

Every statement of claim under Section 199 of Ordinance V. 1878, shall be endorsed with a notice of the time within which judgment may be signed in default of delivering a defence or notice of motion by way of Demurrer.

V.

Before entering final judgment under Section 199 of Ordinance V. 1878, plaintiff shall cause to be filed an affidavit of service of

statement of claim, or of service of Summons with special endorsement under Section 144. 1879.

.... *

I certify the above to be a true copy of the Rules and Orders made, and Table of Fees fixed, by the Supreme Court under the Courts' Ordinance, 1878.

T. SIDGREAVES,
Chief-Justice,
Straits Settlements.

29th September, 1879.

ORDER OF COURT. 1880.

29*th June*, 1880.

Rules and Orders made, and Table of Fees fixed, under the Courts' Ordinance, 1878.

His Honour Sir *Thomas Sidgreaves*, Knight, Chief Justice, His Honour *Theodore Thomas Ford*, Puisne Judge of the Supreme Court of the Straits Settlements, do hereby, in pursuance and execution of the powers given by the Courts' Ordinance, 1878, and all other powers and authorities enabling them in this behalf, order and direct in manner following:—

That so much of Order I. of August, 1879, as fixes the Court Fees to be taken under the Courts' Ordinance, 1878, and any previously existing Table of Fees, except as hereinafter stated, be repealed, and in lieu thereof,

1. The fees and percentages contained in the Schedule hereto, are fixed and appointed to be, and shall be, taken in the Supreme Court in its Original as well as Appellate jurisdiction, and in any office which is connected with such Court, or in which any business connected with such Court is conducted.

2. The fees and percentages set forth in the first column in the Schedule hereto, are to be taken and paid in all suits under

---

* The rest of this Order has been repealed by subsequent Order, dated 29th June, 1880, above.

1880. Section 31 of the Civil Procedure Ordinance, 1878, and the fees and percentages set forth in the second column of the Schedule hereto, are to be taken and paid in all other cases.

3. A folio is to comprise 72 words, every figure comprised in a column being counted as one word.

4. In all cases not provided for by this Rule, such fees shall be charged as have been charged under previous Rules, or by customary practice.

THE SCHEDULE ABOVE REFERRED TO:

Summons, Writs, Commissions and Warrants.	1st Column. $ c.	2nd Column. $ c.
On sealing a Writ of Summons for commencement of an action	1 00	2 00
For each additional defendant	0 50	1 00
On sealing a Concurrent, renewed or amended Writ of Summons for commencement of an action	0 50	0 50
On sealing a Notice for service under Section 129 of the Civil Procedure Ordinance	0 50	0 50
On sealing a Writ of Mandamus or Injunction	2 00	4 00
On sealing a Writ of Subpœna, not exceeding three persons	0 50	1 00
On sealing every other Writ	0 50	1 00
On sealing or issuing any Summons in Chambers	0 50	1 00
On sealing every Commission	3 00	5 00
Appearances.		
On entering an Appearance, for each person	0 50	1 00
Copies.		
For making a Copy and marking same as an Office Copy, for each folio	0 10	0 20
For examining a written or printed Copy and marking same as an Office Copy, for each folio	0 05	0 05
Oaths, etc.		
For taking an Affidavit or an Affirmation	0 50	0 50
And in addition thereto—For each Exhibit therein referred to, and required to be marked whether annexed or not	0 25	0 25
Filing.		
On filing a Special Case	2 00	4 00
On filing an Affidavit	0 50	0 50
On filing each Pleading	0 50	1 00
Each Exhibit or on marking same	0 20	0 20
On filing submission to Arbitration, Award, Bill of Sale, Warrant of Attorney, Cognovit, Bail, Satisfaction Piece, and Writ of Execution with return	1 00	2 00

Certificates.	1st Column. $ c.	2nd Column. $ c.
For a Certificate of Appearance, or of Pleading, Affidavit or proceeding having been entered, filed or taken, or of the negative thereof	0 25	1 00
Searches and Inspections.		
On an application to search for an Appearance, or an Affidavit, or other document filed in Court and inspecting, or copying the same	0 50	0 50
Examination of Witnesses.		
For every Witness sworn and examined by the Registrar or other Officer, in his Office, including Oath, for each hour ... ... These fees are not to apply to the examination of Witnesses for the purpose of any enquiry, taxation of costs, or other proceeding before the Officer.	...	2 00
Hearing.		
For entering or setting down or re-entering or re-setting down an Appeal to the Court of Appeal, or a cause for trial, or hearing including a Demurrer or Special Case, but not any other Petition, nor a Summons adjourned from Chambers	5 00	10 00
Judgments, Decrees and Orders.		
For drawing up and entering a Judgment, or a Decree, or Decretal Order, whether on the original hearing of a cause, or on further consideration, including an Order on the hearing of a Special Case or Petition and any Order by the Court of Appeal	2 00	4 00
For drawing up and entering any other Order or Rule, whether made in Court or at Chambers...	0 50	1 00
For entering every Judgment by default, whether final or interlocutory...	1 00	2 00
For copy of a plan, map, section, drawing, photograph, or diagram required to accompany any Order	The actual cost.	
Taking Accounts.		
On taking an Account of a receiver, guardian, consignee, bailee, manager, provisional, official or voluntary liquidator, or sequestrator, or of an executor, administrator, trustee, agent, solicitor, mortgagee, co-tenant, co-partner, execution-creditor, or other person liable to account, when the amount found to have been received without deducting any payment shall not exceed $1,000	...	1 00
Where such amount shall exceed $1,000, for every $250 or fraction of $250	...	0 20
In the case of any such receiver, guardian, consignee, bailee, manager, liquidator, sequestrator, or execution-creditor, the fees shall, upon payment, be allowed in the account, unless the Court or the Judge shall otherwise direct, and, in the case of taking the accounts of such other accounting parties, the fees		

1880.

	1st Column.		2nd Column.	
	$	c.	$	c.
shall be paid by the party having the conduct of the Order under which such account is taken as part of his costs of the cause or matter [unless the Court or Judge shall otherwise direct], and in such case shall be taken upon the certificate of the result of any such account, but the fees shall be due and payable, although no certificate is required, on the account taken, or on such part thereof as may be taken, and the Solicitor or party suing in person shall in such case cause the proper stamps [the amount thereof to be fixed by the Officer] to be impressed on or affixed to the account.				
Taxation of Costs.				
For taxing a Bill of Costs where the amount allowed does not exceed $50	0	50	1	00
Where the amount exceeds $50, for every $50 allowed or a fraction thereof	0	25	0	50
These fees, except where otherwise provided shall be taken on signing the certificate or on the allowance of the Bill of Costs as taxed, but the fees shall be due and payable if no Certificate or Allocatur is required on the amount of the Bill as taxed, or on the amount of such part thereof as may be taxed, and the Solicitor or party suing in person shall in such case cause the proper stamps [the amount thereof to be fixed by the Officer] to be impressed on or affixed to the Bill of Costs.				
For Certificate or Allocatur of the result, not being a Judgment	1	00	1	00
Petitions.				
For answering a Petition for hearing in Court and setting down	...		5	00
Miscellaneous.				
Upon a reference to the Registrar for purpose of any investigation or enquiry other than the taking of accounts and enquiries under a Decree for every hour or part of an hour the Registrar is occupied	1	00	2	00
On taking an acknowledgment of a Deed by a married woman	...		1	00
On taking a Recognizance or Bond	...		1	00
On taking Bail and taking same off the file and delivering	...		1	00
On a Commitment or Attachment	...		1	00
On amending every Writ or other proceeding if no Order...	0	50	1	00
For a transcript of account by the Accountant-General ...	...		1	00
For every Certificate or Report by the Registrar not being a Certificate of Costs	...		1	00
For registering every execution against lands	0	50	1	00
Translations.				
For the first folio of 72 words	0	75	0	75
For every subsequent folio of 72 words	0	50	0	50

1880.

	1st Column.		2nd Column.	
	$	c.	$	c.
PROBATE [Chapter 43, Civil Procedure Ordinance, 1878].				
On filing every Petition for Probate or Letters of Administration of the estates of deceased persons, whether with or without the Will annexed and whether general *de bonis non cessate*, limited *ad colligendum*, or otherwise.	1	00	1	00
For registering and collating Wills [when required by any Rule or Order of Court to be registered] per folio ...	0	20	0	20
For engrossing copy of Will or Codicil, or any translation thereof, or other document to annex to grant or for exemplification—				
If in the English language, per folio	0	10	0	10
If in any other language, per folio of the English translation	0	15	0	15
For every exemplification of a Probate or Letters of Administration with the Will annexed in addition to the fees for engrossing and collating...	1	00	1	00
For every exemplification of Letters of Administration [without Will annexed]	1	00	1	00
For every search for, and inspection of, any Will or Grant of Letters of Administration	0	50	0	50
For every other Office copy or extract from any Will, Probate, Administration Act or other document filed in the Registry, not exceeding three folios	0	25	0	25
For every subsequent folio	0	10	0	10
For the entry of every *Caveat* including notice to the other Registries and notice to any petitioner	1	00	1	00
For subducting a *Caveat*, including notice	0	50	0	50
On filing a *Caveat*	1	00	1	00
Searching *Caveat* Books...	0	50	0	50
For sealing every Citation	0	50	0	50
For settling the Abstract of Citation for advertisement ...	0	50	0	50
For every appearance to a Citation	0	50	0	50
For administering every Executor's or Administrator's Oath	0	50	0	50
For attesting every Administration Bond [if attested by the Registrar or other Officer]	1	00	1	00
For filing every Bond	1	00	1	00
For searching and for filing Affidavits, for filing pleadings and other documents and for all Summonses, Orders and other matters under the 43rd Chapter of the Civil Procedure Ordinance, 1878, not specially mentioned; the same fees shall be taken as are above directed to be taken for the like matters in the ordinary jurisdiction of the Court.				
Sheriff's Fees.				
For serving every Writ of Summons, Subpœna, Citation, or Order served by the Sheriff's for each person served...	0	75	0	75
The defendant or party being served beyond 2 miles from the Court House, additional for every mile	0	25	0	25
For every Affidavit of Service	1	00	1	00
For executing every Writ of *Fi. Fa.*, Sequestration, Attachment of goods or person, and other Writs	2	00	2	00
For every return to such Writs	1	00	1	00

1880.

	1st Column.	2nd Column.
	$ c.	$ c.
For releasing property seized by instructions of party issuing Writ...	2 00	2 00
For every notice of garnishment	1 00	1 00
Poundage—5 per cent. to be charged upon the first $500, and 2½ per cent. upon every further $100, when levied by seizure and sale, or by sale by the Sheriff under the 371st section of the Civil Procedure Ordinance, 1878, to include Auctioneer's Commission.		
Possession money not exceeding 30 cents per day for each watchman necessarily employed in taking charge of any property under seizure, if outside Town limits, if 2 miles, not exceeding 50 cents.		
Entry in Register of *Lis Pendens*	0 50	0 50

I certify the above to be a true copy of the Rule and Order made, and Table of Fees fixed, by the Supreme Court under the Courts' Ordinance, 1878.

T. SIDGREAVES,
Chief-Justice,
Straits Settlements.

1881. ORDER OF COURT.

27th January, 1881.

Rules and Orders as to Procedure in the Registry.

The Hon'ble Sir *Thomas Sidgreaves*, Knight, Chief Justice, His Honour *Theodore Thomas Ford*, Puisne Judge, and His Honour *Thomas Lett Wood*, Puisne Judge, of the Supreme Court of the Straits Settlements, do hereby, in pursuance and execution of the powers given by the "Courts' Ordinance, 1878," and all other powers and authorities enabling them in this behalf, order and direct in manner following:—

ORDER I.

GENERAL SUMMONS.

Form of.

Rule 1. The general summons for the purpose of proceedings before the Registrars may be in a form similar to the form No. 20 of the "Civil Procedure Ordinance, 1878," substituting the

word "Registrar" for the words "Court in Chambers," and omitting the words "by order," with such variations as the circumstances of the case may require. 1881.

How prepared. Copy to be left at Registry.

—— 2. Summonses shall be prepared by the parties, and sealed by one of the Clerks, and a copy of such summons shall be left at the Registry by the party obtaining such summons.

Two days' Service.

—— 3. All summonses shall be served two clear days before the return thereof.

Default of Appearance.

—— 4. Where any of the parties summoned to attend the Registrar in Chambers fail so to attend, whether upon the return of the summons, or at any time appointed for the consideration, or further consideration, of the matter, the Registrar may proceed *ex-parte*, if, considering the nature of the case, he think it expedient so to do.

Proceedings ex-parte.

—— 5. Where the Registrar has proceeded *ex-parte*, such proceeding shall not, in any manner, be re-considered in the Registrar's Chambers, unless the Registrar, upon a special application made to him for that purpose by a party who was absent, shall be satisfied that he was not guilty of wilful delay or negligence. And, in such case, the costs occasioned by his non-attendance shall be in the discretion of the Registrar, who may fix the same at the time, and direct them to be paid by the party or his Solicitor, before he shall be permitted to have such proceeding re-considered, or make such other order as to such costs, as to such Registrar may seem meet.

Parties absent—Costs.

—— 6. Where a proceeding in Chambers fails, by reason of the non-attendance of any party, and the Registrar does not think it expedient to proceed *ex-parte*, the Registrar may order such an amount of costs [if any] as he shall think reasonable, to be paid to the party attending by the absent party, or by his Solicitor personally.

Adjournments.

—— 7. Where matters, in respect of which summons have been issued, are not disposed of on the return of the summons, the parties shall attend, from time to time, without further summons, at such time or times as the matter may be adjourned to.

1881.

II.

Minutes of Proceedings.

Orders to be made in Book, &c.

Rule 1. A note shall be made by the Registrar of all orders made by him in Chambers, and such orders may be drawn up and entered in the same manner as orders made by the Court; but every order shall be in full force and effect from the time of making the same, and it shall not be necessary to draw up any order made by the Registrar in Chambers, unless it is required to be so drawn up for the purpose of enforcing the same, or for some other purpose.

III.

Evidence and Admissions.

Written Evidence.

Rule 1. Upon any proceedings before the Registrar, any written evidence or admissions taken in the cause may be used, subject to the right of cross-examination, by the opposite party, and the Registrar shall, from time to time, direct in what manner the evidence, to be taken before him in any suit or proceedings, shall be taken.

Registers to be kept.

—— 2. Registers shall be kept of all proceedings in Chambers, with proper dates, in such manner as to the Registrar may seem fit, but so that all proceedings in each cause may appear consecutively and in chronological order, with a short statement of the questions or points decided, or other proceedings had or taken thereat, the evidence adduced thereon, and the names of the parties, or their Solicitors, and a note of the sum in his opinion proper to be allowed upon the taxation of costs for the attendance.

IV.

Adjournments.

Rule 1. The Registrar may, at any time, adjourn into Court, or before the Judge any summons, not being a summons to proceed in any accounts or enquiries referred to the Registrar.

V.

Appeals.

By Summons to shew Cause.

Rule 1. Any party dissatisfied with any order or decision of the Registrar upon any summons or question, not being a question upon which he is to certify or report to the Court, may, on the

refusal of the Registrar to adjourn into Court, or before the Judge under Order IV., appeal to the Court from such order or decision of the Registrar, by summons in Chambers, calling upon the other party to shew cause why such order should not be rescinded or varied. 1881.

When issued. Costs.

—— 2. No such summons shall be issued, except within the two days next after the day upon which such order or decision was made, and the costs thereof shall be in the direction of the Judge.

VI.

DELAY IN PROCEEDINGS IN CHAMBERS.

Order to shew Cause.

Rule 1. In case of default or delay in any proceeding pending before the Registrar, the parties, or any of them, may be required to attend at Chambers at a time to be appointed for that purpose, to shew cause why such proceeding should not be prosecuted.

Directions thereon.

—— 2. And thereupon such directions may be given at Chambers, or by adjournment in open Court, as shall be proper to ensure the prosecution thereof by some person interested therein, and for payment of the costs incurred by any neglect or default.

VII.

PROCEEDINGS UNDER A DECREE.

Certified Copy.

Rule 1. In all cases of proceedings in Chambers under any decree or order, the party prosecuting the same, if such decree or order has been drawn up, shall leave a certified copy thereof with the Registrar.

Summons to proceed.

—— 2. Upon a copy of the decree or order being left, a summons shall be issued to proceed with the accounts or inquiries directed, and upon the return of such summons, the Registrar shall give directions as to the service of the decree or order upon necessary parties, and, if it be not necessary to serve the same upon any persons other than those already before the Court;

or, if satisfied by proper evidence that all necessary parties have been so served with such notice of the decree or order;

shall thereupon give directions as to the manner in which each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the parties who are to attend on

1881. the several accounts and inquiries, and the time within which each proceeding is to be taken; and a day or days may be appointed for the further attendance of the parties; and all such directions may afterwards be varied or added to as may be found necessary.

—— 2A. Where no decree or order has been drawn up, the parties may, if the Registrar shall not otherwise direct, proceed upon summons as under Rule 2.

Substituted Service.

—— 3. Where, upon the hearing of the summons, it appears to the Registrar that, by reason of absence, or for any other sufficient cause, the service of notice of the decree or order upon any party cannot be made, or ought to be dispensed with, the Registrar may, if he shall think fit, wholly dispense with such service, or may, at his discretion, order any substituted service, or notice by advertisement, or otherwise, in lieu of such service.

Further Accounts or Inquiries.

—— 4. Where, in the prosecution of the decree or order, it appears to the Registrar expedient that further accounts should be taken, or further inquiries made, he may apply to the Judge for the same being taken in open Court.

VIII.

Decree for Accounts or Inquiries.

When to be brought in.

Rule 1. Every decree or order directing accounts or inquiries to be taken or made, shall be proceeded upon by the party entitled to prosecute the same, within fifteen days after the same shall have been made.

In default.

—— 2. And, in default thereof, any other party to the cause or matter may apply to the Registrar by summons to have the prosecution of such decree or order.

IX.

Accounts how taken.

Accounts to be verified.

Rule 1. Where any account is directed to be taken, the accounting party, unless the Registrar shall otherwise direct, shall make out his account, and verify the same by affidavit.

Items numbered.

The items on each side of the account shall be numbered consecutively, and the account shall be referred to by the affidavit, as an exhibit, and be left in the Registrar's Chambers.

Inconvenient Form.

If any account so brought in shall, in the opinion of the Registrar, be made out in an inconvenient or improper form, the Registrar may direct further accounts to be filed and verified by affidavit, and may direct that the party bringing in such account be not allowed the costs of such rejected account.

Notice of Charges.

—— 2. Any party seeking to charge any accounting party beyond what he has, by his account, admitted to have received, shall give notice thereof to the accounting party, stating, so far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner.

X.

Advertisements.

How issued.

Rule 1. Where an advertisement is required for the purpose of any proceedings in Chambers, the Registrar shall direct in what manner the advertisement shall be issued, and he may direct that the same shall be advertised by circular, to be distributed in such manner and in such language, as he may think fit, as well as by advertisement in newspapers.

How prepared.

—— 2. The advertisements or circulars shall be prepared by the party prosecuting the decree or order, and submitted to the Registrar for approval, and, when approved, shall be signed by him.

Contents of.

—— 3. Every advertisement for creditors shall direct every creditor, by a time to be hereby limited, to send to the executor or administrator of the deceased, or to such other party as the Registrar shall direct, or to his Solicitor, to be named and described in such advertisement, the name and address of such creditor, and the full particulars of his claim, and a statement of his account, and the nature of the security [if any] held by him; and, at the time of directing such advertisement, a time shall be fixed for adjudicating on the claims.

1881.

XI.

Claims by Creditors.

Notice to appear.

Rule 1. No creditor need make any affidavit nor attend in support of his claim [except to produce his security] unless he is served with a notice requiring him to do so, as hereinafter provided.

Securities and Documents to be produced.

—— 2. Every creditor shall produce the security [if any] held by him, before the Registrar, at such time as shall be specified in the advertisement for that purpose, being the time appointed for adjudicating on the claims; and every creditor shall, if required by notice in writing, to be given by the executor or administrator of the deceased, or by such other party as the Registrar shall direct, produce all other deeds and documents necessary to substantiate his claim before the Registrar, at such time as shall be specified in such notice.

Neglect to produce. Costs.

—— 3. In case any creditor shall neglect or refuse to comply with the preceding Rule, he shall not be allowed any costs of proving his claim, unless the Registrar shall otherwise direct.

Executors, &c., to examine Claims.

—— 4. The executor or administrator of the deceased, or such other party as the Registrar shall direct, shall examine the claims sent in, pursuant to the advertisement.

Allowance and Investigation of Claims.

—— 5. At the time appointed for adjudicating upon the claims, or at any adjournment thereof, the Registrar may, in his discretion, allow any of the claims, or any part thereof, respectively, without proof by the creditors; and direct such investigation of all or any of the claims not allowed, and require such further particulars, information, or evidence relating thereto, as he may think fit; and may, if he so think fit, require any creditor to attend and prove his claim, or any part thereof, and the adjudication on such claims as are not then allowed, shall be adjourned to a time to be then fixed.

Notice to Creditors.

—— 6. Notice shall be given by the executor, or administrator, or such other party as the Registrar shall direct, to every creditor whose claim, or any part thereof, has been allowed, without proof by the creditor of such allowance, and to every such creditor as the Registrar shall direct to attend and prove his claim, or such part thereof as is not allowed by a time to be named in

such notice, not being less than seven days after such notice, and to attend at a time to be therein named, being the time to which the adjudication thereon shall have been adjourned; and in case any creditor shall not comply with such notice, his claim, or such part thereof as aforesaid, shall be disallowed. 1881.

Claims sent in previous to Adjudication Day.

—— 7. Any creditor who has not before sent in the particulars of his claim, pursuant to the advertisement, may do so four clear days previous to any day to which the adjudication is adjourned.

Further Time for Claims.

—— 8. After the time fixed by the advertisement, no claim shall be received [except as before provided in case of an adjournment] unless the Registrar shall think fit to give special leave upon application made by summons, and thereupon such terms and conditions as to costs and otherwise as the Registrar shall direct.

Undisposed of Claims.

—— 9. Where, on the day appointed for hearing the claims, any of them remain undisposed of, an adjournment day for hearing such claims shall be fixed; and, where further evidence is to be adduced, a time may be named within which the evidence on both sides is to be closed; and directions may be given as to the mode in which such evidence is to be adduced.

XII.

The Certificate.

Computation of Interest and Apportionment of Funds.

Rule 1. Where the Court directs any computation of interest, or the apportionment of any fund, the decree or order may direct such computation or apportionment to be made by the Registrar, and may direct the certificate thereof, signed by the Registrar, to be acted upon accordingly, without the same being signed and adopted by the Judge.

On Accounts, what to set out.

—— 2. Where an account is directed, the certificate shall state the result of such account, and not set the same out by way of schedule, but shall refer to the account verified by the affidavit filed, and shall specify by the numbers attached to the items in the account, which, if any, of such items have been disallowed or varied, and shall state what additions, if any, have been made by way of surcharge.

Fair Copy.

And where the account, verified by the affidavit, has been so altered that it is necessary to have a fair transcript of the account,

1881. as altered, such transcript may be required to be made by the party prosecuting the decree or order, and shall then be referred to by the certificate.

Accounts, &c., to be filed.

The accounts and the transcripts, if any, referred to by certificates, shall be filed therewith, but no copies thereof shall be taken by any party except, at his own expense.

Not to set out Decree, &c., or Documents, or Reasons.

—— 3. The certificates to be made by the Registrar shall not, except the special circumstances of the case shall render it necessary, set out the decree or order, or any documents, or evidence, or reasons, but shall refer to the decree or order, documents and evidence, or particular paragraphs thereof, so that it may appear upon what the result stated in any such certificate is found.

—— 4. When such certificate has been signed by the Registrar, notice thereof shall be given to the parties or their Solicitors.

Applications to discharge Certificate.

—— 5. The time within which an application may be made to discharge or vary any certificate shall be three days after the signing thereof by the Registrar; in the case of certificates which are to be acted upon by the Accountant-General, without any further order; and fifteen days in the case of other certificates. Such application shall be made by motion in Court.

Approval by Judge.

—— 6. At the expiration of such three or fifteen days, respectively, the Registrar shall submit the certificate to the Judge for his approval, and the Judge may thereupon, if he approve the same, sign such certificate in testimony of his approval thereof.

XIII.

Reference of Question of Law or Fact to Court.

Registrar may refer.

Rule 1. The Registrar may, either of his own motion, or by consent of parties, by his certificate, refer any question of law or fact to the Court, and may either state the facts which have been proved before him, and the question for the decision of the Court, or a question or issue to be had by the Court, and either party may set down such question or issue, if for argument only, on any motion day, or, if for trial, at the next or any future sittings of

the Court. Where the Registrar shall have stated the facts, the Court may direct further evidence to be taken, either before the Registrar or in Court. 1881.

T. SIDGREAVES, *Chief-Justice.*

T. T. FORD, *Judge.*

THOS. L. WOOD, *Judge.*

I certify the above to be a true copy of the Rules and Orders made by the Supreme Court, for regulating the Practice and Procedure of the Registrar's Department in the Supreme Court.

T. SIDGREAVES.

ORDER OF COURT. 1886.

4th August, 1886.

Fees to be taken in the Registry of the Supreme Court at Singapore under Section 58 of "The Conveyancing and and Law of Property Ordinance, 1886"—6 of 1886.*

		$	c.
1.	On depositing a Power of Attorney	...	50
2.	For Office copies or extracts from any deposited document per folio of 100 words	...	25
3.	For examining and stamping or marking as an Office copy, a copy presented for that purpose of any deposited document per folio of 100 words	...	10
4.	For searching the index of deposited document	...	25
5.	For inspecting a deposited document	...	25

The above fees have been fixed by me, this 4th day of August, 1886.

THEODORE T. FORD,
Chief-Justice.

---

* The following is the section :—

58. [1]—An instrument creating a Power of Attorney its execution being verified by affidavit, statutory declaration, notarial certificate, or other sufficient evidence may with the affidavit or declaration [if any] be deposited in the Registry of the Supreme Court at Singapore.

[2]—A separate file of instruments so deposited shall be kept, and any person may search that file and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

[3]—A copy of an instrument so deposited may be presented at the said Registry, and may be stamped or marked as an office copy, and when so stamped or marked, shall become and be an office copy.

[4]—An office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the Registry.

[5]—The fees to be taken in the Registry shall be fixed by the Chief Justice with the concurrence of the Governor.

[6]—This section applies to instruments creating Powers of Attorney executed either before or after the commencement of this Ordinance.

1886. I hereby express my concurrence in this Scale of Fees.

FRED A. WELD,
Governor, S.S. *

L. S.

This is a true copy of a Power of Attorney deposited in the Registry of the Supreme Court of the Straits Settlements, Settlement of————on this——day of———188—.

Registrar.

[The above is the endorsement to be made in the margin of the copy of any Power of Attorney brought in to be certified by the Registrar.]

1887. ORDER OF COURT.

27*th May*, 1887.

Rules and Orders for regulating the Practice and Procedure of the Supreme Court in its Appellate Jurisdiction.

His Honour *Theodore Thomas Ford*, Chief Justice, His Honour *Etienne Pellereau*, Puisne Judge, His Honour *John Tankerville Goldney*, Puisne Judge, of the Supreme Court of the Straits Settlements, do hereby, in pursuance and execution of the powers given by "The Courts' Ordinance, 1878," and all other powers and authorities enabling them in this behalf, order and direct in manner following:—

I.

Civil Appeals from the Supreme Court.

When a Court of Appeal is to be held at any Settlement, notice of the place and date of the holding of such Court of Appeal shall be published in the *Government Gazette* at least fourteen [14] days before the assembling thereof. Such notice shall not be required in the case of a Court of Appeal held by consent under Section 69 of "The Courts' Ordinance, 1878."

II.

Subject to the provisions of Section 70 of "The Courts' Ordinance, 1878," appeals arising in Malacca shall be heard at Singapore.

* *Vide* Sub-section 5 of Section 58 of Ordinance 6 of 1886, foot-note *antè* p. 25.

III.

On the assembling of the Court of Appeal, the list of appeals for hearing shall be taken day by day, or by adjournment as the Court shall direct. The said list shall be kept in the Registrar's Office, in Singapore and Penang, and it shall be the duty of the Registrar on receiving the written request thereto of the appellant, or his Attorney, under the provisions of Section 3 of Ordinance 1 of 1883, to enter therein the name of the cause, the date of entry, and the name or names of the appellant or appellants, or his, or their Solicitor or Solicitors.

IV.

A copy of any notes of the evidence made by the Judge against whose judgment, decree, or order the appeal is brought, or so much thereof as the Judge shall consider material, may, if the Judge shall make no objection thereto, be supplied by the Judge's Clerk to the party in the suit or action applying for the same, on payment to such Clerk of a fee of 25 cents per folio o 90 words. The Judge's notes of *vivâ voce* evidence shall *primâ facie* be deemed a sufficient record thereof.

V.

If on the day fixed for hearing the appeal, or any other day subsequent thereto, to which the hearing of the appeal may be adjourned, the appellant shall not appear in person, or by an Advocate and Solicitor of the Supreme Court, and it shall not appear to the Court that there is any reasonable ground for such absence, the appeal shall be dismissed for default. If the appellant shall appear in person, or by an Advocate and Solicitor of the Supreme Court, and the respondent shall not appear in person or by an Advocate and Solicitor of the Supreme Court, and it shall not appear to the Court that there is any reasonable ground for such absence, the appeal shall be heard *ex-parte* in his absence.

VI.

It shall not be competent to the parties in an appeal to produce additional evidence before the Court of Appeal, whether of exhibits or witnesses, but if the Court of Appeal requires any exhibits to be produced or witnesses examined to enable it to pronounce a satisfactory judgment, or for any other substantial cause, the Court of Appeal may allow additional exhibits to be received and any necessary witnesses to be examined, whether such witnesses shall have been previously examined in the case appealed from or not.

VII.

Appeals to the Court of Appeal shall be made in the form of a Memorandum which shall be filed with the Registrar of the Division of the Court in which the original case was tried not less than ten [10] days before the sitting of the Court of Appeal.

1887.

VIII.

The Memorandum of Appeal shall set forth concisely, and under distinct heads, the grounds of objection to the decision appealed against, without any argument or narrative, and such grounds shall be numbered consecutively. The appellant shall not, without the leave of the Court, urge or be heard in support of any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

IX.

The Memorandum of Appeal except in cases under Chapters 3, 4, 5 and 6 of "The Appeals Ordinance, 1879," shall be in the following form and to the following effect, and shall be accompanied by a copy of the judgment, decree, or order appealed against:—

Memorandum of Appeal.

Name, &c., &c., Plaintiff.

Name, &c., &c., Defendant.

[Name of Appellant], Plaintiff or Defendant, abovenamed, appeals to the Court of Appeal at [Singapore, or Penang, as the case may be]

against the { Judgment / Decree / Order } of, in the above suit.

Dated the day of for the following reasons:—

[Here state the reasons.]*

There shall also be attached to the Memorandum of Appeal:

1.—A copy of the Judge's notes, or so much thereof as may have been supplied under Rule IV.

2.—The Certificate, if any, given by the Court or Judge as provided by Section 4 of Ordinance 1 of 1883.

3.—The Documents and Writings, with authorised translations of such Documents or Writings as require translating, or such portions thereof as the appellant wishes to be read at the hearing, and upon which he intends to rely in support of his case.

X.

If the Memorandum be not drawn up in the manner hereinbefore prescribed, the Court may reject it, or may return it to the party for the purpose of being corrected. If the Memorandum be not presented within the prescribed period, and no sufficient cause be shewn for the delay, the appeal shall be rejected.

---

* See *Sherifa Shaika* v. *Haughton*, infrà p. 533.—J.W.N.K.

1887.

XI.

If there be two or more plaintiffs, or two or more defendants in a suit, and the decision of the Court from which the appeal is made proceeds on any ground common to all, any one of the plaintiffs or defendants may appeal against the whole decree, and the Court of Appeal may reverse, or modify the decree, or judgment in favour of all the plaintiffs or defendants in the same manner as if they had originally been made parties to the appeal.

XII.

When a Memorandum of Appeal is presented in the prescribed form, and within the time allowed, the proper Officer of the Court of Appeal shall endorse thereon the date of presentment, and shall register the appeal in a book to be kept for the purpose and called the Register of Appeals.

XIII.

Seven clear days before the sitting of the Court of Appeal, the appellant shall deliver to the Registrar, for the use of each of the Judges of the Court of Appeal, a copy of the Memorandum of Appeal previously filed, and in default of so doing, the appeal shall be struck out of the list of appeals, and shall be re-admitted thereto only upon such terms and conditions, as to costs or otherwise, as the Court may deem fit.

XIV.

A copy of the decree, judgment, or order disposing of the appeal, certified by the Court of Appeal, or the proper Officer of such Court and sealed with the seal of the Court, shall be transmitted to the Registrar of the Supreme Court which passed the first decree in the suit appealed from, and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Court of Appeal shall be made in the original register of the suit.

XV.

Application for execution of the decree of a Court of Appeal shall be made to the Court which passed the first decree in the suit, and shall be executed in that manner, as if it were an original decree of the Court.

XVI.

The service of notices required to be served under "The Appeals Ordinance" or these Rules and Orders shall be effected in the same manner as under the ordinary practice of the Supreme Court.

1887.

XVII.

Every return of service or of failure to serve the notice shall be accompanied by the affidavit of the Serving Officer specifying the fact and the mode of service, or the reason why service could not be effected in any of the modes allowed by law.

XVIII.

The above Rules and Orders, or any of them, shall not be deemed in any way to derogate from the general powers of the Court to amend and rectify all proceedings taken before it, whether in respect of form, extension, or limitation of time, error, or otherwise.

XIX.

All previous Rules and Orders in the Appellate Jurisdiction of the Supreme Court are hereby repealed.

Appeals from Magistrates.

I.

The notice of appeal required by Section 21 of "The Appeals Ordinance, 1879," to be given to the respondent shall state specially the grounds of appeal, and a copy shall be transmitted to the Registrar with the Magistrates' case.

II.

No other grounds of appeal shall be taken at the hearing of the appeal than those mentioned in the notice aforesaid, except by leave of the Supreme Court to be granted on such conditions as it may seem just.

THEODORE T. FORD, *Chief-Justice.*

ETIENNE PELLEREAU, *Judge.*

JOHN T. GOLDNEY, *Judge.*

I certify the above to be a true copy of the Rules and Orders made by the Supreme Court, for regulating the Practice and Procedure of the Supreme Court in its Appellate Jurisdiction.

THEODORE T. FORD,

Chief-Justice.

22*nd June*, 1887.

Rules and Orders on [Solicitors'] Costs under "The Courts' Ordinance, 1878." *

His Honour *Theodore Thomas Ford*, Chief Justice, His Honour *Etienne Pellereau*, Puisne Judge, and His Honor *John Tankerville Goldney*, Puisne Judge of the Supreme Court of the Straits Settlements, do hereby, in pursuance and execution of the powers given by "The Courts' Ordinance, 1878," and all other powers and authority enabling them in this behalf, repeal all other Rules and Orders dealing with the subject-matters of the Rules following, and order and direct in manner following:—

ORDER I.

Order for delivery of Bill of Costs to be obtained as of course.

1. An order for the delivery of a Solicitor's Bill of Costs and for delivery up of any deeds, documents, or other papers in the possession of such Solicitor, subject to any lien which such Solicitor may have, and for the taxation of such Bill when delivered, may be obtained on a petition of course, and upon such petition being filed the Registrar will draw up the order thereon forthwith.

Order for taxation of delivered Bill of Costs.

2. An order for the taxation of a Bill of Costs delivered by any Solicitor may be obtained on a petition of course, by the party chargeable therewith, or by any person liable to pay the same either to the party chargeable or to the Solicitor, at any time within six months from the delivery of such Bill, or by the Solicitor after the expiration of one calendar month and within a year from such delivery: provided that after the expiration of one calendar month from the delivery of the Bill, the order, if made upon the application of the party chargeable or liable, shall contain such directions and such conditions as the Court may think proper, and any Solicitor aggrieved by any such order of course may apply by Summons in Chambers that the same may be amended or varied.

After six months from delivery or after payment special circumstances to be shewn for taxation.

3. After the expiration of such six months from the delivery of a Bill of Costs or after payment of the same, no order shall be made for the taxation of a Solicitor's Bill of Costs except upon notice to the Solicitor and under special circumstances to be proved to the satisfaction of the Court.

---

* For Costs under the Bankruptcy Ordinance 2 of 1888, see Rule 76, Sections 1, 2 and 3, of Bankruptcy Rules—*Government Gazette*, 1888, p. 2360, and *Wms. Bank. Prac.* [4th Ed.] 510.—J.W.N.K.

1887.

Petitions for taxation to contain a submission to pay.

4. All petitions by a party chargeable with or liable for a Bill of Costs shall, unless the same shall have been already paid, contain a submission by such party to pay the amount thereof to such Solicitor when taxed.

Costs of taxation how to be borne.

5. In case any order for taxation is made upon the application of the party chargeable or liable, or of the Solicitor, the costs of such order and taxation, except when the order has been made after the expiration of one year, are to be paid according to the event of such taxation, that is to say, if the Bill when taxed be less by a sixth part than the Bill delivered, then the Solicitor is to pay such costs, and if the Bill when taxed is not less by a sixth part then the part chargeable or liable, if such application is made by him or if he attends the taxation, is to pay such costs, and every order for such reference is to direct the Registrar to tax the costs of such reference and to certify what upon such reference shall be found to be due to, or from such Solicitor in respect of such Bill, and of the costs of such reference, if payable; but the taxing officer is to be at liberty to certify specially and circumstances relating to such Bill or taxation, and the Court is to be at liberty to make thereupon any such order as may be thought right respecting the payment of the costs of such taxation: but where such reference is made when the same is not authorised except under special circumstances, the Court is to be at liberty to give any special directions relative to the costs of such reference.

Costs of order for taxation fixed at $5.

6. The costs of obtaining an order for taxation of costs including petition of course, order and service of order, but not including any Court fees payable thereon or disbursements if the same shall be obtained by a Solicitor for the applicant or by the Solicitor, shall be the sum of five dollars.

Solicitor to deliver copy of Bill of Costs.

7. When application is made by a party other than the party chargeable, the Court may order the Solicitor to deliver to the party making the application a copy of the Bill upon payment of the costs of making such copy.

Procedure on taxation.

8. Upon service of an order for taxation the original Bill as delivered or the copy supplied under Rule 7 shall be carried in to the Registrar, and if the party obtaining the order shall neglect to proceed thereon for the space of fourteen days after the service of the order on the other party, the other party may proceed to carry in the Bill of Costs or a copy thereof and obtain an appointment for taxation, and all costs occasioned by the neglect of the party obtaining the order shall be paid by him.

Definition of "Solicitor."

9. The expression Solicitor in these Rules shall mean and include the legal representatives of any Solicitor deceased and if the Solicitor dies pending the proceedings an order may be obtained *ex-parte* to revive the proceedings against his representatives.

10. Upon the taxation of the Bill the certificate of the Registrar, unless set aside, shall be conclusive as to the amount thereof, and where the order contains a submission to pay, the Solicitor may, after forty-eight hours, if there is no application for review, issue execution for the same.

Certificate of Registrar to be conclusive unless set aside.

11. [1].—When the Advocate and Solicitor who acts as Counsel is not the same person who acts as Solicitor in the cause and is not of the same firm and is instructed by a Solicitor the fees paid to him shall not be liable to taxation as between Solicitor and client.

When Advocate and Solicitor are Counsel only.

[2].—A hearing fee is to be allowed upon the hearing or trial of any action, or upon assessment of damages, or upon any application to the Court in which it would be proper for the party to appear by Advocate. In estimating such fee [which is to include the fees hitherto allowed for perusing cause papers and considering authorities] regard is to be had to [1] the magnitude or difficulty of the case or application; [2] any previous agreement between the parties; [3] the length of time occupied thereon; and [4] the other fees and allowances to the Solicitor in the same cause or matter, viz.:—

Advocate's fee to be allowed in proper cases.

On the Hearing or Trial of an Action.

When the Solicitor's fees are to be allowed upon the scale contained in the first column of the undermentioned Schedule ...	From	$10	to $30
Refresher	„	5	„ 15
When under the second and third columns	„	25	„ 100
Refresher	„	10	„ 50

Motions or Petitions if not very special.

Where fees in first column apply ...	From	$ 5	to $10
Where fees in second and third columns apply	„	10	„ 25

NOTE *A.*:—If less than half of a day is occupied, a proportionate part of the above Refresher fees will alone be allowed.

NOTE *B.*:—The maximum of the above scales is to be allowed in general only where, in the opinion of the taxing officer, the case has involved such questions of law as require previous searching of authorities.

Assessment of Damages and Undefended Cases.

When fees in the said first column apply ...	From	$ 5	to $10
When fees in the said second and third columns apply	„	10	„ 30

[3].—The Advocate's fees in the foregoing sub-section may be exceeded in cases of taxation as between Solicitor and client where the client has agreed to pay a higher remuneration, but

1887.

the amount of such increased remuneration will be reviewed by the taxing officer or if required by him or the client by a Judge.

Retaining Fees.

[4].—No Retaining Fee will be allowed where the Advocate and Solicitor in a cause is the same person or are of the same firm. In other cases a Retaining Fee may be allowed according to circumstances. In other applications or matters the taxing officer is to be guided so far as circumstances permit by the amounts above stated, but in no case will a Retaining Fee be allowed on taxation as between party and party. If the Judge certifies that an attendance in Chambers is a proper one for Counsel to attend, a special fee from $5 to $15 may be allowed for such attendance.

Lower Scale.

12. In the case of actions within the meaning of the 31st Section of "The Civil Procedure Ordinance, 1878," and in cases where the estate to be administered, or the trust estate in respect of which proceedings are taken, or the value of the assets in suits for dissolution of partnership, or taking accounts, or the amount of a mortgage sought to be redeemed, or foreclosed, or the purchase-money in a suit for specific performance, and generally in all other cases where the estate fund or subject-matter of the action, suit, or proceeding does not exceed $500, Solicitors shall be allowed the fees set forth in the first column of the Schedule hereto.

Higher Scales.

13. In similar cases to those mentioned in the preceding clause, where the amount exceeds $500 and does not exceed $5,000, and in all other cases where the amount does not exceed $5,000, Solicitors shall be allowed the costs and charges under the second column of the said Schedule, and in all cases where such amount shall exceed $5,000, the costs and fees under the third column in the said Schedule. Solicitors shall be entitled to charge and be allowed the fees set forth in the 3rd column in the said Schedule in all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property and infringements of rights, easements, patents and copyrights, or other similar cases where the procuring such injunction is the principal relief sought to be attained.

Discretion of Judge to direct taxation on any higher or lower scales.

14. Should the amount recovered in any action be less than that sought to be recovered, the Court or Judge may in such and in any other case direct the fees set forth in any of the lower columns to be allowed to all or either or any of the parties and as to all or any part of the costs and the Court or Judge may, notwithstanding the above rules, in any case direct the fees set forth in either of the columns to be allowed to all or either or any of the parties and as to all or any part of the costs.

THE SCHEDULE ABOVE REFERRED TO: 1887.

Writs, Summonses, and Warrants.	1st Column. $ c.	2nd Column. $ c.	3rd Column. $ c.
Writs of summons for the commencement of any action	1 50	2 50	5 00
And for indorsement of claim, if special	1 00	1 50	1 50
Concurrent writ of summons	1 25	2 50	2 50
Renewal of a writ of summons	1 25	2 50	2 50
Writ of summons for service out of jurisdiction...	1 25	2 50	5 00
Writ of mandamus or injunction	1 50	3 00	6 00
Or per folio	...	0 40	0 40
Writ of subpœna ad testificandum duces tecum ...	1 00	2 00	2 50
And if more than four folios, for each folio beyond four	0 30	0 40	0 40
Writ or writs of subpœna ad testificandum for any number of persons not exceeding three, and the same for every additional number not exceeding three	1 25	2 50	2 50
Writ of execution, or other writ to enforce any judgment or order including attendance to obtain	1 25	2 50	3 50
And if for more than four folios. for each folio beyond four	...	0 40	0 40
Any writ not included in the above	1 25	2 50	3 50
These fees include all indorsements and copies or præcipes for the officer sealing them, and attendances to issue or seal, but not the Court fees.			
Summons to attend at Chambers	1 00	1 25	2 00
Or if special, at taxing officer's discretion, not exceeding	1 25	2 50	5 00
Copy for the Judge or Registrar when required	0 50	0 75	0 75
Services, Notices, and Demands.			
Service of any writ, summons, warrant, interrogatories, petition, order, notice, or demand on a party who has not entered an appearance, and if not authorised to be served by post ...	1 00	1 75	1 75
Affidavit of service including copy when required	1 00	1 50	1 50
If served at a distance of more than two miles from the place of business, or office of the Solicitor serving the same for each mile beyond such two miles therefrom	0 35	0 35	0 35
Where more than one attendance is necessary to effect service, or to ground an application for substituted service, such further allowance may be made as the taxing officer shall think fit.			
For service out of the jurisdiction such allowance is to be made as the taxing officer shall think fit.			
Service where an appearance has been entered on the Solicitor or party	0 50	1 00	1 00
Or if authorised to be served by post	...	0 50	0 50

1887.

	1st Column. $ c.	2nd Column. $ c.	3rd Column. $ c.
Where any writ, order, and notice, or any two of them, have to be served together, one fee only for service is to be allowed.			
In addition to the above fees, the following allowances are to be made:—			
As to writs, for each copy for service	0 50	0 50	0 75
As to summons to attend at the Judges' Chambers, for each copy to serve	0 50	0 50	0 75
Or per folio	...	0 12	0 12
As to notice in proceedings to wind-up companies, for preparing or filling up each notice to creditors to attend and receive debts, and to contributories to settle list of contributors ...	...	0 40	0 40
And for preparing or filling up each notice to contributories to be served with a general order for a call, or an order for payment of a call	...	0 40	0 40
And for drawing notice to be served on contributors or creditors of a meeting, per folio ...	...	0 40	0 40
For each copy of the last-mentioned notice to serve, per folio	...	0 15	0 15
For preparing or filling up for service in any other cause or matter, each notice to creditors to prove claims, and each notice that dividends or payment may be received specifying the amount to be received for principal and interest, and costs, if any	0 40	0 40	0 40
For preparing notice to produce or admit, and one copy	1 00	1 75	1 75
If special or necessarily long, such allowance as the taxing officer shall think proper, not exceeding per folio	0 25	0 25	0 40
And for each copy beyond the first, such allowance as the taxing officer shall think proper, not exceeding per folio	...	0 15	0 15
For preparing motion paper [including copy for Judge]	1 00	2 00	2 50
Or per folio	...	0 40	0 40
For preparing notice of motion	0 50	0 75	1 50
Copy for service	0 50	0 50	0 75
Or per folio	...	0 15	0 15
For preparing any necessary or proper notice, not otherwise provided for	0 50	0 50	0 50
Or if special, and necessarily exceeding three folios, preparing same, for each folio, beyond three	...	0 40	0 40
And for each copy for service and service... ...	0 50	0 50	0 50
Copies for service of interrogatories and petitions, and of orders with necessary notices [if any] to accompany, per folio	...	0 15	0 15
Except as otherwise provided the allowances for service include copies for service.			
Where notice of filing affidavits is required, only one notice is to be allowed for a set of affidavits filed, or which ought to be filed together.			
Where any appointment is or ought to be adjourned, service of a notice of the adjournment, or next appointment, is not to be allowed.			

1887.

Appearances.	1st. Column. $ c.	2nd Column. $ c.	3rd Column. $ c.
Entering any appearance including requisition ...	1 25	2 50	2 50
If entered at one time, for more than one person, for every defendant beyond the first	0 50	0 50	0 50
If a person appearing to a writ of summons to recover land, limits his defence by his memorandum of appearance, in addition to the above	1 25	2 50	2 50
Instructions.			
To sue or defend	1 00	2 00	4 00
For statement of complaint	3 00	5 00	10 00
For statement or further statement of defence ...	1 50	2 50	5 00
For counter-claim	1 50	2 50	5 00
For reply by plaintiff when defendant sets up a counter-claim	2 50	4 00	6 00
For reply or further reply in any other case by plaintiff or other person, with or without joinder of issue	1 50	2 50	5 00
For confession of defence	1 50	2 50	5 00
For joinder of issue without other matter and for demurrer	1 00	2 00	4 00
For special case, special petition, any other pleading [not being a summons], and interrogatories for examination of a party or witness...	1 50	2 50	5 00
To amend any pleading	1 00	2 00	4 00
For affidavit in answer to interrogatories, and other special affidavits	1 00	2 00	2 00
To appeal	2 00	4 00	8 00
To add parties by order of Court or Judge ...	1 00	2 00	4 00
To make any application to a Court or Judge ...	1 00	2 00	4 00
Such fee may be allowed as the taxing officer shall think fit having regard to all the circumstances of the case, for attendances on witnesses and procuring evidence, and generally getting up the case.			
Drawing Pleadings and other Documents.			
Statement of claim	3 00	4 00	6 00
Or per folio	...	0 40	0 40
Statement of defence	1 00	2 00	4 00
Or per folio	...	0 40	0 40
Statement of defence and counter-claim	1 00	3 00	5 00
Or per folio	...	0 40	0 40
Reply, with or without joinder of issue, confession of defence, joinder of issue without other matter, memorandum of demurrer, and any other pleading [not being a petition or summons] and amendments of any pleading	1 00	1 50	3 00
Or per folio	...	0 40	0 40
Particulars, breaches, and objections, when required and one copy to deliver	1 00	1 50	2 00
Or such amount as the taxing officer shall think fit, not exceeding, per folio	...	0 40	0 40

1887.

	1st Column. $ c.	2nd Column. $ c.	3rd Column. $ c.
If more than one copy to be delivered, for each other copy, per folio	0 15	0 15	0 15
Special case, whether original or in action, affidavits in answer to interrogatories, and other special affidavits, special petitions and interrogatories, per folio	0 30	0 40	0 40
Accounts, statements, and other documents for the Chambers, when required, and fair copy to leave, per folio	0 25	0 25	0 40
Advertisements to be signed by Registrar including attendance therefor	2 00	2 00	4 00
Bill of costs for taxation, including copy for the taxing officer, for first four folios	2 00	2 00	2 00
For every subsequent folio	0 25	0 25	0 25
Copies.			
Of pleadings and other documents where no other provision is made at, per folio	0 10	0 15	0 15
Copies are not to be allowed as of course, but the allowance is to depend on the propriety of making or sending the copies, which in each case is to be shewn and considered by the taxing officer.			
Inserting amendments in any pleading, special case or petition	0 40	0 40	1 50
Or per folio	0 10	0 15	0 15
Perusals.			
Of statement of complaint, statement of defence, reply, joinder of issue, demurrer, and other pleading by the Solicitor of the party to whom the same are delivered	1 50	2 50	4 00
Or per folio	...	0 15	0 15
Of amendment of any such pleading in writing ...	1 00	1 50	2 00
Or per folio	...	0 15	0 15
Of interrogatories to be answered by a party by his Solicitor	1 00	2 00	4 00
Or per folio	...	0 12	0 12
Of special case by the Solicitor or of any party except the one by whom it is prepared ...	1 50	2 50	5 00
Or per folio	...	0 15	0 15
Of copy, order to add parties, notice of defendant's claim against any person not a party to the action under Section 129, Civil Procedure Ordinance, and of defendant's statement of defence and counter-claim served on a person not a party under Section 130, by the Solicitor of the party served therewith, and in these several cases the perusal of the plaintiff's statement of complaint is also to be allowed unless the Solicitor has been previously allowed such perusal	1 00	2 00	4 00
Or per folio	...	0 15	0 15
Of notice to produce and notice to admit by the Solicitor of the party served	1 00	2 00	4 00

1887.

	1st Column. $ c.	2nd Column. $ c.	3rd Column. $ c.
Of affidavit in answer to interrogatories by the Solicitor of the party interrogating, and of other special affidavits by the Solicitor of the party against whom the same can be read, per folio	0 8	0 15	0 15
Perusing title deeds, wills, or other papers when necessary such fee as the taxing officer may consider proper. Perusing drafts of Deeds prepared in course of suit and proper to be perused by the Solicitor of a party other than the party preparing the same, for every folio	0 12	0 15	0 15
Attendances.			
To obtain consent of next friend to sue in his name	2 00	2 00	4 00
To file any pleading or special case	1 00	1 00	2 00
To inspect, or produce for inspection, documents pursuant to a notice to admit	1 00	2 00	4 00
Or per hour	1 00	2 00	3 00
To examine and sign admissions	1 00	2 00	4 00
To inspect, or produce for inspection, documents referred to in any pleading or affidavit, pursuant to notice under Section 291, Civil Procedure Ordinance	1 00	2 00	4 00
Or per hour	1 00	2 00	3 00
To obtain or give any necessary or proper consent	1 00	2 00	2 00
To obtain an appointment to examine witnesses ...	1 00	2 00	2 00
On examination of witnesses de bene esse or otherwise before Examiner, Commissioner, officer, or other person	2 00	3 00	4 00
Or according to circumstances not to exceed ...	8 00	12 00	12 00
Or reading over an affidavit in answer to interrogatories or other special affidavit when deponent does not read English, per folio	...	0 06	0 06
On deponents being sworn, or by a Solicitor or his clerk to be sworn, to an affidavit in answer to interrogatories or other special affidavit ...	1 00	2 00	2 00
On a summons at Judge's Chambers	1 50	2 50	2 50
Or according to circumstances, not to exceed ...	3 00	5 00	5 00
On adjournment	1 00	1 25	1 25
To enter or set down action, demurrer, special case or appeal, for hearing or trial	1 00	2 00	2 00
A clerk's attendance at the hearing of any proceeding in Court whenever in the judgment of the Registrar such attendance has been reasonably required. Fee for such attendance, per diem	...	$1 to $3	$1 to $5
Clerk's attendance to search list	...	1 00	1 00
To deliver papers [when required] for the use of a Judge prior to a hearing	1 00	1 00	1 00
On taxation of a bill of costs	...	2 00	2 00
Or according to circumstances, not to exceed ...	$1 to $5	5 00	10 00
To obtain or give an undertaking to appear ...	1 50	2 00	2 00
To present a special petition, and for same answered	1 50	2 00	2 00
On printer to insert advertisement in *Gazette* or other paper	1 50	2 00	2 00

1887.

	1st Column. $ c.	2nd Column. $ c.	3rd Column. $ c.
On Registrar that a cause set down is settled, or for any reason not to come into the paper for hearing	1 00	2 00	2 00
For an order drawn up by Registrar	1 00	2 00	2 00
For preparing and drawing up an order made at Chambers in proceedings to wind-up a company and attending for same	2 00	3 00	4 00
And for engrossing every such order, per folio ...	0 12	0 12	0 12
On the Sheriff with writ of execution	1 00	1 00	1 00
To search for appearance, each defendant ...	1 00	1 00	1 00
On judgment for default of appearance for second search before signing	1 00	1 00	1 00
To enter judgment by default, final or interlocutory, including requisition to enter ...	1 00	2 00	2 00
On settling decree when necessary or according to circumstances, not to exceed	5 00	7 00	10 00
On the Solicitor for the other party when necessary and other proper and necessary attendances not being chargeable as "instructions for hearing, &c."	1 00	2 00	2 00
Or if long and special, not exceeding	...	4 00	4 00
Exhibits.			
For marking each exhibit to an affidavit	0 25	0 25	0 25
Translations.			
Other than by Chief Interpreter, when necessary, as taxing officer shall think proper, not exceeding per folio	0 75	0 75	0 75
Letters.			
Such letters as in the opinion of the taxing officer were necessary and proper to be written and not chargeable as notices	1 00	1 00	1 00
Or if long and special	$2 to $5		

ORDER II.

Conveyancing and non-contentious business.

Costs in conveyancing and non-contentious business.

1. The remuneration of a Solicitor in respect of business connected with sales, purchases, leases, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any Court, is to be regulated as follows, namely:—

Costs of sales, purchases, and mortgages completed, to be regulated by ad valorem scale in Schedule.

[*a.*] In respect of sales, purchases and mortgages completed the remuneration of the Solicitor having the conduct of the business whether for the vendor, purchaser, mortgagor, or mortgagee, is to be that prescribed in the Schedule to this Order, and to be subject to the regulations therein contained.

1887.

Costs of uncompleted matters and other than sales, purchases and mortgages, to be regulated by scale in Schedule II.

[*b.*] In respect of business connected with any transaction the remuneration for which if completed, is in the Schedule hereto prescribed, but which is not in fact completed, and in respect of settlements, leases or licenses, or agreements therefor, reconveyances, transfers of mortgage, or further charges, not provided for in the Schedule hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents, and of all other business the remuneration for which is not in the Schedule hereto prescribed, the remuneration is to be as near thereto as may be, but subject to revision by the taxing officer.

As to disbursements, &c., under ad valorem scale.

3. The remuneration prescribed by the Schedule to this Order is not to include stamps, auctioneer's or valuer's charges, travelling expenses, fees paid on searches or registrations, costs of extracts from any register, or other disbursement reasonably and properly paid, nor is it to include any business of a contentious character, nor any proceedings in any Court, but it shall include the registration of documents requiring registration, allowances for the time of the Solicitor and his clerks, and charges for copying and stationery, and all other similar disbursements.

Conveyance and mortgage completed at same time.

4. Where a conveyance and mortgage of the same property are completed at the same time, and are prepared by the same Solicitor, he shall be entitled to charge only his full charges upon the purchase-money with such additional sum as the taxing officer may deem reasonable.

Fractions of $100.

5. Fractions of $100 are to be reckoned as $100.

Cost under $5.

6. Where the prescribed remuneration would, but for this provision amount to less than $5, the prescribed remuneration shall be $5.

Sale of equity of redemption.

7. Where a property is sold subject to incumbrances the charge shall be calculated upon the price of the equity of redemption.

Transfers of mortgages and further charges.

8. The above scale as to mortgages shall apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same Solicitor on the original mortgage or on any previous transfer; and it is not to apply to further charges where the title has been so previously investigated.

SCHEDULE.

Scale of Charges for Sales, Purchases, and Mortgages, and Rules applicable thereto.

SCALE.

	[1] For the 1st $1,000.	[2] For the 2nd $1,000.	[3] For the 3rd and every subsequent $1,000 up to $10,000.	[4] For each subsequent $1,000 up to $50,000.	[5] For each subsequent $1,000, above $50,000.
Vendor's Solicitor for conducting a sale of free-hold or lease-hold property by public auction including the conditions of sale:—					
When the property is sold	$2 per $100 ...	$1 per $100...	50 cts. per $100...	20 cts. per $100...	10 cts. per $100
When the property is not sold then on the reserved price	$1 „ „ ...	50 cts. „ „ ...	25 cts. „ „ ...	10 cts. „ „ ...	5 cts. „ „
But if afterwards sold by the same Solicitor or firm the whole charges not to exceed the charges on one successful sale.					
Vendor's or Mortgagor's Solicitor for deducting title to free-hold or lease-hold property, and perusing, and completing conveyance [including preparation of contract, if any]...	$1 „ „ ...	50 cts. „ „ ..	25 cts. „ „ ...	10 cts. „ „ ...	5 cts. „ „
Purchaser's or Mortgagee's Solicitor for investigating title to free-hold or lease-hold property and preparing and completing conveyance [including perusal and completion of contract, if any]	$2 „ „ ...	$1 „ „ ...	50 cts. „ „ ...	20 cts. „ „ ...	20 cts. „ „
Vendor's or Mortgagor's Solicitor for procuring execution and acknowledgment of deed by a married woman	$5 extra.	...	...	...	...

ORDER III.

Special Allowances and General Provisions.

1887.

1. As to writs of summons requiring special indorsement, original special cases, pleadings, and affidavits in answer to interrogatories, and other special affidavits the taxing officer may, in lieu of the allowances for instructions and preparing or drawing, make such allowance for work, labour, and expenses in or about the preparation of such documents as in his discretion he may think proper. In special cases special allowances may be made.

2. As to drawing any pleading or other document, the fees allowed shall include any copy made for the use of the Solicitor or client or for Counsel to settle. Drawing pleadings.

3. As to instructions to sue or defend, when the higher scales are applicable, if in consequence of the instructions being taken separately from more than three persons [not being co-partners] or from any other cause the taxing officer shall consider the fee above provided inadequate, he may make such further allowance as he shall in his discretion consider reasonable. Instructions to sue or defend, &c.

4. As to affidavits when there are several deponents to be sworn, or it is necessary for the purpose of an affidavit being sworn to go to a distance, or to employ an agent, such reasonable allowance may be made as the taxing officer in his discretion may think fit. No instructions for an affidavit shall be allowed when the Solicitor or his clerk makes the affidavit. Swearing affidavits.

5. The allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits and attending the deponent to be sworn, include all attendances on the deponents to settle and read over, except when deponent does not speak English. Drawing affidavits and attending deponent.

6. [1]—As to delivery of pleadings, services and notices the fees are not to be allowed when the same Solicitor is for both parties, unless it be necessary for the purpose of making an affidavit of service. Certain fees not to be allowed when the same Solicitor acts for both parties.

[2]—As to perusals the fees are not to apply where the same Solicitor is for both parties.

7. Where an Advocate and Solicitor not being the same person or of the same firm is employed as Advocate in any cause or matter such fees shall be allowed for attendances, preparing briefs and other like matters as having regard to the scale of costs hereinbefore set out and to the other circumstances, to the taxing officer shall seem proper. Where another Advocate and Solicitor employed to conduct case in Court.

8. As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses are to be allowed. Evidence.

1887.

Cases not provided for.

9. In all cases for which a fee or costs are not provided in these rules, or where from any exceptional feature the fees or costs allowed are not in the judgment of the Registrar sufficient, he may allow such fees or costs or make such addition to the fees or costs of the existing scale as the Judge on a reference to him may direct.

Attendances in Chambers.

10. As to attendances at Chambers, where by reason of the non-attendance of any party [and it is not considered expedient to proceed *ex-parte*] or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding, the attendance is adjourned without any useful progress being made, the Judge or Registrar may order such an amount of costs [if any] as he shall think reasonable to be paid to the party attending by the party so absent or neglectful or by the Solicitor personally; and the party so absent or neglectful is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested.

Folio.

11. A folio is to comprise 100 words, every figure comprised in a column being counted as one word.

Hearing fee.

12. The hearing fee is to include the fees hitherto allowed for "perusing cause papers and considering authorities" and "reading over notes and preparing for next day."

Two Counsel not to be allowed unless certified for.

13. Fees for more than one Counsel or Advocate for one party or set of defendants shall not be allowed unless the Judge shall at the hearing so certify.

Inspection under Section 291 of the Civil Procedure Ordinance.

14. As to the inspection of documents under Section 291, Civil Procedure Ordinance, 1878, no allowance is to be made for any notice or inspection, unless it is shewn to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection.

Set-off of costs.

15. In any case where under any rule of Court, or by the order or direction of a Court or Judge or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive, until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered.

Attendances.

16. Attendances upon the client are not to be allowed upon taxation between party and party except in the case of consultation before hearing or trial of action, or assessment of damages, or motion for special injunction, or other special applications, and except, when necessary, for obtaining the instructions of the client

upon matters arising in the cause beyond the ordinary discretion of the Solicitor and not relating to matters of procedure. No attendances or letters in respect of abortive attempts at a compromise or of arrangements for the convenience of Solicitors or client are to be allowed on taxation between party and party. One letter or notice before action may be allowed, but no attendance on the client or defendant before writ issued shall be allowed, and no fee for receiving and perusing any letter is to be allowed. 1887.

Form of Bills of Costs.

17. Bill of Costs are to be copied on Foolscap paper bookwise distinguishing by insertion in separate columns costs out of pocket from charges for work done and time expended, and shewing by a statement all sums of money received from, or agreed to be paid by, the client in respect of the suit or matter under taxation or in connection therewith. Dates must be furnished to each item, but they must be kept within the body of the bill, so as to leave the left hand margin for deductions. Every bill shall be headed in the cause or matter to which the same relates with the name of the party whose bill it is, and the decree or order under which the same is to be taxed, and whether the same is to be taxed between party and party or Solicitor and client and in proceedings in a suit or action the scale under which the same is to be taxed. One copy is to be made for the taxing officer and left with him on obtaining an appointment to tax, and one copy for the other party, or in case where several parties are entitled or directed to attend the taxation, each set of parties so entitled or directed to attend.

Notice of taxation.

18. Not less than twenty-four clear hours' notice of taxation is to be given to the other party or parties and on the expiration of fifteen minutes from the time appointed for taxation or named in the notice if the other party or parties do not attend, the taxing officer may proceed to tax the bill in the absence of such other party or parties. The taxing officer may adjourn the taxation, from time to time, if he shall deem it necessary or desirable so to do.

Amendment of Bill of Costs.

19. In the taxation of costs between party and party, the bill of costs may be amended at any time before the taxation closes.

Disbursements.

20. The taxing officer shall require vouchers for all disbursements over $5.

Certificate.

21. When the taxation is finished, the Solicitor shall cast up the bill and the deductions therefrom which are to be checked by the taxing officer or his clerk, and the taxing officer is to proceed to make his certificate or allocatur for the amount of such costs less the deduction.

Objections to taxation.

22. Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any items, may at any time

1887.

before the certificate or allocatur is signed or within twenty-four hours thereafter, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein, by a list, in a short and concise form, the item or items, parts or part thereof, objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same.

Review of taxation by taxing officer.

23. Upon such application the taxing officer shall re-consider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.

Review of Taxing Officer's certificate by Judge.

24. Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may apply to a Judge at Chambers for an order to review the taxation as to the same item or part of an item, and the Judge may thereupon make such order as to the Judge may seem just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

Evidence on reviewal.

25. Such application shall be heard and determined by the Judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof, unless the Judge shall otherwise direct.

Irregularities in service of Notice no ground for setting aside judgment.

26. Any irregularity in the service of the notice to tax or delivery of copy of the bill to the opposite party shall not be a ground for setting aside any judgment entered up thereon, but shall be a ground for an application to review only, and no objections or application to review shall be a bar or stay to the entering of the judgment for the amount of the certificate or allocatur.

Interpretation of terms Court or Judge.

27. The expression Court or Judge in these Rules shall include the Registrar in applications or matters by the Civil Procedure Ordinance or any Rules of Court directed to he heard or taken before him.

Costs endorsed on specially endorsed writ.

28. When a writ of summons is specially endorsed under Chapter VIII. of the Civil Procedure Ordinance, the following are the amounts which may be indorsed by the plaintiff's Solicitor upon the writ for costs and to include mileage:—

In actions above $5,000	...	...	...$15
„ above $ 500	...	...	...$12
„ below $ 500	...	...	...$ 8

1887.

Where the plaintiff's Solicitor, at the time of issuing the writ, claims more than the sums fixed as above, the indorsement on the writ of summons in respect of costs shall be as follows:— "Such sum as shall be allowed on taxation for costs." And in case the plaintiff shall be found not entitled to more costs than such fixed sums, or if more than one-sixth shall be disallowed, the plaintiff's Solicitor shall pay the costs of taxation, so if the Solicitor has indorsed on the writ one of the fixed sums for costs of judgment, and claims more costs on signing judgment and on taxation shall not be found entitled to more than such sum, or if more than one-sixth be taken off on taxation, the plaintiff's Solicitor shall in like manner pay the costs of taxation.

T. T. FORD, C.J.

ETNE. PELLEREAU, J.

JOHN T. GOLDNEY, J.

I hereby certify that the above is a true copy of certain Rules and Orders made this day by the Judges of the Supreme Court, of the Straits Settlements, under the provisions of "The Courts' Ordinance, 1878."

THEODORE T. FORD,
Chief-Justice.

ORDER OF COURT.

1888.

26th January, 1888.

Rules and Orders for regulating the Practice and Procedure of District Delegates of the Judges of the Supreme Court.

His Honour *Theodore Thomas Ford*, Chief-Justice of the Supreme Court, of the Straits Settlements, doth hereby, in pursuance and execution of the powers given by "The District Delegates Ordinance, 1887," order and direct in manner following:—

I.

The District Delegates shall, not less than once in every two weeks, hold a Court for the hearing of applications for Grants of Probate and Letters of Administration and notice of the days on which such applications may be taken shall be posted in the Office of the District Delegate.

1888.

II.

Applications for a Grant of Probate or Letters of Administration must be made in person by the executors or the parties entitled to Letters of Administration; or by a duly constituted Attorney of the party who is desirous of obtaining the same, or, in the case of infants and minors, by their duly appointed guardian.

III.

Such applications may be made in all cases where:—[*a*] the testator or intestate had at the time of his death his permanent residence within the jurisdiction of the District Delegate to whom the application is made; and [*b*] the nett value of the estate and effects of the deceased exclusive of what the deceased was possessed of, or entitled to, as trustee and not beneficially does not exceed $500.

IV.

The petition and all other documents that may be necessary for the purpose of obtaining a Grant of Probate or Letters of Administration shall be drawn in the Office of the District Delegate [when parties are not represented by a Solicitor] from instructions furnished by the applicants; and in drawing up the same the forms in the Schedule hereto [*a*.] shall be followed, as nearly in each case as the circumstances will allow, or such forms as, from time to time may, be prescribed by law.

V.

In case of Wills, Office copies of Wills, or other documents in a foreign language, there shall be filed therewith a translation thereof verified by the affidavit of some person qualified to translate the same, when the same have not been translated by a sworn Interpreter of the Supreme Court or Magistrates' Courts.

VI.

All oaths and affirmations which may be necessary for the purpose of obtaining a Grant of Probate or Letters of Administration, shall be taken before the District Delegate, and all documents requiring alteration for the like purpose shall be attested before the District Delegate.

VII.

An uniform fee of $2, to be affixed to the petition before it is received, shall be charged in all cases before the District Delegate,

---

[*a*.] These forms being numerous and lengthy are not given in this work—they are however to be found *in extenso* in the *Government Gazette* of 1887, pp. 2399-2422.

and such fee shall include and be in lieu of all Court and other fees, charges and expenses payable in respect of the application and the grant. 1888.

VIII.

The statement contained in any petition for Grant of Probate or Letters of Administration must in all cases be verified by the oath of the applicant sworn before the District Delegate or a Commissioner entitled to take oaths, as in the form contained on the petition.

IX.

Whenever the applicant applies as guardian of any minor or infant, or as Attorney of another person, the manner of his appointment shall be shortly stated in the petition.

X.

Upon receiving an application for Probate the District Delegate must ascertain:—[*a*] the date of the deceased's death; [*b*] the place of the deceased's death; [*c*] the value of the property to be covered by the grant. And before making any grant on such application he must see that the affidavit verifying the statements contained in the petition, and the affidavit verifying the account for the Collector have been subscribed and sworn by the applicant.

XI.

Upon the hearing of an application for Probate or Letters of Administration with the Will annexed, the District Delegate must inspect the Will and each Codicil, and see whether by the terms of the attestation clause [if any] it is shewn that the same have been executed in accordance with the requirements of the law. In order to prove that such requirements were in fact complied with, the District Delegate must also examine on oath one at least of the subscribing witnesses for that purpose.

XII.

If on the sworn evidence of the subscribing witnesses or witness it appears that such requirements were not complied with, the District Delegate must refuse Probate.

If both the subscribing witnesses are dead, or if from other circumstances their evidence cannot be obtained, resort must be had to other persons [if any] who may have been present at the execution of the Will or Codicil; and if this cannot be obtained, evidence on oath as to the handwriting of the deceased and the subscribing witnesses and also as to any circumstances which may raise a presumption in favour of the due execution must be procured.

1888.

XIII.

Interlineations, alterations, erasures and obliterations are invalid unless they existed in the Will or Codicil at the time of execution, or, if made afterwards, unless they have been executed and attested in the mode required by law, or unless they have been rendered valid by the re-execution of the Will or by the subsequent execution of a Codicil thereto.

XIV.

Where any deed, memorandum, or other document which was in existence at the time of the execution of the Will is referred to therein, and is of such a nature as to raise a question whether it ought or ought not to form a constituent part of the Will, its production must be required with a view to ascertain whether it be entitled to Probate, or its non-production accounted for.

XV.

Upon receiving an application for a grant of Letters of Administration the District Delegate must ascertain the same facts, and see that the same affidavits are subscribed and sworn by the applicant as are prescribed in Rule 10 before he can make any grant thereon; and in addition the petition should set forth: [*a*] the names and interests of all persons who, according to the practice of the Court, would have a prior right to the applicant; [*b*] how such prior rights are cleared off; [*c*] where any of such persons have renounced, the date of the renunciation; and [*d*] where the applicant claims as the representative of another person, the date and particulars of the grant to him.

XVI.

Where it appears to the District Delegate that there are persons who have a prior right to the applicant to have the grant made to them, he must issue citations [in the form marked *G.* in the Schedule hereto] * or otherwise give notice of the application to such of them as in his opinion may be desirous of obtaining a grant for themselves; but where such persons are numerous, or great, or undue expense would be caused thereby, he may, at his discretion, dispense with the service of any citation or notice on any of them.

XVII.

Grants of Administration may be made to guardians of minors and infants for their use and benefit. In the case of minors [*i.e.*, infants over the age of seven years], the minor may elect his next-of-kin or next friend by the form marked *K.* in the Schedule hereto * and such election shall be filed; in the case of infants [*i. e.* under the age of seven years], the District Delegate shall,

* *Vide* foot-note [*a.*] *antè* p. 48.

in his discretion, assign a guardian to the infant; and in the case of there being both minors and infants, the guardian elected by the minor may act as such for both. 1688.

XVIII.

A citation shall be served on the person named therein, either personally by delivering a copy thereof to him, or by leaving a copy thereof at such person's last known place of residence, by the process server of the District Delegate's office; and the date of such service, within three days at latest thereafter, shall be endorsed by the process server on the citation. No such service shall be good if made on Sunday, Christmas Day or Good Friday, or unless made between the hours of 10 A.M. and 4 P.M. on week days, and of 10 A.M. and 1 P.M. on Saturdays.

XIX.

Where any person served with a citation or notice as aforesaid does not, within the period named, therein deliver or cause to be delivered a memorandum in writing dated on the day of delivering the same, and stating that he appears thereto, the applicant may ask for such Probate or Administration as is asked for in his petition, and the District Delegate may upon being satisfied of the due service of such citation or notice make such order for the granting of Probate and Administration as may seem to him just or expedient.

XX.

Any person having or taking any interest in the estate of a deceased person under his Will, or as one of his next-of-kin, or as a creditor or otherwise may without filing a petition for a Grant of Probate or Administration to himself cause a citation to be issued in the form marked *J.* in the Schedule hereto* directed to the executor or executors, or residuary legatees or legatee, or any other person or persons having a prior right to such Probate or Administration before himself, calling upon the person cited to accept or refuse such Probate or Administration.

XXI.

Such citation shall be issued by the District Delegate upon an affidavit of the party applying, or of some other person shewing the interest of the applicant and the right of the person to be cited, and shall be served as aforesaid. If the person to be cited shall not be resident within the Settlement in which the citation is issued the District Delegate shall make such order, as to the time when the same shall be made returnable, as to him shall appear reasonable and just.

XXII.

The person served with such a citation may if he intends to apply for Probate or Administration enter an appearance as afore-

* *Vide* foot-note [*a.*] *antè* p. 48.

1888. said; but if he shall not appear to the citation according to the exigency thereof, he shall, upon proof of due service thereof, be deemed to have renounced such Probate or Administration; and if he shall appear, but shall not within twenty-four days proceed to apply for such Probate or Administration, such person shall he deemed to have renounced the same.

XXIII.

In drawing the account for the Collector, the District Delegate should add a schedule of the debts [if any] due from the deceased to persons resident in the Colony: and for the purpose of estimating the nett value of the estate and effects of the deceased, the aggregate amount of such debts should de deducted from the value of the estate and effects as specified in the petition.

XXIV.

Debts which may be so deducted, are debts due and owing from the deceased and payable by law out of any part of the estate and effects comprised in such account, but do not include voluntary debts expressed to be payable on the death of the deceased, or payable under any instrument which shall not have been *bonâ fide* delivered to the donee thereof three months before the death of the deceased, or debts in respect whereof a reimbursement may be capable of being claimed from any other estate or person.

XXV.

Where any immoveable property forms part of the estate and effects of the deceased, and such property is the sole security for any debts due and owing from him to any persons resident or non-resident in the Colony, the amount of such mortgage debts may be deducted.

XXVI.

An administration bond shall not necessarily in all cases be required, but only in such cases as the District Delegate may think it desirable that such a bond should be given: provided that in all cases referred to in Rule 17 it shall be required. In all cases where an administration bond shall be required it shall be as near as may be in the form marked *H.* in the Schedule hereto annexed,* and shall be given in double the amount of property covered by the grant and be attested before the District Delegate, who must satisfy himself that the sureties proposed are responsible persons.

XXVII.

The District Delegate shall, in cases where he deems it desirable, require proof in addition to the oath of the executor or administrator of the identity or death of the deceased, or of the party applying for the grant.

---

* *Vide* foot-note [*a.*] *antè* p. 48.

XXVIII.

In all cases where Probate or Administration is for the first time applied for after the lapse of 12 years from the death of the deceased, the reason of the delay and for the application being then made must be ascertained by the District Delegate; and without making any order thereon the papers with a statement of such reasons should be transmitted to the Supreme Court.

XXIX.

In all cases where the District Delegate is doubtful whether the Probate or Letters should or should not be granted, or when any question or contention arises in relation to the grant, he must forward all documents that have been filed with the application, together with a statement of the case, for the direction of the Court, and then await the instructions of the Court.

XXX.

The District Delegate shall forthwith, after hearing any application for grant of Probate or Letters of Administration, endorse on the petition the order which he makes thereon.

XXXI.

If the order be that the grant applied for be made, the District Delegate shall, after making such order, require the applicant to subscribe and swear before him the usual oath for faithful administration in the form appended to the petition, and forthwith forward the same with all documents which may have been filed therewith and notes of any evidence taken by him to the Registrar of the Supreme Court.

XXXII.

No order under the preceding rule shall be made by the District Delegate on any petition, until after the expiration of seven days from the filing of the petition or until after the time named in any caveat, citation or notice for appearance shall have expired, whichever period is the longer.

XXXIII.

On receiving from the Registrar the Probate or Letters of Administration for transmission to the applicant, the District Delegate shall deliver the same to the applicant, but before doing so, he shall certify in writing on the petition that the affidavit for the Collector has been delivered, and that such affidavit required no stamp duty; and stating the gross value of the estate and effects of the deceased as shewn by the account delivered with or annexed to such affidavit.

1888.

XXXIV.

On receiving any accounts or other documents for filing in the Registry of the Supreme Court, the District Delegate shall forthwith transmit the same to the Registrar of the Supreme Court.

XXXV.

Any person intending to oppose the issuing of a grant of Probate or Letters of Administration may enter a caveat in the form marked *I.* in the Schedule hereto.* Whenever any such caveat is lodged with the District Delegate, he shall forthwith enter the particulars thereof in a book to be kept by him for that purpose and forward the caveat to the Registrar of the Supreme Court.

XXXVI.

Where a caveat has been entered, the District Delegate shall not grant Probate or Letters of Administration unless such caveat has been first withdrawn or otherwise duly disposed of.

XXXVII.

If at any time it is brought to the knowledge of the District Delegate that the estate or effects of the deceased were at the time of the grant of greater nett value than $500, he shall at once communicate the fact together with any information he may have acquired on the subject to the Collector of Stamps.

THEODORE T. FORD,

Chief-Justice.

None of the beforementioned Rules having been disapproved by resolution of the Legislative Council within the time appointed by "The District Delegates Ordinance, 1887," I do hereby 'make' these Rules, and they are from this date in force where District Delegates are legally appointed.

THEODORE T. FORD.

Chief-Justice.

26th January, 1888.

---

* *Vide* foot-note [*a.*] *antè p.* 48.

ORDER OF COURT. 1888.

18*th October*, 1888.

Rules and Orders by the Judges, under "The Courts' Ordinance, 1878," and Table of Fees fixed on Grant of Probate or Letters of Administration by the Supreme Court in non-contentious matters.

His Honour Sir *Theodore Thomas Ford*, Knight, Chief-Justice, His Honour *Thomas Lett Wood*, Puisne-Judge, and His Honour *Etienne Pellereau*, Puisne-Judge, and His Honour *John Tankerville Goldney*, Puisne-Judge, of the Supreme Court of the Straits Settlements, do repeal any other rule, order, or custom in force regulating the subject-matter of this Order, and hereby order, on and from the 1st day of January next, as follows:—

I.

That in all cases, except as hereinafter expressly provided, where an application is made in the Supreme Court for a Grant of Probate or Letters of Administration and the estate and effects in respect of which the grant is applied for, exclusive of that which the deceased was possessed or entitled to as trustee and not beneficially, exceeds the sum of $500—the following fees shall be charged, which fees shall include all Court fees, charges, and expenses in respect of such application and grant, and the filing of accounts in pursuance thereof, that is to say:—

On filing application ...	...	...	...$	1
On obtaining grant on estates					
exceeding $	500	and not exceeding $	1,000	... „	4
Do. „	1,000	do. „	2,000	... „	7
Do. „	2,000	do. „	5,000	... „	10
Do. „	5,000	do. „	15,000	... „	15
Do. „	15,000	... ...		„	20

II.

This Order is not to apply to contentious business.

THEODORE T. FORD, *Chief-Justice.*
THOS. L. WOOD, *Judge.*
E. PELLEREAU, *Judge.*
JOHN T. GOLDNEY, *Judge.*

I hereby certify that the above is a true copy of a certain Order made this day by the Judges of the Supreme Court, of the Straits Settlements, under the provisions of "The Courts' Ordinance, 1878.

THEODORE T. FORD, *Chief-Justice.*

1889. ORDER OF COURT.

23*rd April*, 1889.

Rules and Orders for regulating the Practice and Procedure of the Supreme Court, at Singapore, in Appeal Cases from Her Majesty's Consular Court in Bangkok, in the Kingdom of Siam.

We, *Theodore Thomas Ford*, Knight and Chief-Justice, and *John Tankerville Goldney*, Judge of the Supreme Court, of the Straits Settlements, do in virtue of all and every power vested in us, will and determine that—

I.

All appeal cases from Her Majesty's Consular Court in Bangkok, in the Kingdom of Siam, be set down for hearing by the Senior Judge of the Supreme Court, of the Straits Settlements at Singapore, at a date to be fixed by him; such date shall not be less than six weeks, or more than three months from the date of the receipt of the papers in appeal from the said Consular Court.

II.

Upon the fixing of such dates as aforesaid, the Registrar of the Supreme Court, of the Straits Settlements at Singapore, shall notify in writing to the Registrar, or such other officer filing a similar notice in the said Consular Court the date so fixed as aforesaid for such hearing.

III.

Such officer shall communicate to the parties to the appeal the date so fixed as aforesaid.

IV.

If the Appellant and Respondent appear at the Court House at Singapore, on the day so fixed as aforesaid, the Court shall proceed to try and determine the appeal in the usual manner.

V.

Should neither the Appellant nor the Respondent appear the Court may, at its discretion, proceed to determine the appeal upon the papers in appeal transmitted to the Court from the said Consular Court.

VI.

Should the Appellant not appear and the Respondent appear, the Court may, if it should think fit, dismiss the appeal for want of prosecution.

THEODORE T. FORD, *Chief-Justice.*
JOHN T. GOLDNEY, *Judge.*

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

PAGE.

A.

Abdul Cader and anor., Habib Abdul Rahman and anor. *v.* - 193
Abdullatif *v.* Mahomed Meera Lebe - - - - - - 249
Abdulrahman and ors. *v.* Mannar Asary - - - - - 118
Ahamed Meah and anor. *v.* Nacodah Merican - - 583
Aisha and ors., Hajee Shaik Abdul Cader *v.* - - - - 151
Alsagoff, Syed Mahomed, Reg. *v.* 651
Anamalai Chetty *v.* Kader Tamby - - - - - 620
Armoogum and ors, *In re* - 327
Armootah Pillay *v.* Fatimah Bee and anor. - - - - 416
——Pullay, Fatimah and anor. *v.* - - - - - 225
Armotha Pullay *v.* Marimootoo 85
Ashabee and ors. *v.* Mahomed Hashim and anor. - - 212
Assoline, The - - - - 638
Attorney-General, Brown, *v.* - 459
——*v.* Chew Sin Yong and anor. - - 648, 680
——*v.* Haji Abdul Rahman - - - - - 497
——*v.* Municipal Commissioners, S. - - 484
——*v.* Seven Barrels of Gunpowder, &c. - 688
——, Wemyss *v.* 10

B.

Baboo, Etam *v.* - - - 445
Ban Chin Hong & Co. *v.* Indo-China Steam Navigation Co. 677

PAGE.

Batty, Reg. *v.* - - - - 441
Bawasah Merican *v.* Kootyan Chetty - - - - - 321
Beebee Samsoo *v.* Wright - 199
Blazé *v.* Maynard & Co. - - 394
Brandt & Co. *v.* Goh Guan Lu - 481
Broadrick, Pendek *v.* - - 666
Brown *v.* Attorney-General - 459
——*v.* Taynappa Chetty - 268
——*v.* Vengadashellum - 524

C.

Carr *v.* Teo Guan Tye - - 561
Cashin *v.* Murray - - - 435
Caudersah & Co. *v.* Mahomed Eusoff & Co. - - - 158
Chan Ah Tye and ors., Reg. *v.* 518
Chartered Bank of India, &c., *In re* - - - - - 570
——Mercantile Bank, &c., *ex-parte* - - - - 281
Chawana Mahomed Hussein *v.* Mahomed Mustan - - 1
Cheah Boon Ean *v.* Cheah Chong Beng and anor. - - - 6
——Chong Beng and anor, Cheah Boon Ean *v.* - - 6
—— Khay Pin and anor., Khoo Seoke Haing *v.* - - 74
——Poh Nhoo *v.* Ong Loon Tek and ors. - - - 71
——Tee and anor., Reg. *v.* - 84
Chee Tang and anor., Reg. *v.* - 176
Chew Hock Seng, *In re* - - 97
——Sin Yong and anor., Attorney-General *v.* - 648, 680
Chih Lim Neo *v.* Sit Hoon Neoh 492
China Gunny *v.* Muniandee - 161

1889. ORDER OF COURT.

23*rd April*, 1889.

Rules and Orders for regulating the Practice and Procedure of the Supreme Court, at Singapore, in Appeal Cases from Her Majesty's Consular Court in Bangkok, in the Kingdom of Siam.

We, *Theodore Thomas Ford*, Knight and Chief-Justice, and *John Tankerville Goldney*, Judge of the Supreme Court, of the Straits Settlements, do in virtue of all and every power vested in us, will and determine that—

I.

All appeal cases from Her Majesty's Consular Court in Bangkok, in the Kingdom of Siam, be set down for hearing by the Senior Judge of the Supreme Court, of the Straits Settlements at Singapore, at a date to be fixed by him; such date shall not be less than six weeks, or more than three months from the date of the receipt of the papers in appeal from the said Consular Court.

II.

Upon the fixing of such dates as aforesaid, the Registrar of the Supreme Court, of the Straits Settlements at Singapore, shall notify in writing to the Registrar, or such other officer filing a similar notice in the said Consular Court the date so fixed as aforesaid for such hearing.

III.

Such officer shall communicate to the parties to the appeal the date so fixed as aforesaid.

IV.

If the Appellant and Respondent appear at the Court House at Singapore, on the day so fixed as aforesaid, the Court shall proceed to try and determine the appeal in the usual manner.

V.

Should neither the Appellant nor the Respondent appear the Court may, at its discretion, proceed to determine the appeal upon the papers in appeal transmitted to the Court from the said Consular Court.

VI.

Should the Appellant not appear and the Respondent appear, the Court may, if it should think fit, dismiss the appeal for want of prosecution.

THEODORE T. FORD, *Chief-Justice.*
JOHN T. GOLDNEY, *Judge.*

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

PAGE.

A.

Abdul Cader and anor., Habib Abdul Rahman and anor. *v.* - 193
Abdullatif *v.* Mahomed Meera Lebe - - - - - - 249
Abdulrahman and ors. *v.* Mannar Asary - - - - - 118
Ahamed Meah and anor. *v.* Nacodah Merican - - 583
Aisha and ors., Hajee Shaik Abdul Cader *v.* - - - 151
Alsagoff, Syed Mahomed, Reg. *v.* 651
Anamalai Chetty *v.* Kader Tamby - - - - - 620
Armoogum and ors, *In re* - 327
Armootah Pillay *v.* Fatimah Bee and anor. - - - 416
——Pullay, Fatimah and anor. *v.* - - - - - 225
Armotha Pullay *v.* Marimootoo 85
Ashabee and ors. *v.* Mahomed Hashim and anor. - - 212
Assoline, The - - - - 638
Attorney-General, Brown, *v.* - 459
——*v.* Chew Sin Yong and anor. - - 648, 680
——*v.* Haji Abdul Rahman - - - - - 497
——*v.* Municipal Commissioners, S. - - 484
——*v.* Seven Barrels of Gunpowder, &c. - 688
——, Wemyss *v.* 10

B.

Baboo, Etam *v.* - - - 445
Ban Chin Hong & Co. *v.* Indo-China Steam Navigation Co. 677

PAGE.

Batty, Reg. *v.* - - - 441
Bawasah Merican *v.* Kootyan Chetty - - - - - 321
Beebee Samsoo *v.* Wright - 199
Blazé *v.* Maynard & Co. - - 394
Brandt & Co. *v.* Goh Guan Lu - 481
Broadrick, Pendek *v.* - - 666
Brown *v.* Attorney-General - 459
——*v.* Taynappa Chetty - 268
——*v.* Vengadashellum - 524

C.

Carr *v.* Teo Guan Tye - - 561
Cashin *v.* Murray - - - 435
Caudersah & Co. *v.* Mahomed Eusoff & Co. - - - 158
Chan Ah Tye and ors., Reg. *v.* 518
Chartered Bank of India, &c., *In re* - - - - - 570
——Mercantile Bank, &c., *ex-parte* - - - - 281
Chawana Mahomed Hussein *v.* Mahomed Mustan - - 1
Cheah Boon Ean *v.* Cheah Chong Beng and anor. - - - 6
——Chong Beng and anor, Cheah Boon Ean *v.* - - 6
—— Khay Pin and anor., Khoo Seoke Haing *v.* - - 74
——Poh Nhoo *v.* Ong Loon Tek and ors. - - - 71
——Tee and anor., Reg. *v.* - 84
Chee Tang and anor., Reg. *v.* - 176
Chew Hock Seng, *In re* - - 97
——Sin Yong and anor., Attorney-General *v.* - 648, 680
Chih Lim Neo *v.* Sit Hoon Neoh 492
China Gunny *v.* Muniandee - 161

PAGE.

Chin Ah Chi, Reg. *v.* - - 589
——Beng Leang and ors. *v.* Municipal Commissioners, P. 431
Choa Hong, *In re* - - - 569
Chong Ah Nai *v.* Puteh - - 433
————Pye and anor., Reg. *v.* 597
Chua Ah Tong, Opium Farmer *v.* 188
Chung Ah Quee, Koh Seang Thye *v.* - - - - - 136
Coldenburg and anor., Meyer *v.* 596
Coopang Chetty *v.* Veera Padiachee and ors. - - - 364
Crane *v.* Yeoh Hong Ghee - 587

D.

D'Almeida *v.* D'Menzies - - 126
Din and ors., Reg. *v.* - - 615
D'Menzies, D'Almeida *v.* - 126
Donohue *v.* Joaquim - - 628
Doral *v.* Lesslar - - - 183
Dorasamy, Reg. *v.* - - - 162
————Pillay, Reg. *v.* 350, 405
D'Silva, Vaughan *v.* - - 286
Dumsheah, *In the goods of* - 594
Duval *v.* Scully - - - 120

E.

Ebramsah, Shaik Pareetho *v.* - 491
Etam *v.* Baboo - - - 445
Everett, Fraser *v.* - - - 512

F.

Fatimah and anor. *v.* Armootah Pullay - - - - 225
——— Bee and anor., ——— Pillay *v.* - - - - 416
Fox *v.* Tan Heng Wee - - 604
Fraser *v.* Everett - - - 512
——— Sammugum *v.* - - 338
——— and Co. *v.* Nethersole - 269
Frederick Pooles, *In re* - - 670
French, Michell *v.* - - - 437
Fu Ah Seh, Sahid *v.* - - 349

G.

Glenfalloch, The, Payna Emamsah *v.* - - - - - 478
Goh Choo Lan, Reg. *v.* - - 407

PAGE.

Goh Guan Lu, Brandt and Co., *v.* 481
Golam Mydin, Raman Chetty *v.* 97
Gordon, Shellapen *v.* - - 388
Green, Reg. *v.* - - - - 401
Gunpowder, &c., Attorney-General *v.* - - - - - 688
Guthrie and Co., Solomon and anor. *v.* - - - - - 679

H.

Habib Abdul Rahman and anor. *v.* Abdul Cader and anor. - 193
Hajee Brahim, Sahat *v.* - - 337
—— Ismail, Ismail bin Savoosah and ors. *v.* - - - - 453
—— Mahomed Saiboo and anor., Mahomed Ghouse *v.* - 101
———————— Thaib, *In the goods of* - - - - - 178
—— Mat Allee *v.* Manah and anor. - - - - - 276
—— Shaik Abdul Cader *v.* Aisha and ors. - - - 151
———————— *v.* Mahomed Cader Hussain - 181
Haji Abdul Rahman, Attorney-General *v.* - - - - - 497
Hampshire, Ung Ah Moi and ors. *v.* - - - - - 296
Hashim Nina Merican and anor., Palaniapah Chetty *v.* 559
Hassan Kudus and ors., Letchman Chetty *v.* - - 675
Haughton, Sherifa Shaika *v.* - 533
Heim *v.* Lim Tiang Hee - - 465
Hermann Jebsen and Co., Lim Tuan Hong *v.* - - - 79
Hia Ma Lai, Tio Ang Boi *v.* - 230
Ho Ah Fah, Thum Chee *v.* - 606
Hoey Hoon and ors., Reg. *v.* - 357
Hok Canton, The - - - 200
Ho Kim Hock, *In re* - - 120
Huttenbach *v.* Municipal Commissioners, P. - - - 551

I.

Inche Khatijah, Mahomed Meera Nachiar and anor. *v.* 608
Indo-China Steam Navigation Co., Ban Chin Hong and Co. *v.* 677

	PAGE.
Ing Ah Meng *v.* Opium Farmer	627
—— Mit, *In the goods of*	380
Ismail, ——	187
—— and anor., Reg. *v.*	234
—— bin Savoosah and ors. *v.* Hajee Ismail	453
—— *v.* Madinasah Merican and anor.	311
J.	
Jamalsah *v.* Vershat	471
Jayah bin Kachi and anor *v.* Sabria and ors.	413
Jenabboo and anor *v.* Vytilingum	78
Jenaiboo *v.* Narainen Chetty and anor.	359
Joaquim, Donohue *v.*	628
Johnson *v.* McLarty and ors.	430
K.	
Kader Tamby, Anamalai Chetty *v.*	620
Kaliapah Chetty, Vanjoor *v.*	592
Kana Shaik Ibrahim, Shayna Mustan Rowter *v.*	344
Kat Bawa and anor., Nana Ebramsah *v.*	82
Katz Brothers, Khan Mahomed *v.*	4
Keng Chew and Co., Shedumbrum Chetty *v.*	587
Khan Mahomed *v.* Katz Brothers	4
Khoo Hock Leong *v.* Lim Ang Kee	353
——Kong Peh, Reg. *v.*	515
——Seang Ju, —— *v.*	392
——Seoke Haing *v.* Cheah Khay Pin and anor.	74
——Soon Tjio and ors., Syed Hassan bin Omar al Hadeed	528
——Thean Poh and anor., *In re*	675
Kiam Guan, Seah Lee and anor. *v.*	403
Koh Ah Pow and ors., *In re*	287
——Seang Thye *v.* Chung Ah Quee	136
——Soon Liat and anor., Veerappah Chetty *v.*	614
Kok Sah Lai, Reg. *v.*	493
Koomat, Reg. *v.*	386
Kootyan Chetty, Bawasah Merican *v.*	321
Kyle, *In re*	376
Kynnersley, *In re*	151
L.	
Lam Tai Ying, *In re*	685
Langan and ors. *v.* Lee Cheng Keat and ors.	154
Law Seow Huck, Quah Loo Moye *v.*	100
Lee Cheng Keat and ors., Langan and ors. *v.*	154
——Chin Poo *v.* Lee Chye Hoon	380
——Chye Hoon,——Chin Poo *v.*	380
——Eng Swee,——Joo Neo *v.*	325
——Ho Nam, Opium Farmer *v.*	557
——Joo Neo *v.* Lee Eng Swee	325
——Kan and ors., Reg. *v.*	560
——Kang Wye *v.* Ng Ah Min	335
——Queh Seng *v.* Municipal Commissioners, S.	554
Lehah, Man and anor. *v.*	389
Lesslar, Doral *v.*	183
Letchman Chetty and anor, Nain Boon Keow *v.*	85
—— —— *v.* Hassan Kudus and ors.	675
Li Ah Chew *v.* Penang Tramway Co.	250
Lim Ang Kee, Khoo Hock Leong *v.*	353
——Seng Ee *v.* Wray and anor.	240
——Seow Chong and anor., Tan Chye Hoon *v.*	8
——Tiang Hee, Heim *v.*	465
—— Wah, *In re*	281
——Tuan Hong *v.* Hermann Jebsen and Co.	79
Loh Hoh Seng and ors., Stubbs and ors. *v.*	409
Low Chin, Ooi Koey Chuan *v.*	475
——Kim Pong, Moses *v.*	443
——Lau Sew, Reg. *v.*	76
Low, Ramsamy *v.*	396
M.	
Mabot and ors., Reg. *v.*	638
Madinasah Merican and anor., Ismail bin Savoosah *v.*	311

	PAGE.
Mah Ah Choon, Reg. *v.*	472
Mahomed, Reg. *v.*	260
——— Cader Hussain, Hajee Shaik Abdul Cader *v.*	181
——— Eusoff and Co., Caudersah and Co. *v.*	158
——— Ghouse *v.* Hajee Mahomed Saiboo and anor.	101
——— Hashim and anor., Ashabee and ors. *v.*	212
——— Hussein, *In the goods of*	191
——— Meera Lebe, Abdullatif *v.*	249
——— Nachiar and anor. *v.* Inche Khatijah	608
——— Mustan, Chawana Mahomed Hussein *v.*	1
——— Mydin *v.* Pana Sittee Mahomed	191
——— Salleh and anor. *v.* Nacodah Merican	463
Man and anor. *v.* Lehah	389
Manah———., Hajee Mat Allee *v.*	276
Mana Nondu and Co. *v.* Poonasamy Naiku and Co.	511
Mannar Asary, Abdulrahman and ors. *v.*	118
Mansfield and Co., Turner *v.*	91
Marimootoo, Armotha Pullay *v.*	85
Marrable *v.* Satow	274
Masiamah *v.* Pachak	444
Mat Akib and anor., Reg. *v.*	665
——Alli, Tijah *v.*	124
Maynard and Co., Blazé *v.*	394
McAlister ——, *In re*	279
— Larty and ors., Johnson *v.*	430
Meyappa Chetty *v.* Ong Hong Pee and anor.	399
Meyappah Chetty, *In re*	183
Meyer *v.* Coldenburg and anor.	596
Michell *v.* French	437
Milah *v.* Tijah	186
Monteiro, Regina *v.*	556
Mootoo *v.* Municipal Commissioners, P.	446
Mootyah Chetty *v.* Yacob	568
Moses *v.* Low Kim Pong	443
Muckdoom Nina Merican, *In the goods of*	119
Muniandee, China Gunny *v.*	161
Municipal Commissioners, S., Attorney-General *v.*	484
——————— P., Chin Beng Leang and ors. *v.*	431
——————— P., Huttenbach *v.*	551
——————— S., Lee Queh Seng *v.*	554
——————— P., Mootoo *v.*	446
——————— S., Tanjong Pagar Dock Co. *v.*	103
——————— P., Tan Kim Keng and anor *v.*	450
Murray, Cashin *v.*	435

N.

Nacodah Merican, Ahamed Meah and anor. *v.*	583
——————— Mahomed Salleh and anor. *v.*	463
——————— and anor., Noor Mahomed Merican and anor. *v.*	88
——————— and ors., Tengah Chee Nachiar *v.*	265
Nagore *v.* Nagore Gunny	595
———Gunny, Nagore *v.*	595
Nain Boon Keow *v.* Letchman Chetty and anor.	85
Nana Ebramsah *v.* Kat Bawa and anor.	82
Narainen Chetty and anor., Jenaiboo *v.*	359
Nethersole, Fraser and Co. *v.*	269
Ng Ah Min, Lee Kang Wye *v.*	335
— Hock Seng, *In re*	368
Noor Mahomed Merican and anor. *v.* Nacodah Merican and anor.	88
Nya Abu and ors., Reg. *v.*	169
Nyah Hamzah, *In re*	568

O.

Ojir and anor., Reg. *v.*	122
Ong Ah Poh, *In re*	399
——Hong Pee and anor., Meyappa Chetty *v.*	399

PAGE.

Ong Kong Poon, Reg. *v.* - - 346
——Loon Tek and ors., Cheah Poh Nhoo *v.* - - - - 71
Ooi Koey Chuan *v.* Low Chin - 475
Opium Farmer *v.* Chua Ah Tong - - - - - - 188
————————Ing Ah Meng *v.* - 627
————————*v.* Lee Ho Nam - 557
———— ——, Wee Swee Hin *v.* 527

P.

Pachak, Masiamah *v.* - - 444
Palaniapah Chetty *v.* Hashim Nina Merican and anor. - 559
Palmer, Tan Seng Qui *v.* - 251
Pana Sittee Mahomed, Mahomed Mydin *v.* - - - 191
Pantalani, Reg. *v.* - - - 605
Payna Emamsah *v.* The Glenfalloch - - - - - 478
Penang Tramway Co., Li Ah Chew *v.* - - - - - 250
Pendek *v.* Broadrick - - 666
Piper, *In re* - - - - - 221
Pooles, *In re* Frederick, - - 670
Poonasamy Naiku and Co., Mana Nondu and Co. *v.* - 511
Puteh, Chong Ah Nai *v.* - - 433

Q.

Quah Loo Moye *v.* Law Seow Huck - - - - - - 100
Quaik Kee Hock *v.* Wee Geok Neo - - - - - - 128
———Siew Soon *v.* —— Kim Guan - - - - - - 319
Quak Ah Sah, Reg. *v.* - - 385

R.

Rabia, Reg. *v.* - - - - - 513
Rajah Samsudin Tunku Jaksa, *In re* - - - - - - 346
Raman Chetty, *In re* - - 471
———————*v.* Golam Mydin- 97
Ramsamy *v.* Low - - - - 396
Rawang Tin Mining Co., *In re* The - - - - - - 570
Reg. *v.* Batty - - - - - 441

PAGE.

Reg. *v.* Chan Ah Tye and ors. - 518
—— *v.* Cheah Tee and anor. - 84
—— *v.* Chee Tang - - - 176
—— *v.* Chin Ah Chi - - 589
—— *v.* Chong Ah Pye and anor. 597
—— *v.* Din and ors. - - 615
—— *v.* Dorasamy - - - 162
—— *v.* ———— Pillay - 350, 405
—— *v.* Goh Choo Lan - - 407
—— *v.* Green - - - - 401
—— *v.* Hoey Hoon and ors. - 357
—— *v.* Ismail and anor. - - 234
—— *v.* Khoo Kong Peh - - 515
—— *v.* ——Seang Ju - - 392
—— *v.* Kok Sah Lai - - 493
—— *v.* Koomat - - - 386
—— *v.* Lee Kan and ors. - 560
—— *v.* Low Lau Sew - - 76
—— *v.* Mabot and ors. - - 638
—— *v.* Mah Ah Choon - - 472
—— *v.* Mahomed - - - 260
—— *v.* Mat Akib and anor. - 665
—— *v.* Monteiro - - - 556
—— *v.* Nya Abu and ors. - 169
—— *v.* Ojir and anor. - - 122
—— *v.* Ong Kong Poon - - 346
—— *v.* Pantalani - - - 605
—— *v.* Quak Ah Sah - - 385
—— *v.* Rabia - - - - 513
—— *v.* Rodriguez - - - 323
—— *v.* Sahid - - - - 615
—— *v.* Suprayen - - - 258
—— *v.* Syed Mahomed Alsagoff 651
—— *v.* Tan Yok Lan and ors. - 668
—— *v.* ——Sim Ho - - 156
—— *v.* Teo Ah Hoo - - 317
—— *v.* Vong Ah Hoon - - 375
—— *v.* Wee Sim Tiam and ors. 238
—— *v.* Wong Ah Kum - - 150
—— *v.* Yeap Hock Tin - - 237
—— *v.* Yeoh Boon Leng - - 630
Riccard, Taserip *v.* - - - 214
Rodriguez, Reg. *v.* - - - 323

S.

Sabapathy Chetty *v.* Sitra Mootar - - - - - 530
Sahat *v.* Hajee Brahim - - 337
Sahid, Reg. *v.* - - - 615
———— *v.* Fu Ah Seh - - 349

	PAGE.
Sahria and ors., Jayah bin Kachi and anor. *v.*	413
Sameh Moordee, *In re*	530
Sammugum *v.* Fraser	338
Satow, Marrable *v.*	274
Savavathy Chetty, *In re*	595
Scully, Duval *v.*	120
——— *v.* Scully	602
Seah Lee and anor. *v.* Kiam Guan	403
—— Liang Seah, Yeoh Kian Guan *v.*	590
Shaik Pareetho *v.* Ebramsah	491
Shayna Mustan Rowter *v.* Kana Shaik Ibrahim	344
Shedumbrum Chetty *v.* Keng Cheow and Co.	587
Shellapen *v.* Gordon	388
Shenayah Chetty and anor. *v.* Veyna Sultan Mahomed	663
Sherifa Shaika *v.* Haughton	533
Sheriffa Essah, *In the goods of*	98
Simons *v.* Teo Guan Tye	544
Sinyak Rayoon and anor., *In re*	329
Sit Hoon Neoh, Chih Lim Neo *v.*	492
Sitra Mootar, Sabapathy Chetty *v.*	530
Solomon and anor. *v.* Guthrie and Co.	679
Spirit Farmer *v.* Tok Tim Tong	546
Stubbs and ors. *v.* Loh Hoh Seng and ors.	409
Suprayen, Reg *v.*	258
Syed Hassan bin Omar al Hadeed *v.* Khoo Soon Tjio and ors.	528
—— Mahomed Alsagoff, Reg. *v.*	651
——— ——— Attas *v.* Tan Pok Sye	345
——— ——— ——— *v.* Tek Lee	345

T.

Tan Boon Tay and ors., Tan Chin Hoon *v.*	584
—— Chin Hoon *v.* Tan Boon Tay and ors.	584
—— Chye Hoon *v.* Lim Seow Chong and anor.	8
Tan Heng Wee, Fox *v.*	604
Tanjong Pagar Dock Co. *v.* Municipal Commissioners, S.	103
Tan Kim Keng and anor. *v.* Municipal Commissioners, P.	450
—— Pok Sye, Syed Mahomed Attas *v.*	345
—— Seng Qui *v.* Palmer	251
—— Sim Ho, Reg. *v.*	156
—— Tua Kow, *In re*	291
—— Yok Lan and ors., Reg. *v.*	666
Taserip *v.* Riccard	214
Taynappa Chetty, Brown *v.*	268
Tek Lee, Syed Mahomed Attas *v.*	345
Tengah Chee Nachiar *v.* Nacodah Merican and ors.	265
Teo Ah Hoo, Reg. *v.*	317
Teo Guan Tye, Carr *v.*	561
——— ——— Simons *v.*	544
Thermopylœ, The	679
Thum Chee *v.* Ho Ah Fa	606
Tijah *v.* Mat Alli	124
—— *v.* Milah	186
Tio Ang Boi *v.* Hia Ma Lai	230
Tok Tim Tong, Spirit Farmer *v.*	546
Turner *v.* Mansfield and Co.	91

U.

Ung Ah Moi and ors. *v.* Hampshire	296

V.

Vanjoor *v.* Kaliapah Chetty	592
Vaughan *v.* D'Silva	286
Veera Padiachee and ors., Coopang Chetty and ors. *v.*	364
Veerappah Chetty *v.* Koh Soon Liat and anor.	614
Vengadashellum, Brown *v.*	524
Vershat, Jamalsah *v.*	471
Veyna Sultan Mahomed, Shenayah Chetty and anor. *v.*	663
Vong Ah Hoon, Reg. *v.*	375
Vytilingum, Jenabboo and anor *v.*	78

W.

PAGE.

Wee Geok Neo, Quaik Kee Hock *v.* - - - - - 128
—— Kim Guan, Quaik Siew Soon *v.* - - - - - 319
—— Nga Neo *v.* Yeo Kian Guan and anor. - - - 558
—— Sim Tian and ors., Reg. *v.* 238
—— Swee Hin *v.* Opium Farmer - - - - - 527
Wemyss *v.* Attorney-General - 10
Wong Ah Kum, Reg. *v.* - - 150
Wray and anor., Lim Seng Ee *v.* - - - - - - 240
Wright, Beebee Samsoo *v.* - 199

Y.

PAGE.

Yacob, Mootyah Chetty *v.* - 568
Yeap Hock Tin, Reg. *v.* - - 237
Yeo Kian Guan and anor., Wee Nga Neo *v.* - - - - 558
———— ————*v.* Seah Liang Seah - - - - - - 590
Yeoh Boon Leng, Reg. *v.* - 630
—— Cheng Kang and ors., Yeoh Him and ors., *v.* - 204, 500
—— Him and ors. *v.* Yeoh Cheng Kang and ors. - 204, 500
—— Hong Ghee, Crane *v.* - 587

TABLE OF CASES CITED.

A.

		PAGE.
Abbot *v.* Baker's Tea Association	W. N. 1871, 207, & 1872, 31	270
Abdullah, *In the goods of*	2 Kyshe [Ecc. Ca.] 8	330, 334
Abdulrahim *v.* Drahman	1 Ibid. 171	226
Abud *v.* Riches	2 L. R. Ch. Div. 528	433, 434
Adams *v.* Morgan	12 L. R. Ir. 1, Affd. on App. 14 L. R. Ir. 140	182
——— *v.* Scott	7 W. R. 213	359
Adolphin *v.* Ellis	14 L. R. Q. B. 841	438
Adney *v.* Greatrex	38 L. J. Ch. 414	133
Agnew *v.* Jobson	47 L. J. M. C. 67	241, 247
Alford *v.* Vickery	1 Car. & M. 280	79
Alison, *In re*	11 L. R. Ch. Div. 284. 293	359, 362
Allee *v.* Saman & anor	1 Kyshe, 480	187, 252, 257
Allen *v.* Knight	5 Hare, 272, on App. 11 Jur. 527	155
——— *v.* Meera Pullay & ors.	1 Kyshe, 394	161
Allies *v.* Probyn	2 C. M. & R. 408	588
Allison, *In re*	10 Ex. 561	275
Allsop *v.* Allsop	29 L. J. Ex. 315	367
Andros *v.* Andros	24 L. R. Ch. Div. 637	133
Anglo-French Co-operative Society, *In re*	21 ———	196
Annot Lyle, The	11 Prob. Div. 114	480
Anonymous	Allen, 92	73
———	1 Lev. 68, s. c. 11 Q. B. 112, 117	73
———	6 Mad. H. C. [App.] 10, 29	157
Arkwright *v.* Gell	5 M. & W. 203	452
Armstrong *v.* Armstrong	7 L. R. Eq. 518	132
——— *v.* Lewis	2 Cr. & M. 274, in Eq. 3 M. & K. 45	186
Arnold *v.* Arnold	14 L. R. C. D. 270	455
——— *v.* Hamel	9 Ex. 404	241
——— *In re*	14 L. R. Ch. Div. 270	469
Ashby *v.* White	Ld. Raym. 938	438
Asher *v.* Whitlock	1 L. R. Q. B. 1	226
Atkinson *v.* Baker	4 T. R. 229	445
——— *v.* Sittree	Willes, 482	73
Attorney-General *v.* Aspinall	2 M. & C. 613	486
——— *v.* Baliol College	9 Mod. 407	355
——— *v.* Chamberlaine	6 Jur. [N.S.] 745	23
——— *v.* Chambers	4 De G. M. & G. 206	27
——— *v.* Compton	1 Y. & C. 417	486
——— *v.* Corporation of Birmingham	15 L. R. Ch. Div. 423	509
——— *v.* De Wind	1 Kyshe, 303	250
——— *v.* Eastlake	11 Hare, 205, 223	486
——— *v.* Kwok A. Sing	5 L. R. P. C. 179	172, 174
——— *v.* Lonsdale	7 L. R. Eq. 377	4, 32, 48, 50, 55, 56, 61, 64
——— *v.* Norwich	16 Sim. 225	486
——— *v.* Sidney Sussex College	15 W. R. 162	509
——— *v.* Tomline	12 L. R. Ch. Div. 214, s. c. 14 Ch. Div. 58	33, 52, 60, 64, 67

		PAGE.
Attorney-General *v.* West Hartlepool Improvement Commissioners	10 L. R. Eq. 152	486, 487
——— of Lancaster *v.* Duke of Devonshire	14 L. R. Q. B. Div 195	508
Ayles' Trusts, *In re*	1 L. R. Ch. Div. 282	129
Ayre *v.* Craven	2 Ad. & E. 2	367

B.

Bagnall *v.* Carlton	6 L. R. Ch. Div. 371	196
Bagot *v.* Williams	3 B. & C. 235	563
Bahia & San Francisco Ry. Co., *In re*	3 L. R. Q. B. 574	465
Bailey *v.* Haines	19 L. J. Q. B. [N.S.] 73	507
Baker *v.* Read	18 Beav. 398	590
Ball *v.* Herbert	3 T. R. 253, 261	57, 58
Banister, *In re*	12 L. R. Ch. Div. 131	457
Bank of Ireland *v.* Trustees of Evans' Charities	5 H. L. C. 389	443
Barber & Co., *In re*	9 L. R. Eq. 725, 731 et seq.	478
Barclay *v.* Collett	4 Bing. N. C. 658	100
Barker, *In re*	17 L. R. Q. B. D. 259	626
———*v.* Hodgson	3 M. & S. 267	137
———'s Estate, *In re*	15 L. R. Ch. Div. 635	267
Barlow *v.* Orde	3 L. R. P. C. 164	130
Barnett, *Ex-parte*	9 L. R. Ch. App. 293	284
———*v.* Smith	10 L. R. Ch. Div. 491	465
———*v.* South London Tramway Co.	18 L. R. Q. B. Div. 815	465
Barrell, *Ex-parte*	10 L. R. Ch. Ap. 512	253, 256
Barrow, *v.* Barrow	18 Beav. 529	379
Barwick *v.* English Joint Stock Bank	2 L. R. Ex. 259	545
Bastin *v.* Bidwell	18 L. R. Ch. Div. 238	23
Batavier, The	2 Wm. Rob. 407	480
Bateman *v.* Countess of Ross	1 Dow. 235	328
Beaumont *v.* Reeve	8 L. R. Q. B. 483	7
Beavan *v.* Delahay	1 H. Bl. 8	79
Beeston *v.* Weate	5 E. & Bl. 986	452
Bell *v.* Corporation of Quebec	5 L. R. Ap. Ca. 84	24
Bettyes *v.* Maynard	49 L. T. [N.S.] 389, rev. 46 L. T. [N.S.] 766	359, 664
Bhiloo Mundul & ors. *v.* Mootu Jall Ghore Mundul	9 W. R. 252	313
Bickett *v.* Morris	1 L. R. Sc. & Div. Ap. 47.	4, 48, 49, 50, 52
Bidder *v.* Brydges	37 L. R. Ch. Div. 406	588
Bignall *v.* Gale	9 Dowl. 631	208
Birch *v.* Allen	8 L. R. Ch. Div. 314	590
Bird *v.* Gunston	2 Chit. 459	241
Blackburne *v.* Somers	5 L. R. [Ir.] 1	452
Blaiberg, *In re*	11 L. R. Q. B. Div. 537	471
Blaieberg *v.* Beckett	18 ——— 96	624
Blake *v.* White	1 Y. & C. Ex. Eq. 421	559, 560
Blanchard *v.* Collins	10 Ohio, 138	60
Blarrain *v.* Scott	3 Camp. 388	438
Blenkertim *v.* Robertson	24 L. R. Q. B. Div. 543	625
Blewett *v.* Tregonning	3 Ad. & E. 554	518
Blight *v.* Hartnoll	23 L. R. Ch. Div. 218	267
Blumdell *v.* Catterall	5 B. & Ald. 268	24, 55, 57
Board of Works for Greenwich *v.* Mandslay	5 L. R. Q. B. 397, 401	56
Bogg *v.* Midland Railway Co.	4 L. R. Eq. 310	24
Boman *v.* Wathen	2 McLean. 376	60
Bomarsund, The	Lushington, 78	201
Bongah *v.* Mat Din	Penang Case [unreported]	125

		PAGE.
Boodle *v.* Davies	3 Ad. & E. 200	208
Bottle *v.* Knocker	46 L. J. Ch. [N.S.] 159	90
Bottomley *v.* Ambler	38 L. T. [N.S.] 545	208
Bourdin *v.* Greenwood	13 L. R. Eq 281	138
Bourne *v.* Seymour	16 C. B. 337	483
Bowes *v.* Shand	2 L. R. Ap. Ca. 455	465
Boydell *v.* Drummond	11 East 142	83
Brace *v.* Wehnert	25 Beav. 348	464, 583
Bradford Banking Co. *v.* Briggs	12 L. R. Ap. Ca. 39	465
Bradshaw *v.* Vaughton	30 L. J. M. C. 67	556
Brazier *v.* McLean	6 L. R. P. C. 397	438
Brice *v.* Bannister	3 L. R. Q. B. Div. 569	562
Bridgman *v.* Holt	Show. P. C. 122	438
Bridgwater Trustees *v.* Bootle-cum-Linacre	2 L. R. Q. B. 4	58, 60
Briggs *v.* Boss	3 L. R. Q. B. 268	121
Bright *v.* Boyd	1 Story Rep. [Amer.] 478	355
Briscol *v.* Drought	11 Ir. C. L. Rep. 250	452
Bristow *v.* Sequeville	19 L. J. C. P. [N.S.] 289	633
British India Steam Navigation Co. *v.* Commissioners of Inland Revenue	7 L. R. Q. B. Div. 165	182
British Seamless Paper Box Co., *In re*	17 L. R. Ch. Div. 467	196
Brodrick *v.* Scale	6 L. R. C. P. 99, 103	121
Brook Delcomyn & Badart, *In re*	33 L. J. [N.S.] C. P. 246	209
Brown *v.* Bolton	31 L. R. Ch. Div. 542	133
——— *v.* Clark	3 Ves. 166	377
——— *v.* Cure of Montreal	6 L. R. P. C. 157	366. 367
——— *v.* Dale	9 L. R. Ch. Div. 75	509
——— *v.* Royal Ins. Co.	28 L. J. Q. B. [N.S.] 275	137
Browne *v.* Hope	14 L. R. Eq. 343	267
Brunsden *v.* Humphrey	11 L. R. Q. B. Div 712, rev. 14 L. R. Q. B. Div. 141	421, 655
Bryson *v.* Russell	14 ——— ———720	241, 246
Buckinshaw *v.* Nicholl	3 L. R. Ap. Ca. 1004	465
Budding *v.* Murdoch	1 L. R. Ch. Div. 42	418
Burdett, *In re*	20 L. R. Q. B. Div. 310	477
Burke & ors., *In re*	33 L. J. C. P. [N.S.] 246	209
Burroughes *v.* Bayne	5 H. & N. 296	216
Burton *v.* Wigley	1 Bing. N. C. 665	208
Bury Commissioners' Case	5 L. R. C. P. 310, 319	308
Bushell's Case	1 Mod. 119	438
Byron *v.* Godfrey	4 Ves. 6	90

C.

Cader Mydin *v.* Shatomah	Woods' Or. Ca. 42, s. c. Str. L. R. 260	225, 228
Cadman *v.* Horner	18 Ves. 10	545
Cahill *v.* Cahill	8 L. R. App. Ca. 420	225
Calder *v.* Halket	3 Moo. P. C. C. 28	438
Caledonian Credit & Mortgage Corp. Ltd. *v.* Gorney	16 L. R. Q. B. Div. 24	625
Calvert *v.* Sebbon	4 Beav. 222	90
——— *v.* Thomas	19 L. R. Q. B. Div. 204	623
Campbell's Trusts, *In re*	34 W. R. 629	132
Cann *v.* Clipperton	10 Ad. and E. 582	242
Capital Bank *v.* Henty	54 L. R. C. P. Div. 514 on App. 7 L. R. App. Ca. 741, 754, 787	367
Cape Breton Co., *In re*	26 L. R. Ch. Div. 221, on App. 29 L. R. C. D. 795	196
Carlos *v.* Fancourt	5 T. R. 482	182
Carlow *v.* Kenealy	12 M. and W. 139	182
Carton *v.* Meenachee	3 Kyshe, 151	191

		PAGE.
Cartwright *v.* Vawdry	5 Ves. 530	129
Cary *v.* Stephenson	2 Salk 420	312
Cashin *v.* Murray	4 Kyshe, 435 [infrà]	517
Cassidy, *Goods of*	4 Hagg. Ecc. Rep. 360; 1 Wm. Exors, 8 Ed. 476	192
Casson *v.* Roberts	31 Beav. 613, s. c. 32 L. J. Ch. [N.S.] 105	253
Castro *v.* Regina	6 L. R. Ap. Ca. 329	190
Catling *v.* King	46 L. J. Ch. [N.S.] 384	344
Caton *v.* Caton	1 L. R. Ch. Ap. 137, Affd. 2 L. R. Eng. and Ir. Ap. 127	464
Cattley *v.* Loundes	34 W. R. 193	216
Cattlin *v.* Brown	11 Hare 372	213
Cauder Mohuddeen, *Goods of*	Str. L. R. 281	499, 500
Cecil *v.* Langdon	28 L. R. Ch. Div. 1	498
Chamber Colliery Co. *v.* Hopwood	32 ——— 549	452
Chamberlain *v.* King	6 L. R. C. P. 474	241
Chambers *v.* Caulfield	6 East 244	328
——— *v.* Goldwin	9 Ves. 254, 271	359
Chapman *v.* Brown	6 Ves. 404	213
——— *v.* Day	31 W. R. 767	75
——— *v.* Shepherd	2 L. R. C. P. 228	545
Charlotte, The	2 Wm. Rob. 71	203
Charter *v.* Charter	7 L. R. H. L. 364	133
Chasemore *v.* Turner	10 L. R. Q. B. 500	138
Chatterton *v.* Cave	3 L. R. App. Ca 483	507
Chattoch *v.* Mullar	8 L. R. Ch. Div. 177	584
Chawana Mahomed Hussein *v.* Mahomed Mustan	4 Kyshe, 1 [infrà]	241, 246
Cheah Boon Hean *v.* Crown	Penang Case [unreported]	392
Cheavin *v.* Walker	5 L. R. Ch. Div. 850	395
Che Him *v.* Robertson	1 Kyshe, 131	241, 247
Chetham *v.* Ld. Audley	4 Ves. 72	90
China Gunny *v.* Muniandee	4 Kyshe, 161 [infrà]	391
Chin Guan Tak & ors. *v.* Chin Seah Pow	1 Ibid, 586	383
Choa Choon Neoh *v.* Spottiswoode	1 Ibid, 216, 221	330, 331, 333, 334
Cholmondeley *v.* Clinton	2 Jac. & W. 90	359
Chooashary & anor. *v.* Cassim	3 Kyshe, 98	231
Chua Ah Tong *v.* Opium Farmer	4 Ibid. 188 [infrà]	242
Chulas *v.* Kolson binte Syed Malim	Str. L. R. 462, s.c. Woods' Or. Ca. 35	225, 330, 334
Clark *v.* Peckham	10 R. I. [Amer.] 35, 38	60
Clarke *v.* Bradlaugh	7 L. R. Q. B. 38, 61, on App. 8 L. R. Ap. Ca. 354	275, 438
——— *v.* Callow	46 L. J. Q. B. 53	83, 344
——— *v.* Clarke	9 L. R. Ap. Ca. 737	590
Clarke's Trusts, *In re*	1 L. R. Ch. Div. 497	509
Clement *v.* Burns	43 N. H. 609, 617	60
Clever, *Ex-parte*	18 L. R. Q. B. Div. 489	622, 624
Cockell *v.* Bacon	16 Beav. 158	359
Cockerane *v.* Entwistle	W. N. 1890, 103	625
Cockerell *v.* Aucompte	2 C. B. [N.S.] 440	483
——— *v.* Barber	1 Sim. 23, on App. 2 Russ. 585	90
Coles *v.* Bristow	6 L. R Eq. 149	545
Collette *v.* Goode	7 L. R. Ch. Div. 842	345, 418
Collier *v.* Hicks	2 B. & Ad. 663	152
Collins *v.* Jones	10 B. & C. 777	284
Colonial Bank *v.* Winney	30 L. R. Ch. Div. 261	465
Colvin *v.* Hartwell	5 Cl. & Fin. 523	423
Compton *v.* Bloxham	2 Coll. Ch. Rep. 201	90
Connor *v.* Tan Jim Sin	3 Kyshe, 114	77
Cook *v.* Cooper	7 Ad. & E. 605	73
Cook *v.* Leonard	6 B. & C. 351	241

		PAGE.
Cooke *v.* Booth	2 Cowp. 819	148
——— *v.* Crawford	13 Sim. 91	499
——— *v.* Eshelby	12 L. R. Ap. Ca. 271	561, 563, 564
Cooper *v.* Hood	28 L. J. [N.S.] Ch. 212, s.c. 26 Beav. 293	464, 583
——— *v.* Wandsworth Board of Works	14 C. B. [N. S.] 180, 194	322
Corbett *v.* Plowden	25 L. R. Ch. Div. 678	23
Cotterell *v.* Stratton	8 L. R. Ch. Ap. 295	199, 359
Cowdell *v.* Neale	26 L. J. C. P. [N.S.] 37	153
Cox *v.* Coleridge	1 B. & C. 37, 54	152, 288, 351
Crawford *v.* Delaware	7 Ohio St. 459	60
Crawshaw *v.* Crawshaw	14 L R. Ch. Div. 817	267
Crockett, *In re*	2 Ph. 553	586
Croft *v.* Day	7 Beav. 84	270
Crompton *v.* Vane Railway Co.	7 L. R. Ch Div. 567	583
Crook *v.* Whitley	7 De. G. M. & G. 490	132
Crooks *v.* Allan	5 L. R. Q. B. Div. 38, 42	529
Cross *v.* Eglin	2 B. & Ad. 106	483
——— *v.* Sprigg	6 Hare, 552	90
Cumber *v.* Wane	1 Sm. L. C. 288.	588
Cumming *v.* Ince	11 L. R. Q. B. 112, 117.	73

D.

Dance *v.* Goldingham	8 L. R. Ch. Ap. 902	486
Darbey *v.* Whitaker	4 Drew 134	67
Daubney *v.* Cooper	10 B. & C. 237	153, 351
Davey *v.* Durrant	1 De G. & J. 535. s.c. 26 L. J. Ch. [N.S.] 805	359
Davidson *v.* Ord	1 Kyshe, 205	241, 438
Davies *v.* Price	34 L. J. Q. B 8	210
——— *v.* Rees	17 L. R. Q. B. Div. 408	477
——— *v.* Solomon	7 ——————— 112	367
Davis *v.* Burton	11 ——————— 537	471, 6 1
——— *v.* Hedges	6 ——————— 687	421
——— *v.* Park	8 L. R. Ch. Ap. 862 [note]	511
Dawkins *v.* Antrobus	17 L. R. Ch. Div. 615	486
——— *v.* Paulet	5 I . R. Q. B. 94	628
Day *v.* Brownrigg	10 L. R. Ch. Div. 302	438
Dendy, *In re*	31 L. J. Ch. [N.S.] 184	90
Denero, The	38 L. J. Adm. 69	678
Dennis *v.* Lane	6 Mod. 131	278
Denton *v.* Denton	8 Jur. 388	100
Derecourt *v.* Corbishley	5 E. & B. 188, s.c. 24 L. J. Q. B. 313	242
Deveze, *In re*	9 L. R. Ch. App. 293	284
De Witt *v.* De Witt	11 Sim. 41	586
Dickenson *v.* Eyre	7 Q. B. 307 [note]	73
Dickinson *v.* Shee	4 Esp. 67	318
Dickeson *v.* Hilliard	9 L. R. Ex. 79, 84	367
Dillett, *In re*	12 L. R. App. Ca. 459	507
Dimmock *v* Hallett	2 L. R. Ch. Ap. 21	544
Din Dyal Chatterjee *v.* Maharajah Ingutruder Bururuee	1 W. R. 310	138
Dix *v.* Reed	1 Sim. & Stu. 237	90
Dobbins' Settlement, *In re*	57 L. T. [N.S.] 277, s.c. 56 L. J. Q. B. 295.	400, 401
Dobson *v.* Groves	6 Q. B. 637	209
Doe *v.* Humphreys	2 East, 237	307
—— *v.* Oliver	2 Sm. L. C. 634	74
—— *v.* Passingham	6 B. & C. 305	100
Doe d Cross *v.* Cross	8 Q B. 714	179
Doe d Cross *v.* Steel	3 Camp 116	307

		PAGE.
Dolaret *v.* Rothschild	1 S. & S. 590, 598	513
Dorin *v.* Dorin	7 L. R. H. L. 568	129, 130, 131
Doss *v.* Doss	14 L. T. P. C. [N.S.] 646	460
Douglas *v.* Forrest	4 Bing. Rep. 686, 704	312, 313
Downes *v.* Glazebrook	3 Meriv. 200	359
Downing *v.* Capel	2 L. R. C. P. 461	77
Drew *v.* Drew	25 L. T. [O.S.] 282	209
Duke of Buccleuch *v.* Metropolitan Board of Works	5 L. R. Eng. & Ir. App. 418	24, 35, 65
Duke of Cadaval *v.* Collins	4 Ad. & El. 858	73
——— Clarence	1 Wm. Rob. 346	204
——— Leeds *v.* Earl of Amherst	20 Beav. 239, 240	383
Duncombe *v.* Mayer	8 Ves. 320	100
Dunhill *v.* Ford	3 L. R. C. P. 36	209
Duval *v.* Scully	4 Kyshe, 120 [infrà]	120, 183
Dyson *v.* Mason	22 L. R. Q. B. Div. 351	617, 619

E.

Eads *v.* Williams	24 L. J. Ch. 531	208
Eagles *v.* Le Breton	15 L. R. Eq. 148	132
Earl of Oxford's Case	2 W. & T. L. C. in Eq. 504	421
Easum and ors. *v.* Cato	5 B. & Ald. 861	282
Eaton *v.* Storer	22 L. R. Ch. Div. 91	418, 420
Eberle's Hotel Co. *v.* Jonas	18 L. R. Q. B. Div. 459	285
Eden *v.* Smyth	5 Ves. 341	90
Edlin *v.* Battaby	2 Lev. 152	421, 424, 425
Edwards *v.* Edwards	2 L. R. Ch. Div. 291	530, 532
——— *v.* Jones	1 Myl. & Cr. 226	90
Egyptian, The	1 Moo. P. C. C. 373	480
Ellis v. Houston	10 L. R. Ch. Div. 236	129
—— *v.* Rogers	29 ——— ——— 671	455
Elmore *v.* Perree	57 L. T. [N.S.] 333	584
Emma Silver Mining Co. *v.* Grant	17 L.R. Ch. Div. 122	196
Erlanger *v.* New Sombrero Co.	3 L. R. App. Ca. 1256	196
Errington *v.* Aynesly	2 Bro. C. C. 343	464
Esdaile *v.* Visser	13 L. R. Ch. Div. 421	435
Evans *v.* Davies	7 Hare 498	132
——— *v.* Wood	5 L. R. Eq. 9	544

F.

Farnell *v.* Bowman	12 Ap. Ca. 643	67, 70
Farrance *v.* Bolton	8 L. R. Ch. Ap. 123	455
Fatimah & ors. *v.* Logan & ors.	1 Kyshe, 255, 262	123, 213, 334
Favier & Provin, *In re*	L. T. Newspaper, 30th October, 1886	224, 348
Feather *v.* The Queen	6 B. & S. 283	23, 38, 62
Ferguson *v.* Ferguson	10 L. R. Ch. Ap. 661	433, 434
——— *v.* Kinmore	8 Cl. & Fin. 251	438
Fetherstone *v.* Cooper	9 Ves. 67	209
Field *v.* Laline	30 L. J. Ex. [N.S.] 168	465
Finch *v.* Finch	23 L. R. Ch. Div. 267, 271	313, 314, 420, 599
——— *v.* Underwood	2 ——— ———310	23, 42, 43, 45
Fisher *v.* Calvert	27 W. R. 301	182
—— *v.* Webster	14 L. R. Eq. 283	586
Fletcher *v.* Moore	18 L. J. Ch. [N.S.] 384	352
Flower *v.* Local Board of Low Leyton	5 L. R. Ch. Div. 347	214, 484, 487, 490

		PAGE.
Flower *v.* Marten	2 Myl. & Cr. 459	90
Floyd *v.* Barker	12 Coke 23	438
Foakes *v.* Beer	9 L. R. Ap. Ca. 605	588
Foat *v.* Mayor of Margate	11 L. R. Q. B. Div. 299	214
Forbes *v.* Watt	2 L R. Sc. & Div. Ap. 214	148
Ford *v.* Foster	7 L. R. Ch. Ap. 611	395
—— *v.* Tiley	6 B. & C. 325	23
Foster *v.* Wheeler	36 L. R. Ch. Div. 697, on App. 38 ———— 133	583
Fowler *v.* Alexander	3 Y. & J. 513	148
——— *v.* Barstow	20 L. R. Ch. Div. 240	511
Fox *v.* Makereth	1 W. & T. L. C. in Eq. [4th Ed.] 150, 162	590
Franks *v.* Martin	1 Eden 309	464, 583
Fray *v.* Blackburn	3 B. & S. 576	438
Freeman *v.* Rosher	13 L. R. Q. B. 780	320
Freuwin *v.* Lewis	4 M. & G. 249	486
Fritz *v.* Hobson	14 L. R. Ch. Div. 542	24
Fryer *v.* Kinnersly	33 L. J. C. P. [N.S.] 96	366
Fuller *v.* Abrahams	3 Bro. & Bing. 116	363

G.

Gabriel *v.* Dresser	15 C. B. 622	588
Gan Kim Swee *v.* Lee Ah Kee	Penang Case [not reported]	138, 145
——— ——— *v.* Newland	3 Kyshe, 108	162
Gapp *v.* Bond	19 L. R. Q. B. Div. 200	595, 596
Garme *v* Barnard	54 L. J. Ch. Div. 517	459
Garnett *v.* Farrans	6 B. & C. 611	438
Gaved *v.* Martyn	19 C. B. [N.S.] 732	452
Gibbons *v.* Hickson	55 L. J. Q. B. [N.S.] 119	532
——— *v.* McMullen	L. R. P. C. 217	465
Gill *v.* Shelley	9 L. J. Ch. 68	129
Gillespie, *In re*	14 L. R. Q. B. Div. 963	282
Gillett *v.* Thornton	19 L. R. Eq. 599	596
Gilmore *v.* Shuter	2 Lev. 227, s. c. 2 Mod. 310	7
Gilpin *v.* Fowler	23 L. J. Ex. [N.S.] 152	366
Glenfruin, The	10 L. R. Pro. Div. 103	678
Goddard *v.* O'Brien	9 L. R. Q. B. Div. 37	588
Goh Chin Tek *v.* Ramsawmy Chetty	Penang Case [not reported]	121
Goode *v.* Cheeseman	2 B. & Ad. 328	588
Goodinge *v.* Goodinge	1 Ves. Sen. 230	132
Goodman's Trusts, *In re*	17 Ch. Div. 266	130
Goodwin *v.* Roberts	1 L. R. Ap. Ca. 476	465
Granby *v.* Allen	1 Ld. Raymond 224	87
Gray *v.* Haig	20 Beav. 219	383
—— *v.* Lewis	8 L. R. Eq. 526	411
Greathead *v.* Bromley	7 T. R. 455	421
Greatrex *v.* Hayward	8 Ex. 291	452
Great Western Railway *v.* Bagge	15 L. R. Q. B. D. 628	344
Green *v.* Humphreys	23 L. R. Ch. Div. 207	138
Gregory *v.* Gregory	Coop. 201	590
——— *v.* Hurrill	5 B. & C. 341	138, 145
——— *v.* Mighell	18 Ves. 328	584
Grell *v.* Levy	16 C. B. [N.S.] 73	127
Gronveldy *v.* Bouwell	Salk. 395	438
Gunn *v.* Bolckow	10 L. R. Ch. Ap. 491	465
—— *v.* Roberts	9 L. R. C. P. 331	679, 680
Guy *v.* Pearkes	18 Ves. 196	377, 379

H.

		PAGE.
Hagger *v.* Baker	14 M. & W. 9	210
Haigh *v.* Haigh	31 L. J. Ch. 420	209
Hajee Shaik Abdul Cader *v.* Aisha & ors.	4 Kyshe, 151 [infrà]	350, 351
Halimah *v.* Bradford	Str. L. R. 383	334
Hall *v.* Levy	10 L. R. C. P. 154	421
Hammond *v.* Howell	2 Mod. 219	438
——— *v.* Smith	33 Beav. 452	147
Hams, *In re*	10 Ir. Ch. 100 [cited in Prid. on Conv. 741]	121
Hankey *v.* Smith	3 T. R. 507	283, 284
Hanson *v.* Keating	4 Hare, 116	421, 424
Hardman *v.* Bellhouse	9 M. & W. 596	588
Hardwick *v.* Moss	31 L. J. Ex. 205	241
——— *v.* Wright	35 Beav. 133	478
Hare *v.* Waring	3 M. & W. 362	465
Harpurshad *v.* Sheoh Dyal	3 L. R. Ind. Ap. 259, 285, 6	507
Harris, *In re*	10 Ir. Ch. Rep. 100	184
Harrison *v.* Bush	5 E. & B. 344, 348	367
——— *v.* Lay	13 C. B. [N.S.] 528	208
——— *v.* Sterrett	4 H. & McHen. 540	60
Harvey *v.* Shelton	7 Beav. 455	209
Hawah *v.* Daud	Str. L. R. 253	328, 334
Hawkins *v.* Maltby	4 L. R. Eq. 572, s. c. 6 L. R. Eq. 505	545
Haydon *v.* Brown	59 L. T. [N.S.] 330, 810, s. c. W. N. 1888, 49	532
Hayn *v.* Culliford	47 L. J. Q. B. 755	678
Heath *v.* Brewer	9 L. T. [N.S.] 653	241
Heaton, *In re*	27 L. R. Ch. Div. 570	395
Heeraman Haloye, *In re*	1 Ind. Jur. 97	336
Henderson *v.* Forss	Sebastian's Dig. Law of Trade-Marks, 36, s. c. Lloyd on Trade-Marks, & Seton on Decrees, 4th Ed. 236	270
——— *v.* Henderson	3 Hare, 114, 115	421
Hennessy *v.* White	Sup. Ct. of Victoria, 1869	270
Hermann *v.* Seneschal	32 L. J. C. P. 43	241
Hermitage *v.* Kilpin	9 L. R. Ex. 205	435
Hetherington *v.* Groom	13 L. R. Q. B. Div. 789	621, 624, 625, 626
Hewlett *v.* Laycock	2 Car. and P. 574	209
Hibblewhite *v.* McMorine	6 M. and W. 200	465, 470
Hick, *In re*	8 Taunt. 699	210
Hickok *v.* Hine	23 Ohio St. 523	60
Hickson *v.* Darlow	23 L. R. Ch. Div. 690	676
Hill *v.* Crook	6 L. R. H. L. 265, 283	130
Hinde *v.* Whitehouse	7 East 558	83
Hindley *v.* Haslam	3 L. R. Q. B. Div. 481	421
Hinton *v.* Sparks	37 L. J. C. P. [N.S.] 81	253, 256
Hoar *v.* Dawes	Doug. 371	562, 565 567
Hodgkinson *v.* Kelly	6 L. R. Eq. 496	545
Holker *v.* Paritt	8 L. R. Ex. 107, on App. 10 Ibid. 59	452, 453
Hole *v.* Smith	17 L. R. Ch. Div. 444	664
Holt *v.* Sindrey	7 L. R. Eq. 170	133
Hooper *v.* Hooper	McCle Y. 509	209
———	29 L. J. Pro. and Div. 59	328
Hope, The	2 W. Rob. 8	480
Hope *v.* Hope	26 L. J. Ch. 417	127
Hopkinson *v.* Marquis of Exeter	5 L. R. Eq. 63	486
Hopper, *In re*	2 L. R. Q. B. 367, 374	208
Hornor *v.* Heath	27 L. T. [O. S.] 330	90
Horton *v.* McMurtry	29 L. J. Ex. 260	95
Houlder *v.* Smith	9 L. R. Q. B. 170, s. c. 19 L. J. Q. B. 172	438
Howley *v.* Knight	19 L. J. Q. B. [N.S.] 3	187

		PAGE.
Hudson *v.* Taylor	Cited in Fry, 232, 233	33
Huggins *v.* Waydey	15 M. and W. 357	241
Hughes *v.* Buckland	15 ——— 346	241
Humble *v.* Shore	7 Beav. 247	267
Hume *v.* Druyff	8 L. R. Ex. 214	2
Hunt *v.* Gunn	13 C. B. [N.S.] 226	465, 468, 469
Hunter *v.* Stewart	31 L. J. Ch. [N.S.] 346	421, 427
Hutcheson *v.* Eaton	13 L. R. Q. B. Div. 861	209
Hutley *v.* Marshall	46 L. J. [N.S.] 186	182
Hutton *v.* Parker	7 Dowl. 739	160

I.

Ibimey *v.* Stocker	1 L. R. Ch. Ap. 396	452
Industrie, The	3 L. R. Ad. & Ecc. Ca. 303	480
Ing Ah Mit, *In the goods of*	4 Kyshe, 380 [infrà]	630, 633
Ingleby & Boak, *In re*	13 L. R. Ch. Div. [Ir.] 326	499, 500
Ismail, *In the goods of*	4 Kyshe, 187 [infrà]	252, 258

J.

Jack *v.* Kipping	9 L. R. Q. B. Div. 113	285
Jacobs *v.* Amyatt	1 Madd. 376 [note]	378
Jamaludin *v.* Hajee Abdullah	1 Kyshe, 503	330, 334
James *v.* David	5 T. R. 141	589
——— *v.* Dean	15 Ves. 236	355
Jemalah *v.* Mahomed Ali & ors.	1 Kyshe, 386	311
Jenaiboo *v.* Narainen Chetty & anor.	4 ———, 359 [infrà]	664, 665
Jenks *v.* Turpin	13 L. R. Q. B. Div. 505	521, 522, 617
Jenner *v.* Clegg	1 M. & Rob. 213	79
Jewis *v.* Lawrence	8 L. R. Eq. 345	90
Johnston & Co. *v.* Orr Ewing & Co.	7 L. R. App. Ca. 219	273, 404
Jonassohn *v.* Ransome	3 C. B. [N.S.] 779	588
Jones *v.* Harris	7 L. R. Q. B. 157	185
——— *v.* North	19 L. R. Eq. 426	161
——— *v.* Matthie	11 Jur. [O. S.] 504, 761	359, 362
——— *v.* Powles	3 M. & K. 581	155
——— *v.* Rimmer	14 L. R. Ch. Div. 592	454
——— *v.* Smith	1 Hare 43, on App. 1 Phil. 244	85
——— *v.* St. John's College	6 L. R. Q. B. 115	161
Joule *v.* Jackson	7 M. & W. 450	98

K.

Kader Bee & anor. *v.* Kader Mustan & anor.	1 Kyshe, 432	102, 213
——— Meydin *v.* Shatomah	Woods' Or. Ca. 42, s.c. Str. L. R. 260	225, 427
——— Mydin *v.* Hajee Abdul Cader	1 Kyshe, 489	509
Kamoo *v.* Bassett	1 Ibid. 1	628
Kearns *v.* Cordwainers' Co.	6 C. B. [N.S.] 388	24
Kemp *v.* Neville	10 ——— ——— 523	438
Kendall *v.* Hamilton	4 L. R. Ap. Ca. 504	563
Kensit *v.* Great Eastern Railway Co.	23 L. R. Ch. Div. 566, on App. 27 Ibid. 122	452
Kepp *v.* Wiggett	10 C. B. 35, s.c. 20 L. J. C. P. [N.S.] 49	74
Kerr *v.* Clinton	8 L. R. Eq. 462	130
Kerslake *v.* Cox	16 L. T. [N.S.] 396	208, 209
Khoo Aing Hong *v.* Meyappa Chetty	3 Kyshe, 124	402, 666

		PAGE.
Khoo Poh *v.* Wan Mat	Str. L. R. 247	138
—— Seok Haing *v.* Khoo Wee Team & anor.	1 Kyshe, 633	75, 102
—— Tiang Bee *v.* Tan Beng Gwat	1 —— 413	129, 132
—— Yah Hong *v.* Khay Thye & anor.	1 —— 647	460
Kimber *v.* Barber	8 L. R. Ch. Ap. 56	196
King, *In re*	3 De G. & J. 63	87
—— *v.* Hoare	13 M. & W. 494	563
—— *v.* Kemp	8 L. T. 255	127
Kirby *v.* Simpson	10 Ex. 358	241, 247
Kirchner *v.* Venus	12 Moo. P. C. 399	465
Kirk *v.* East India Dock Co.	55 L. T. [N.S.] 245	209
—— *v.* Todd	21 L. R. Ch. Div. 484	75
Kitchee Pakirmah & anor. *v.* Syed Akil	Penang Case [unreported]	609, 613
Kitchen *v.* Campbell	2 W. Saund. 827	421
Knatchbull *v.* Gueber	3 Mer. 146	470
Ko Bo An *v.* Punghulu Shaik Beenan	1 Kyshe, 273	241, 245
Krans, *Ex-parte*	1 B. & C. 258	288
Krehl *v.* Burrell	11 L. R. Ch. Div. 146	444
Kunja Pillay *v.* Visuveraden Daven	Penang Case [unreported]	7
Kurling *v.* Flight	2 Phil. 116	465
Kynnersley, *In re*	4 Kyshe, 151 [infrà]	350, 351
Kyshe *v.* Inche Nap Pendek & ors	1 Ibid. 624	99

L.

Lady Elibank *v.* Montolieu	1 W. & T. L. C. in Eq. 341 [2nd Ed.]	378, 424
Laird *v.* Briggs	19 L. R. Ch. Div. 22	52, 54
Laker *v.* Hordern	1 ——————644	132
Lambert *v.* Lambert	2 Bro. Par. Ca. 18	378
Lao Leang Ann, *In the goods of*	Woods' Or. Ca. 35	334
Larchin *v.* N. W. Deposit Bank	8 L. R. Ex. 80, on App. 10 L. R. Ex. 64.	121
Larios *v.* Gubrity	5 L. R. P. C. 346	465
Lavery *v.* Pursell	39 L. R. Ch. Div. 508	569, 584
Law *v.* Garrell	8 ——————— 26	596
Lawless *v.* Anglo-Egyptian Cotton Co.	4 L. R. Q. B. 262	367
Lea *v.* Miller	Sebastian's Dig. of Trade-Mark Cases, 513	395
Leather Cloth Co., Ltd. *v.* American Leather Cloth Co., Ltd.	11 H. L. 523, 539	273, 395, 404
Lebby Long, *In the goods of*	2 Kyshe Ecc. Ca. 27	187, 252
Lee *v.* Wilmot	1 L. R. Ex. 364	138
Leete *v.* Hart	3 L. R. C. P. 322	241
Leigh *v.* Byron	1 Sm. & Giff. 486	133
——— *v.* Jack	5 L. R. Ex. Div. 264	226
Lepine *v.* Bean	10 L. R. Eq. 162	130
Leslie *v.* French	23 L. R. Ch. Div. 552	421
Letchmee & anor. *v.* Ramasawmy	3 Kyshe. 102	393
Levy *v.* Soloman	25 W. R. 842	132
Lewers *v.* Earl of Shaftesbury	2 L. R. Eq. 270	252, 257
Lewis *v.* Levy	27 L. J. Q. B. [N.S.] 282	153
——— *v.* Marshall	7 Man. & Gr. 729, 744	465
Lids K. Jalf, The	Swab. 118	480
Liggins *v.* Inge	7 Bing. 682	67
Limbrey *v.* Gurr	6 Mod. 151	213
Lim Chow Seng *v.* Opium Farmer	3 Kyshe, 136	161
—— Chye Peow *v.* Wee Boon Tek	1 Kyshe, 236	252, 257, 328
—— Guan Teet *v.* Shaik Ahamad Bashaib & anor.	1 ——— 536	138
Limmer Asphalte Paving Co. *v.* Commissioner of Inland Revenue	7 L. R. Ex. 211	182
Linoleum Manufactory Co. *v.* Nairn	7 L. R. Ch. Div. 834	395
Litton *v.* Litton	3 ——————793	418

		PAGE.
Liverpool Adelphi Loan Association *v.* Fairhurst	9 Ex. 422	87
Lloyds Banking Co. *v.* Jones	29 L. R. Ch. Div. 221	85, 155
Locking *v.* Parker	8 L. R. Ch. Ap. 30	359
London Hamburg, &c. Bank, *In re*	2 L. R. Eq. 231	545
Lord Cawder *v.* Lewis	2 Y. & C. Ex. Eq. 427	355, 421, 424, 425
Lowen *v.* Fulton	19 Sim. 104	590
Lucas *v.* Beale	10 C. B. 738	563
——— *v.* Commaford	3 Bro. C. C. 166	464
Lumb *v.* Milnes	5 Ves. 517	377
Lumsden *v.* Winter	1 L. R. Q. B. Div. 650	418
Lyne *v.* Bruce	2 H. Bl. 327	589
Lyon *v.* Fishmongers' Co.	1 L. R. Ap. Ca. 662	24, 29, 30, 36, 47, 51, 57, 58, 59, 60, 62, 64, 67
Lyth *v.* Ault	7 Ex. 669	588

M.

MacGibbon *v.* Abbott	10 L. R. App Ca. 653	132
Mackay *v.* Commercial Bank of New Brunswick	5 L. R. P. C 394	545
Macleod *v.* Jones	24 L. R. C. D. 289	359
Maddison *v.* Alderson	8 L. R. Ap. Ca. 484	583
Magellan Pirates, The	16 Jur. 1146	172
Magor *v.* Chadwick	11 Ad. & E. 571.	452
Mahomed Aniff *v.* Ebram Khan	3 Kyshe, 88	251
——— Mushurddeen Khan *v.* Clara Jane Mushurddeen	2 N. W. P. H. Ct. Rep. 173	138
——— Salleh *v.* Nacodah Merican	4 Kyshe, 463 [infrà]	584
Mamsah *v.* Mahomed Lebbye	3 Ibid. 130	231
Man & anor. *v.* Samsah	3 Ibid. 99	338
Martin *v.* Lee	14 Moo. P. C. 142	132
——— *v.* Waddell	16 Pet. 367	60
Martinson *v.* Clowes	25 L. R. C. D. 857, on App. 52 L. T. [N.S.] 706	359
Mary, The	1 Wm. Rob. 448	204
Mayor and Corporation of London *v.* Southgate	38 L. J. Ch. [N.S.] 141	464
Mayor of Cork *v.* Southgate	Ibid.	584
——— Thetford *v.* Taylor.	8 L. R. Q. B. 95	79
McAlister, *In re*	4 Kyshe, 279 [infrà]	400, 401
— Andrew *v.* Bassett	33 L. J. Ch. D. 561 s.c. 4 De G. J. & S. 380	270
— Gregor *v.* Deal & Dover Ry. Co.	22 L. R. Q. B. 69	486
— Hattie, *Ex-parte*	10 L. R. C. D. 398	184, 185
— Kinnon *v.* Armstrong & Co.	2 L. R. Ap. Ca. 531	285
Megson *v.* Hindle	15 L. R. Ch. Div. 198	132
Melville *v.* Stringer	13 L. R. Q. B. Div. 392	621, 624, 626
Mendies *v.* Gurdellas.	2 J. & H. 263	465
Merican & ors. *v.* Mahomed	3 Kyshe, 138	507
Merrill *v.* Morton	17 L. R. C. D. 382	132
Mersey Docks & Harbour Board *v.* Overseers of Birkenhead	8 L. R. Q. B. 445	105
——— Steel & Iron Co. *v.* Naylor	9 L. R. App. Ca. 434	285
Merten *v.* Adcock	4 Esp. 251	83
Metropolitan Board of Works *v.* McCarthy	7 L. R. Eng. & Ir. Ap. 243	24
Mew & Thorne, *In re*	31 L. J. Bank. 89	674
Meyappa Chetty *v.* Khoo Bean Teen & ors.	1 Kyshe, 510	121, 184
Meyappah Chetty *v.* Hassan Hussain	Penang Case [unreported]	596
Meyerhoff *v.* Frochlich	3 L. R. C. P. D. 333. Appd. 4 L. R. C. P. Div. 63	138
Midland Railway Co. *v.* Local Board of Wittington	11 L. R. Q. B. D. 788	215, 218, 241, 247, 487
Miller *v.* Hope	2 Shaw's App. Ca. 125	438

		PAGE.
Milnes *v.* Gery	14 Ves. 400	67
Mohan *v.* Dundalk Railway Co.	6 L. R. [Ir.] 477	307
Monetary Advance Co. *v.* Cater	20 L. R. Q. B. D. 785	477
Monsom *v.* Boehm	26 L. R. C. D. 398	395
Moore *v.* Campbell	11 Ex. s.c. 23 L. J. Ex. [N.S.] 310	465
——— *v.* Great Southern & Western Ry. Co	10 Ir. C. L. Rep. 46	60
Mootoo & ors. *v.* Ayah Doreh Pillay	3 Kyshe. 90	391
Moraiss & ors. *v.* DeSouza	1 Ibid. 27	120
Morgan *v.* Mather	2 Ves. jr. 15	210
Morley *v.* Newman	5 D. & R. 317	208
Moritt, *In re*	18 L. R. Q. B. Div. 222	620, 623, 624, 626, 627
Morton & Hallett, *In re*	15 L. R. C. D. 143	499
——— *v.* Tibbett	19 L. J. Q. B. 382	511
Moseley *v.* Simpson	16 L. R. Eq. 226	208
Mostyn *v.* Fabrigas	1 Sm. L. C. 668	438
Municipal Commissioners *v.* Chuah Seng & ors.	3 Kyshe. 140	402, 666
Munster *v.* Lamb	10 Q. B. Div. 588	438
Munt *v.* Shrewsbury Railway Co.	13 Beav. 1	486
Murphy's Case	2 L. R. P. C. 535	259
Murray *v.* East India Co.	5 B. & Ald. 204	312, 314
——— *v.* McKenzie	10 L. R. C. P. 625	121, 184
Mustan Bee & ors. *v.* Shina Tamby & anor.	1 Kyshe, 580	213
Myers *v.* Elliott	16 L. R. Q. B. Div. 526	472

N.

Nash *v.* Duncomb	1 M. & Rob. 104	177
—— *v.* Eads	25 Sol. Jour. 95	359
Neath Case	6 L. R. Q. B. 707	105, 109
Needler *v.* Wright	Nels. C. R. 57 [cited in Sug. on V. & P. [13th Ed.] 6157	421
Neesom *v.* Clarkson	4 Hare 97; 2 W. & T. L. C. in Eq. 518	356, 421, 424
Nelson *v.* Couch	15 C. B. [N.S.] 99, 108	421, 562
——— *v.* Stocker	28 L. J. Ch. [N.S.] 760	87
Newill *v.* Newill	7 L. R. Ch. App. 253	586
Newington *v.* Levy	5 L. R. C. P. 607, Affd. 6 L. R. C. P. 180	421
Newman *v.* Bendyshe	10 Ad. & El. 11	190, 191
New Sombrero Phosphate Co. *v.* Erlanger	5 L. R. C. D. 73	196
Nield *v.* London & N. W. Railway Co.	10 L. R. Ex. 4	49
Nind *v.* Marshall	1 Bro. & B. 319	148
North Central Wagon Co. *v.* Manchester, &c., Railway Co.	35 L. R. C. D. 191	532
Norwich Union Co, *In re*	13 L. R. [Ir.] 326	499
Nottingham Patent Brick, &c., Co. *v.* Butler	16 Q. B. D. 789	455
Nuttall *v.* Bracewell	2 L. R. Ex. 1	452

O.

Occleston *v.* Fullalove	9 L. R. Ch. App. 147	129, 130
O'Dwyer, *In re*	19 L. R. [Ir.] 19	477
Official Receiver, *Ex-parte*	18 L. R. Q. B. Div. 222.	620, 623, 625, 626, 627
O'Keefe *v.* Cullin	7 Ir. R. C. L. 319	366
Olley *v.* Fisher	34 L. R. Ch. Div. 367	252
Ong Cheng Neo *v.* Yeap Cheah Neo & ors	1 Kyshe, 326	132, 213, 226, 330, 331, 333, 334
Ong How *v.* Abdulrahman	Str. L. R. 354	231

		PAGE.
Opium Farmer *v.* Koh Boo Ann	Str. L. R. 278	190, 191
Oridge *v.* Sherborne	11 M. & W. 374	182
Oriental Inland Steam Navigation Co. *v.* Scinde Railway Co.	9 L. R. Ch. Ap. 557	571, 576, 578, 580, 581, 582
Orr *v.* Newton	2 Cox 274	590
Orr Ewing & Co. *v.* Johnston	7 L. R. App. Ca. 219	270
Osborne *v.* Rowlett	13 L. R. Ch. Div. 774	499
Overhill's Trusts, *In re*	1 Sm. & Gif. 362	138

P.

Paine *v.* Hutchinson	3 L. R. Eq. 257, on App. 3 L. R. Ch. Ap. 388.	544, 545
Palaniapah Chetty *v.* Lim Poh	1 Kyshe, 548	7, 182
Palmer *v.* Temple	9 Ad. & E. 508	253, 256
Parker, *In re*	15 L. R. C. D. 528, s.c. 17 C. D. 264	132
Parkes, *In re*	13 L. R. [Ir.] 85	400
Parmeter *v.* Attorney-General	10 Price, 378, 412	57, 65
Parnell, *In re*	10 L. R. Ch. Ap. 512	253, 256
Parsons *v.* Bland	38 W. R. 388	621, 622, 625
Pascal *v.* Richards	44 L. T. [N.S.] 87	418
Paul *v.* Children	12 L. R. Eq. 16	129
Payler *v.* Homersham	4 M. & S. 423	148
Peace *v.* Hains	11 Hare 151	90
Pearce *v.* Watts	20 L. R. Eq. 492	588
Pearks *v.* Moseley	5 L. R. Ap. Ca. 714	213
Pearree, *Ex-parte*	25 L. R. Ch. Div. 656	624
Peat *v.* Jones	8 L. R. Q. B. Div. 147	285
Peirce *v.* Corf	9 ——— 210	83
Perry *v.* Jenkins	1 M. & C. 116	312
Peterson *v.* Hicksman	2 W. & T. 506	421
Peto *v.* West Ham	28 L. J. M. C. 240	105, 108
Phelips *v.* Hadman District Board	1 C. & E. 67	214, 484
Phillips *v.* Phillips	4 De G. F. & J. 208	155
Phips *v.* Ingram	3 Dow. 669	209
Phosphate Sewage Co. *v.* Molleson	4 L. R. Ap. Ca. 801	421
Pickard *v.* Bretz	5 H. & N. 9	184
——— *v.* Marriage	1 L. R. Ex. Div. 364	184, 532
Pickering *v.* Stephenson	14 L. R. Eq. 322	489
Pickord *v.* Sears	6 L. R. Ex. Div. 364	121
Pillings' Trusts, *In re*	26 L. R. Ch. Div. 432	499
Pinnel's Case, *In re*	5 Rep. 117	588
Piper, *In re*	4 Kyshe, 221 [infrà]	348
Plant *v.* Cotterell	29 L. J. Ex. 198	445
Plimmer *v.* Mayor, &c., of Wellington	9 App. Ca. 699, 714	67
Plews *v.* Baker	16 L. R. Eq. 564	596
——— *v.* Middleton	6 Q. B. 845	209
Pollard's Case	2 L. R. P. C. 106	438
Pootoo *v.* Valee Utu Taven	1 Kyshe, 622	328, 334
Porcheste *v.* Petric	3 Doug. 273	438
Postlethwaite *v.* Rickman	36 W. R. 808	590
Poulton *v.* Lattimore	9 B. & C. 259	340
Powell *v.* Butler	5 Ir. R. C. L. 309	452
——— *v.* Farmer	34 L. J. [N.S.] C. P. 72	116
——— *v.* Thomas	6 Hare, 300	356
Pratt *v.* Swaine	8 B. & C. 285	312
Prestney *v.* Mayor of Colchester	21 L. R. Ch. Div. 111	509
Proctor *v.* Mainwaring	3 B. & Ald. 145	605
Prunath Chowdry *v.* Rakeah Begum	7 Moo. Ind. Ap. 323	138
Pryor *v.* Pryor	10 L. R. Ch. Ap. 469	75
Pulido *v.* Musgrave	5 L. R. Ap. Ca. 102	438
Pullen *v.* Suelus	48 L. J. C. P. [N.S.] 394	344
Punghulu Allang *v.* Him	3 Kyshe, 144	239, 606, 608

Q.

		PAGE.
Quarrier *v.* Colston	1 Ph. 147	127
Queen *v.* Chandra Sekhar Roy	5 Ben. L. R. 100	157
—— *v.* Dwarkanath Dutt	7 W. R. Cr. 15	651
—— *v.* Farrell	3 Cox C. C. 139	318
—— *v.* Gibson	18 L. J. Q. B. Div. 537	507
—— *v.* Grand Junction Railway	13 L. J. M. C. 221	106, 108
—— *v.* Great Western Railway Co.	15 —— 88	108
—— *v.* Heeraman Huloye	5 W. R. Cr. 5	336
—— *v.* Herm Lal Das	8 Ben. L. R. 422	157
—— *v.* Jordan	36 W. R. 589. Affd. Ibid. 797	438
—— *v.* Midland Railway Co.	10 L. R. Q. B. 389	105, 108
—— *v.* Nuddy Moosalamee	6 Suth. W. R. Cr. R. 60	514
—— *v.* Overseers of Neath	6 L. R. Q. B. 707	109, 116
—— *v.* Panna & ors.	7 N. W. P. H. C. Rep. 202	652, 662
—— *v.* Payne	1 L. R. C. C. R. 347	516, 518
—— *v.* Southwark & Vauxhall Co.	6 E. & B. 1008	109, 114
—— *v.* Thompson	1 L. R. C. C. R. 377	516
—— *v.* Ungun Lall	N. W. R. Selected Cases, 21	157
Quincey *v.* Sharpe	1 L. R. Ex. Div. 72	138

R.

Rada Bhai *v.* Shama	4 Bom. H. Ct. Rep. [App.] 155	226
Rameshur Pershad *v.* Koonj Behari	4 L. R. App. Ca. 121	452
Ramsamy *v.* Low	4 Kyshe 396. [infrà]	230, 524, 525, 526, 527
Ramsay *v.* Shelmedine	1 L. R. Eq. 129	267
Raudegger *v.* Holmes	1 L. R. C. P. 679	596
Rawlins, *In re*	18 L. R. Q. B. Div. 489	622, 624
Redgrave *v.* Hurd	20 L. R. Ch. Div. 1	545
Reed & Bowen, *In re*	17 L. R. Q. B. Div. 244	673
—— *v.* Cowmeadow	6 Ad. & E. 661	241
Reeves *v.* Brymer	6 Ves. 516	90
—— Trust, *In re*	4 L. R. Ch. Div. 841	90
Regina *v.* Abass	3 Kyshe, 184	237
—— *v.* Adams	50 J. P. 136	517
—— *v.* Appleby	3 Stark. 33	516
—— *v.* Baker	26 L. J. M. C. 193, s.c. 7 El & B. C. 697	190
—— *v.* Barley	2 Cox C. C. 191	318
—— *v.* Beckwith	7 —— 505	606
—— *v.* Bertrand	1 L. R. P. C. 520, s.c. 36 L. J. P. C. [N.S.] 51	81, 176, 177, 352
—— *v.* Brittleton	12 L. R. Q. B. Div. 266, s.c. 50 L. T. [N.S.] 276	123, 518
—— *v.* Bull	9 C. & P. 22	318
—— *v.* Burdett	24 L. J. M. C. 63	517
—— *v.* Burns	16 Cox C. C. 195	606
—— *v.* Carpenter	1 —— 72	318
—— *v.* Cassidy	1 F. & F. 79	317
—— *v.* Chan Ah Tye & ors.	4 Kyshe, 518 [infrà]	617
—— *v.* Chapman	8 C. & P. 558	318
—— *v.* Chapple	9 —— 355	496
—— *v.* Christie	1 Fos & Fin 75	606
—— *v.* Clegg	19 L. T. [N.S.] 47	517
—— *v.* Commissioners of Pagham Level	8 B. & C. 355	30, 31, 32, 48, 50, 55, 64
—— *v.* Cooper	46 L. J. M. C. 219	442
—— *v.* Dayal Jairaj & ors.	3 Bom. H. C. Rep. Cr. C. 58	662
—— *v.* Denoo Bundhoo	12 W. R. Cr. 1	251
—— *v.* Drury	18 L. J. M. C. 189	406, 407

		PAGE.
Regina *v.* Debruiel	11 Cox C. C. 207	495
—— *v.* Dunn	12 Ad. & E. 599, 619	278
—— *v.* Edwards	3 Cox C. C. 82	317, 318
—— *v.* Fowler	4 B. & Ald. 273	507
—— *v.* Fursey	6 C. & P. 81	358
—— *v.* Ganz	9 L. R. Q. B. Div. 93	228
—— *v.* Ganu bin Tatia Selar	5 Bom. H. C. Cr. 38	157
—— *v.* Gilmore	15 Cox C. C. 85.	406
—— *v.* Green	4 Kyshe, 401, [infrà]	666
—— *v.* Hagan	8 C. & P. 167	177
—— *v.* Hanson	Cited in Paley on Con., 123	666
—— *v.* Harris	1 L. R. C. C. R. 282	84
—— *v.* Holden	8 C. & P. 606	318
—— *v.* Hunt	2 Cox C. C. 261.	177
—— *v.* Jordan	1 Leach C. C. 515	496
—— *v.* Kadir	2 Kyshe [Cr. Rulings] 105	163
—— *v.* Kenny	2 L. R. Q. B. Div. 307	123
—— *v.* Khatabai	6 Bom. H. C. Rep. Cr. C. 9	123
—— *v.* Lauvadier	15 Cox C. C. 329	223, 348
—— *v.* Lee Cheng.	2 Kyshe [Cr. Rulings] 88	324
—— *v.* —— Hong Kang & ors.	3 Ibid. 145	238
—— *v.* —— Kan & ors.	4 Kyshe, 560 [infrà]	593
—— *v.* Lim Peng & ors.	3 Ibid. 84	162
—— *v.* Lloyd	19 L. R. Q. B. Div. 213	352
—— *v.* Maurer	10 Q. B. Div. 513	349, 372
—— *v.* Moah	25 L. J. M. C. 66	442
—— *v.* Mun Bomoh & ors.	2 Kyshe [Cr. R.] 110	231
—— *v.* Murphy	2 L. R. P. C. 535, 552	507, 509
—— *v.* Newman	51 L. J. M. C. 87	442
—— *v.* Nillins	53 ———— 157	223
—— *v.* Ooi Tim & ors.	3 Kyshe, 119	190
—— *v.* Overree & anor.	2 Ibid. [Cr. R.] 88	324
—— *v.* Owen	20 L. R. Q. B. Div. 829	517
—— *v.* Parkinson	2 Den. C. C. 459	496
—— *v.* Portugal	16 L. R. Q. B. Div. 487	223
—— *v.* Pym	1 Cox Cr. C. 339	338
—— *v.* Ramtohul Singh	5 W. R. Cr. 12	348
—— *v.* Salmons	1 T. R. 251	190
—— *v.* Scaife	17 Q. B. 241	516
—— *v.* Shaik Ishmael Lebby	3 Kyshe, 99	239
—— *v.* Sheen	2 C. & P. 634	406
—— *v.* Sheik Hossain	3 Kyshe, 98	237, 520
—— *v.* Shurmer	17 L. R. Q. B. Div. 323	176, 177
—— *v.* Sirdar Khan	2 Kyshe, [Hab. Cor. Ca.] 43	151, 223, 372
—— *v.* Swinnerton	C & M. 593	516
—— *v.* Tan Sin Hap	3 Kyshe, 94	617
—— *v.* Taylor	1 Fos. & Fin. 535	606
—— *v.* Thompson	1 L. R. C. C. R. 377	123
—— *v.* Turner	5 M. & S. 206	666
—— *v.* Ward	7 Cox C. C. 421	517
—— *v.* Wealand	20 L. R. Q. B. Div. 827	517
—— *v.* Webster	16 ———— 134	385
—— *v.* Weil	9 ———— 701	372, 373, 374
—— *v.* Willans	3 Kyshe, 16, 19. 23, 27	32, 330, 334, 603
—— *v.* Wilson	3 L. R. Q. B. Div. 42	348
Rennie *v.* Young	2 De G. & J. 136	426
Republic of Peru *v.* Dreyfus	38 L. R. Ch. Div. 348	511
Rex *v.* Beezley	4 C. & P. 220	318
—— *v.* Bodle	6 ——— 186	318
—— *v.* Dawson	13 St. Tr. 454	174
—— *v.* Harris & Woods	7 C. & P. 581	318
—— *v.* Justices of Essex	2 Chit. 385	153
—— *v.* ———— Wilts	8 B. & C. 380	153

		PAGE.
Rex *v.* Owen	1 Mood. C. C. 96	496
—— *v.* Pavey	7 C. & P. 839	655
—— *v.* Simmonds	1 C. & P. 84	318
—— *v.* Staffordshire Justices	1 Chit. 217	153
—— *v.* Taylor	3 B. & C. 502	662
—— *v.* Trafford	1 B. & Ad. 874	31, 49, 55, 64
—— *v.* Turner	R. & M. C. C. R. 239	652
—— *v.* Ward	4 Ad. & E. 384	24
—— *v.* Woodhead	2 C. & K. 520	317, 318
Rhoades, *In re*	29 L. R. Ch. Div. 142	267
Richardson *v.* Boston	24 How. [U.S.] 188	60
Ridgway *v.* The Hungerford Market Co.	3 Ad. & El. 171	96
Riding *v.* Smith	1 L. R. Ex. Div. 91	367
Roberts, *In re*	27 L. R. Ch. Div. 346, on App. 30 L. R. Ch. Div. 234	267
—— *v.* Bury Commissioners	4 L. R. C. P. 755	307, 308
—— *v.* Orchard	33 L. J. Ex. 65	241
—— *v.* Richards	50 L. J. C. 297, on App. W. N. [1881] 156	452
—— *v.* Roberts	33 L. J. Q. B. 249	367
Robertson *v.* Norris	1 Giff. 421	359, 362
Robinson *v.* Cox	9 Mad. 263	7
—— *v.* Ridley	6 —— 2	355
—— *In the goods of*	1 L. R Pro. & Div. 384	179
Rodgers *v.* Rodgers	31 L. T. [N.S.] 285	395
Rodney *v.* Chambers	2 East 283	328
Roe d Dodson *v.* Grew	2 Wils. 322	609, 612, 613
Rogers *v.* Powell	38 L. J. Ch. [N.S.] 648	420
Rolt *v.* Cox	2 Wils. 253	345
Rose *v.* Groves	5 Man. & G. 613	24
—— *v.* Miles	4 M. & S. 101	4
Ross *v.* Boards	8 Ad. & E. 290	209
——' Trusts, *In re*	13 L. R Eq. 290	325, 326
Rudge *v.* Bowman	3 L. R. Q. B. 689	544
Rumbold *v.* Metropolitan Bank	2 —— 194	465
Russell, *In the goods of*	2 Kyshe [Ecc. Ca.] 6	90
Rykschroeff, *In re*	2 Ibid. [Hab. Cor. Ca.] 10	348

S.

Saffigu *v.* Adams	Cro. Jac. 61	312
Sahrip *v.* Mitchell and anor	Str. L. R. 466	250
Salkeld, *In re*	12 Ad. and E. 767	210
Salmah & anor. *v.* Soolong	1 Kyshe, 421	328
Salmon *v.* Duncombe	11 L. R. Ap. Ca. 627	241, 261
Sampson *v.* Sampson	8 L. R. Eq. 479	102
Sandilands, Buttery & Co. *v.* Municipal Commissioners	Str. L. R. 309	452
—— *In the goods of*	Penang Case [unreported]	594
Santos *v.* Illidge	6 C. B. [N.S.] 841	127
Sard *v.* Rhodes	1 M. and W. 153	588
Saunders *v.* Saunders.	2 East 254	215
Savage *v.* Foster	8 Mod. 35	87
Saxonia, The	Lush. 410	480
Sayers *v.* Collyer	28 L. R. Ch. Div. 103	252, 257
Scarf *v.* Jardine	7 L. R. Ap. Ca. 345, 351	588
Scott *v.* Nixon	3 D. & W.	459
—— *v.* Stanfield	3 L. R. Ex. 220	438
Scratton *v.* Brown	4 B. & C. 485	24
Seaton *v.* Seaton	36 W. R. 865	421, 426

		PAGE.
Secunder *v.* Kyamboo	3 Kyshe, 116	77
Seddon *v.* Tutop	6 T. R. 607	421
Selby *v.* Higgs	15 L. R. Q. B. Div. 619	621, 624
Selmes *v.* Judge	6——————724.	215, 218, 241, 247, 487
Selwyn *v.* Garfit	38 L. R. Ch. Div. 273	664
Serrao *v.* Noel	15 L. R. Q. B Div. 549	421
Shafto's Trust. *In re*	29 L. R. Ch. Div. 247	498
Shaik Ahmoodeen Moallen *v.* Mamat Safoora Bilice	6 Suth. W. R. Misc. Rules 125	334
Shaik Madar *v.* Jaharrah	1 Kyshe, 385	328
Sharpe *v.* Foy	4 L. R. Ch. Ap. 35, 42	87
——— *v.* Johnson	4 Dowl. 324	73
Shatomah *v.* Kader Meydin	Str. L. R. 275	225
Shaw *v.* Fisher	2 De G. & S. 11	465
——— *v.* Port Philip Mining Co.	13 L. R. Q. B. Div. 103	465
Shedumbrum Chetty *v.* Adagappa Chetty	1 Kyshe, 663	421
Sheffield Benefit Building Society *v.* Harrison	15 L. R. Q. B. Div. 358	676
Sherratt *v.* Mountford	15 L. R. Eq. 305	133
Showell *v.* Winkup	60 L. T. [N.S.] 391	509
Sibree *v.* Tripp	15 M. & W. 33	588
Simpson *v.* Charing Cross Bank	34 W. R. 568	471
Sims *v.* Bond	5 B. & Ad. 389	563
Singer Manu. Co. *v.* Wilson	2 L. R. Ch. Div. 434	395
Skeet *v.* Lindsay	2 L. R. Ex. Div. 314	138
Skrymsher *v.* Northcote	1 Swan 566, 570	267
Slaney *v.* Watney	2 L. R. Eq. 418	90
Smart *v.* Magistrates of Dundee	8 Bro. Par. Ca. 119	39
Smith *v.* Smith	20 L. R. Eq. 500	444
——— *v.* Monteith	13 M. & W. 427	73
Soanes *v.* Edge	Johns. 69	584
Société Générale de Paris *v.* Dreyfus	37 L. R. Ch. Div. 215	511
——————— *v.* Walker	11 L. R. Ap. Ca. 20	465, 470
Soilleux *v.* Herbst	2 B. & P. 444	328
Somervill *v.* Hawkins	20 L. J. C. P. 131	367
Somerville *v.* Schembri	12 L. R. Ap. Ca. 453	272, 404
Spiller, *In re*	18 L. R. Ch. Div. 614	267
Spread *v.* Morgan	11 H. L. C. 588	427
Springett *v.* Jenings	10 L. R. Eq. 488, on App. 6 L. R. Ch. Ap. 333	267
Sreenath Ghose, *In re*	10 W. R. C. R. 33	157
St. Leonard's Parochial Schools, *In re*	10 L. R. App. Ca. 308	505
Stacey *v.* Elph	1 My. & K. 195	590
Stamford, *Ex-parte*	17 L. R. Q. B. Div. 259	622, 624, 626
Steel *v.* State Line Steamship Co.	4 L. R. Ap. Ca. 72	678
Stein *v.* Valkenhuysen	27 L. J. Q. B. [N.S.] 237, 238	630
Stephens *v.* Peel	16 L. T. [N.S.] 145	270
Stikeman *v.* Dawson	1 De G. & Sm. 90	87
Stockport Waterworks Co. *v.* Potter	3 H. & C. 300	452
Strathnaver, The	1 L. R. Ap. Ca. 58	203
Stickland *v.* Weldon	28 L. R. Ch. Div. 426	505, 508
Stringer *v.* Gardiner	27 Beav. 35	132
Strong *v.* Bird	18 L. R. Eq. 315	90
Stuart *v.* Greene	5 Ir. R. Eq. 470	509
Sturgis *v.* Champneys	5 M. & C. 97	378
Sutcliffe *v.* Booth	32 L. J. Q. B. [N.S.] 136	452
Sutton *v.* Sutton	22 L. R. Ch. Div. 511	436
Suwerkrop *v.* Day	8 Ad. & El. 624	192
Swan *v.* Swan	8 Price, 518	421
Sykes *v.* Sykes	4 L. R. Eq. 200, on App. 3 L. R. Ch. Ap. 301	267

T.

		PAGE.
Taafe *v.* Downes	3 Moo. P. C. C. 28 [note]	438
Tan Kay *v.* Tan Lat	Woods' Or. Ca. Appx. 3	73
Tan Kim Keng & anor. *v.* Municipal Commissioners	1 Kyshe. 478	215, 451, 452
Tan Tek Soon & ors. *v.* Tan Ching Seng & ors.	Singapore Case [not reported]	585
Tanner *v.* Smart	6 B. & C. 603	147
Taylor *v.* Caldwell	32 L. J. Q. B. [N.S.] 164	160
—— *v.* Manners	1 L. R. Ch. App. 48	90
—— *v.* Martindale	1 Y. & C. C. C. 658	454
—— *v.* Meads	34 L. J. Ch. [N. S.] 203	225, 228
—— *v.* Nesfield	3 El. & Bl. 724	241
—— *v.* Portington	7 De. G. M. & G. 328	583
—— *v.* Taylor	20 L. R. Eq. 155	270
Ternan, *In re*	33 L. J. M. C. 201	172, 288
Terraz, *Ex-parte*	4 L. R. Ex. Div. 63	223, 224
Thomas *v.* Brown	1 L. R. Q. B. Div. 714	253, 256
—— *v.* Kelly	13 L. R. App. Ca. 506	622, 624
—— *v.* Morris	16 L. T. [N.S.] 398	208
Thompson *v.* Christie	1 Macg. H. L. 236	196
Thorburn *v.* Barnes	2 L. R. C. P. 384	209
Thorpe *v.* Cregeen	55 L. J. Q. B. 80	472
Tidswell, *In re*	33 Beav. 213	209
Tillam *v.* Copp	5 C. B. 211	209
Tollett *v.* Thomas	6 L. R. Q. B. 521	598
Toogood *v.* Spyring	1 C. M. & R. 181, 193	367
Tozer *v.* Child	6 E. & B. 289	438
Trafford *v.* The King	8 Bing. 204	49
Tufnell *v.* Constable	8 Sim. 69	90
Tunnicliffe *v.* Teed	17 L. J. M. C.	556
Tunno & Bird, *In re*	5 B. & A. 488	209
Turner *v.* Hancock	20 L. R. Ch. Div. 303	199

U.

Ullee, *In re*	53 L. T. [N.S.] 711 s.c. on App. 54 L. T. [N.S.] 286	334
Underhill *v.* Stamp	1 Ld. Raymond, 254	530
Ung Ah Chin *v.* Cheah Tek Soon	4 Kyshe [infrà]	253
Ungley *v.* Ungley	4 L. R. Ch. Div. 73, on App. 5 L. R. Ch. Div. 887	464
Union Bank *v.* Lenanton	3 L. R. C. P. Div. 243	596
United Joint Stock Association, *Ex-parte*	3 De G. & J. 63	87
United States *v.* Klintoch	5 Wheaton's Rep.	172
—— *v.* Pirates	—— 184	172
Usill *v.* Hales	3 L. R. C. P. Div. 319	153

V.

Vaughan *v.* Venderstegen	23 L. J. Ch. [N.S.] 793	87
Vauxhall Case	6 E. & B. 1008	109
Veale's Trusts, *In re*	5 L. R. Ch. Div, 622	132
Veazie *v.* Williams	3 Sto. 633	363
Venour's Settled Estate, *In re*	2 L. R. Ch. Div. 522	436
Veramah *v.* Thaivoo	3 Kyshe, 117	231
Versay *v.* Mahomed Haniff	3 Ibid. 79	231
Vickers *v.* Vickers	4 L. R. Eq. 529	67
Vivid, The	1 Asp. [N.S.,] 601	480
Vyse *v.* Foster	8 L. R. Ch. Ap. 309	196

W.

		PAGE.
Waddell *v.* Blockey	4 L. R. Q. B. Div. 678	545
Wake *v.* Hill	7 ——— 296, Affd. 8 Ap. Ca. 195	676
Walcott *v.* Lyons	29 L. R. Ch. Div. 584	509
Walker *v.* Foobisher	6 Ves. 70	209
——— & Hughes' Contract, *In re*	24 L. R. Ch. Div. 698	498
——— *v.* London & N. W. Railway Co.	1 L. R. C. P. Div. 518. Affd. on App. 36 L. T. [N.S.] 53, 58 [note] 297, 301, 306, 307, 308, 309, 310	
Wall *v* Stubbs	1 Madd. 80	545
Walley *v.* Walley	1 Vern. 484	355, 421, 426
Walmesley *v.* Walmesley	3 Jo. & Lat. 556	383
Walshe *v.* Provan	8 Ex. 852	562, 563
Ward *v.* Dudley	57 L. T. [N.S.] 20	676
Warner *v.* Jacob	20 L. R. Ch. Div. 220, s.c. 46 L. T. [N.S.] 657	359, 362, 664
Watkins *v.* Evans	18 L. R. Q. B. Div. 386.	623, 626, 627
Watson *v.* Bodell	14 L. J. Ex. 281	438
——— *v.* Fraser	R. & M. 17	208
Watts, *In re*	22 L. R. Ch. Div. 5	199
Webb *v.* Firmauer	3 M. & W. 473	624, 626
——— *v.* Kirby	7 De G. M. & G. 376	192
Webster, *Ex-parte*	22 L. R. Ch. Div. 136	400
Wederbun *v.* Wederbun	4 My. & Cr. 41	590
Wedge *v.* Berkeley	6 Ad. & E. 663	241
Welch *v.* Knott	4 K. & J. 747	270
Wells' Estate, *In re*	6 L. R. Eq. 599	132
——— *v.* Wells	18 ——— 504.	132
Whelpdale's Case	3 Co. 241	73
White *v.* Morris	21 L. J. C. P. [N.S.]. 185	625
Whitehouse *v.* Fellowes	30 L. J. C. P. 305	452, 453
Whittaker *v.* Whittaker	21 L. R. Ch. Div. 657	125
Wild's Case	6 Coke's Rep. 17	584, 585
Wilkins, *In re*	8 L. R. Q. B. 107	2
Wilkinson *v.* Adam	1 V. & B. 422	129, 130
——— *v.* Schneider	9 L. R. Eq. 423	267
Wilks *v.* Davis	3 Mer. 507	67
Willesford *v.* Watson	14 L. R. Eq. 572	596
Williams, *In re*	25 L. R. Ch. Div. 656	624
——— *v.* Snowden	W. N. [1880] 124	356, 664
——— *v.* Stevens	9 Q. B. 14	79
——— *v.* Stratton	50 L. J. Ch. [N.S.] 495	87
——— *v.* Walker	9 L. R. Q. B Div. 576	225
——— *v.* Wilcox	8 Ad. & E. 314	24
Willis *v.* McLacklen	1 L. R. Eq. 376	438
Willoughby, *In re*	30 L. R. Ch. Div. 324	334
Winter *v.* Brockwell	8 East 308	67
——— *v.* Letchbridge	McCle. 253	208
Wood *v.* Wand	3 Ex. 748	452
Woodward *v.* Humpage	8 Jur. [N.S.] 256	90
Woolam *v.* Hearn	2 W. & T. L. C. in Eq. 404	252
Wootton *v.* Collins	Mich. 9 Geo. II.	73
Wordsworth *v.* Harley	1 B. & Ad. 391	215, 241, 452
Worly *v.* Worly	28 Beav. 58	590
Wotherspoon *v.* Currie	5 L. R. H. L. 508	273, 278, 404
Wright *v.* Colls	19 L. J. C. P. 60, s. c. 8 C. B. 150	23, 24
——— *v.* Leonard	11 C. B. [N.S.] 258	87
——— *v.* Morley	11 Ves. 12	379
Wyld, *Ex-parte*	30 L. J. Bank. 10	308

Y.

		PAGE.
Yates *v.* Milwankee	10 Wallace, 497	60
Yeap Cheah Neoh *v.* Ong Cheng Neo	6 L. R. P. C. 318, s. c. 1 Kyshe, 326. 132, 213, 226, 330, 331, 333, 334	
Yeo *v.* Dawe	32 W. R. 203, Rev. on App. 33 W. R. 739, s. c. 53 L. T. [N.S.] 125	182
Yeomans *v.* Williams	1 L. R. Eq. 184	90
Yorkshire Engine Co. *v.* Wright	21 W. R. 15	2
Young *v.* Bank of Bengal	1 Moo. P. C. C. 150	282

Z.

Zouch *v.* Wallinsgate	1 H. Bl. 31	79

ERRATA.

Page.	
46	Line 6; *dele* brackets.
125	last word of foot-note—*for* "cotss" *read* "costs."
149	line 50; *for* "forlorne" *read* "forlorn."
151	last word of foot-note; *for* "nfrà" *read* "infrà."
181	line 9; *for* "Mamomed Cader Hussain" *read* "Mahomed Cader Hussain"
,,	,, 9 of head-note; *for* "agreament" *read* "agreement."
,,	,, 26; *for* "as follow" *read* "as follows."
256	,, 26; *for* "purehase" *read* "purchase."
,,	,, 34; *for* "ferfeiture" *read* "forfeiture."
257	,, 10; *for* "plaontiff" *read* "plaintiff."
409	,, 9 of head-note; *for* "A purchase of land" *read* "A purchaser of land."
416	,, 1 ,, ; *for* "Sections 153 and 107" *read* "Sections 153 and 207."
,,	,, 16 ,, ; *for* "Story's Eq. Jurisdiction" *read* "Story's Equity Jurisprudence."
433	margin; *before* "Nov. 12." *insert* "1888."
441	line 1 of head-note; *for* "uses" *read* "user."
558	,, 6 from bottom; *for* "wos" *read* "was."
625	,, 20; *for* "mortgage" *read* "mortgagee."
628	*Donohue* v. *Joaquim*, line 5; *for* "struck not" *read* "struck out."

Note.—*For correct quotation and spelling of "Cases Cited" in this Volume, see "Table of Cases Cited."*—Suprà.

CASES

HEARD AND DETERMINED

IN

HER MAJESTY'S SUPREME COURT

OF THE

STRAITS SETTLEMENTS,

1808—1884.

VOLUME IV.

1885—1890.

CIVIL, ECCLESIASTICAL, HABEAS CORPUS, ADMIRALTY

AND

BANKRUPTCY CASES;

CRIMINAL RULINGS AND MAGISTRATES' APPEALS.

CHAWANA MAHOMED HUSSEIN *v.* MAHOMED MUSTAN.

PENANG.

SIDGREAVES, C. J.

1885.

February 9.

A defendant who has been arrested on mesne process, under Section 422 B. of the Civil Procedure Ordinance 5 of 1878, and given security that he will not leave the jurisdiction without the permission of the Court, is at liberty to leave without such permission immediately after the plaintiff has obtained judgment in the action. The security bond is at an end no sooner such judgment is pronounced, and the sureties therein, cannot be made liable thereon for the departure of the defendant after the date of such judgment.

The words "either ..... or otherwise" in the aforesaid section, have no meaning, or at least do not extend the "prosecution" of the action beyond final judgment, and though they are not found in the corresponding section of the English Debtor's Act [32 & 33 Vict., c. 62, s. 6] the effect of the two sections is the same, and the English cases on the latter, are authorities on the construction of the former.

Yorkshire Engine Co., v. *Wright*, 21 W. R. 16 [*dictum* of Bramwell, B.] approved and followed.

This was an action on a bail bond entered into by the defendant as surety for one Shina Tamby. The plaintiff on the 5th June, 1884, had commenced an action against the said Shina Tamby, and also procured his arrest, under Section 422 B. of the Civil Procedure Ordinance 5 of 1878, [as amended by Ordinance 8 of 1880] on mesne process. The defendant went bail for the

SIDGREAVES, C. J. 1885.

CHAWANA MAHOMED HUSSEIN v. MAHOMED MUSTAN.

said Shina Tamby, in a specified sum, and executed the bond herein sued on. The bond, after reciting the action against Shina Tamby and his arrest as aforesaid, was conditioned to be of no effect "if the said Shina Tamby should not leave the jurisdiction of the Supreme Court, without the leave of the said Court, first had and obtained." There was nothing in the bond to shew it was intended to be a security only till judgment, nor anything to mark its duration. Shina Tamby put in no appearance to the action, and on the 13th June aforesaid, the plaintiff signed final judgment against him and took out execution. On the 14th June, the said Shina Tamby left the jurisdiction for Larut, without first obtaining the leave of the Court. The plaintiff then sued the defendant, the surety, on the bond, to recover the sum specified alleging that the condition of the bond had been broken.

Ross, for defendant contended, there had been no breach of the condition, as Section 422 B., only intended to secure the presence of the defendant up to judgment, and that arrest after judgment was provided for by Section 393 of the Ordinance [as amended.] He cited *Re* Wilkins, 8 L. R. Q. B. 107, and *Hume* v. *Duff*, 8 L. R. Ex. 214, as in point.

Van Someren, for the plaintiff conceded, that if Section 422 B. was worded in the same way as Section 6 of the English Debtor's Act of 1869 [32 & 33 Vict., c. 62] on which the cases cited turned, they would be conclusive against him, though possibly it might at first sight be thought that those cases were distinguishable, as in neither of them had the defendant been bailed, but was in custody in prison—such a fact however, made no difference as appears by the *dictum* of Bramwell, B. in *Yorkshire Engine Company* v. *Wright*, 21 W. R. p. 16. Those cases however, in truth, were no authorities on Section 422 B. as that Section dealt with the absence of the defendant, as materially prejudicing the plaintiff "*either* in the prosecution of his suit, *or otherwise*." The cases cited only shewed that the "prosecution" of the action stopped with final judgment, but the words of Section 422 B. meant by "either ..... or otherwise" something beyond or other than the "prosecution" of the action: that Section 393 in no way interfered with this contention, as full scope could be given to that Section, by holding it applicable to arrests after judgment, *where the defendant had not been arrested before;* and full scope could also be given to the three extra words in Section 422 B., as applicable to the detention of the defendant, or continuing his bail, even after judgment, where he *had been* arrested before. The Legislature must have meant something by the insertion of those words, but the argument on the other side would treat them as if they were not in the Section, it gave no meaning to them at all.

Sidgreaves, C.J.—This case turns on Section 422 B. of the Civil Procedure Ordinance, which is as follows:—

"When the plaintiff in any Civil proceeding in the Supreme Court proves, at any time *before final judgment*, decree, or order, by evidence on oath, to the satisfaction of the Court that the plaintiff has a good cause of

action or other valid claim against the defendant, and that there is probable cause for believing either that the defendant is concealing himself ..... or that he has removed or concealed any of his property ..... or having regard to his conduct or to the state of his affairs or otherwise, that he has withdrawn, or is about to withdraw himself or any of his property from the Settlement for the purpose of avoiding the process of the Court, or under such other circumstances as to induce the Court to believe that the ends of justice are likely to be defeated unless he be arrested; and that there is also probable cause for believing that the absence of the defendant from the Settlement will materially prejudice the plaintiff, *either* in the prosecution of his suit, *or otherwise*, the Court may order such defendant to be arrested and imprisoned for a period not exceeding six months unless and until he sooner gives security ..... that he will not go out of the Settlement without the leave of the Court."

The question is, what is the meaning or effect of the words "either in the prosecution of his suit or otherwise." Now looking at the whole scope and object of the Section, there can be no doubt it was meant to apply only to cases *before* final judgment, and if corroborative evidence is required to this fact, we have it in Section 393, which provides for arrests after judgment. If Section 422 B. had been worded as in the English Act, there could be no doubt as to the effect of the Section, but the words "either .. .. or otherwise"—words not to be found in the English Act,—are said to make a difference in the meaning to be given to the Section. The cases cited by the Counsel for the defendant are conclusive to shew that the "prosecution" of the action terminates with final judgment, and the case of *Yorkshire Engine Company* v. *Wright*, cited by the Counsel for the plaintiff, is still stronger and more applicable to the present case, as shewing the effect of final judgment even on the security bond entered into by the defendant. Then do these words "either ... . or otherwise" make any difference? I think not. We are to look at the Section as a whole, and give no greater effect to these words, than the whole scope and object of the Section requires. Judging from my own experience of our local Legislature, and knowing how redundant expressions are sometimes put into Ordinances, perhaps to satisfy some question that is raised, but without intending to alter the effect of the Section, I cannot but look on these words as of that character, and consider they really have no meaning. In any case, I am of opinion those words do not extend the "prosecution" of the action beyond final judgment. I consider there is no difference in meaning on this point between Section 422 B. and the corresponding Section in the English Debtor's Act, and the authorities decided on the latter, are authorities on the former. The bond was therefore at an end when final judgment was entered up against Shina Tamby, and he was not liable to be held on bail after that date. It is admitted he left the jurisdiction only after that date, and there has been therefore no breach of the condition of the defendant's bond. The judgment must be for the defendant with costs.

Judgment for defendant.

KHAN MAHOMED *v* KATZ BROTHERS.

PENANG.

SIDGREAVES, C. J.

1885.

February 18.

If a riparian proprietor erects an embankment on his own land as a protection to his land against the river, and thereby causes injury to the land of his opposite neighbour, he is liable in damages to such neighbour for the loss sustained by the injury.

A riparian proprietor finding his land was being washed away by the river, which was gradually leaving its old channel and was encroaching on his land, drove in piles in the river, in a line which was his original boundary by grant prior to the washing away of his land, with a view to reclaiming his land, but in so doing obstructed the free use of the new channel by adjoining riparian proprietors, who, in consequence, sustained special damage by being put to extra expense in bringing their goods by another route to their land and in removing the piles,

Held, he was liable to them for such special damage, although the obstruction may have also been a public nuisance.

The nature and facts of the plaintiff's case sufficiently appear in the judgment. The defendant counter-claimed by reason of the plaintiff having driven in piles into the river to the limit of his original boundary with a view to reclaiming his land, and thereby obstructing them from bringing up their goods in boats to their land, which necessitated them bringing their goods overland at an extra expense, and also further expense in removing portion of the piles. The obstruction was a public nuisance, and the plaintiff had been prosecuted by the Crown for it until it was entirely removed.

Ross [*Van Someren* with him] for the plaintiff, cited *Bickett* v. *Morris*, 1 L. R. Sc. & Div. App. 47; *Attorney-General* v. *Lonsdale*, 7 L. R. Eq. 377; and on the counter-claim *Rose* v. *Mills*, 4 M. & S. 101.

Thomas for defendants.

Cur. Adv. Vult.

March 9. *Sidgreaves*, C.J. In this case, the plaintiff who is possessed of land situate at the south side of the Penang River, and whose northern boundary is the said river, sues the defendants who occupy land nearly opposite, and whose southern boundary is the said river, for damages alleged to have been sustained by him in consequence of the defendants having lately raised a granite and brick embankment or wall by the side of the said river, along their southern boundary, which caused a silting up of the said river and a diversion of it on to the plaintiff's land. If this injury has accrued to the plaintiff's land, and accrued since and in consequence of the raising of this wall or embankment by the defendants, then the defendants are liable to make good to the plaintiff the damage sustained by such injury, and it is upon this point that I propose to decide the case.

The plaintiff Khan Mahomed, got possession of the land by Conveyance dated the 30th May, 1881, and he has committed himself to two statements—1*st*, that at that time the godowns on the defendants' land were not finished, and that the manager's house, outside of which is the wall or embankment, had not then been begun, but was begun a few days afterwards; 2*nd*, that at that time, when he took possession, he had his full quantity under his grant between his southern boundary and the river. The first statement is undoubtedly incorrect; it is clear from the evidence of Mr. Halifax, Mr. Heim, and Mr. St. John, that the whole of the buildings including the wall, had been finished for about two years before the plaintiff took possession. Mr. St. John, a private surveyor and a witness on behalf of the plaintiff, said

that a plan of Messrs. Katz Brothers' property bearing date March, 1880, bore his signature, and had been made by him or under his directions. On that plan, the godown, manager's house and detaining wall are delineated as completed. An entry in the defendant's ledger, shewed that the last payment for the godown and manager's house was made on the 13th June, 1879. Taking this in conjunction with the second statement, it amounts to this, that for a period of about two years after the wall was completed, it did not in the slightest degree, influence the course of the river or affect the land afterwards occupied by the plaintiff, but that as soon as the plaintiff got possession, the wall which had stood for two years without causing any mischief whatever, began all at once to develope the qualities which the plaintiff says has proved so disastrous to his land. This at all events makes it extremely doubtful as to whether the injury to the land now held by the plaintiff,—undoubtedly caused by the washing away of the banks by the scour of the river,—was caused by the erection of this wall or not, or whether other causes were not at work unnoticed by previous holders, or if noticed, not heeded until the late extraordinary rise in the value of the land, caused it to attract the notice of the plaintiff, and as he tells us that in May, 1881, he purchased the piece of land for $1,205, and has since refused $17,500 for it, he would, no doubt, regard its gradual disappearance with alarm.

A review of the whole of the evidence forces me to the conclusion that this wall which had been innocuous for two years before the plaintiff entered into possession of the land remained so afterwards, and that the irruption of the stream on to the plaintiff's land was caused by the natural bend of the river which describes a considerable curve as it flows by the plaintiff's land aggravated by the imprudence or heedlessness of previous owners, when the land was of little value, who deliberately stripped it of its natural protection by cutting down the bakow on its bank, and leaving it defenceless against the never-ceasing scour and gradual invasion of the river. To this may be added the blocking up of one of the three arches of the bridge some seven years ago, to which Captain Fox attributes the great increase of the bend of the river, and consequent eating away of the plaintiff's land.

Mr. Ross attempted to shew that some statements elicited by him in cross-examination from Mr. Barnett, the Engineer to the Municipal Commissioners, were confirmatory of the case set up by the plaintiff, but it is quite clear that the whole of his evidence is against it, and that he considered that what effect had been produced by the erection of this wall, was so infinitesimal, that it need not be taken into consideration.

I find therefore that the injury to the plaintiff's land was not caused by the act or default of the defendants, and a verdict must be entered for the defendants.

On the counter-claim by the defendants against the plaintiff for having obstructed the navigation of the river by placing piles across the channel of the river, and so causing expense to the defendants in removing them for the passage of their boats, I assess the damages at $150.

CHEAH BOON EAN *v.* CHEAH CHONG BENG & ANOR.

PENANG.

SIDGREAVES, C. J.

1885.

March 4.

The provision in Schedule 1 of the Stamp Ordinance, 1881, as to Promissory-notes not being payable after sixty days, has no application to a Promissory-note made before that Ordinance, though sued on after that Ordinance became law.

Palaniapah Chetty v. *Lim Poh*, Civil Cases, Vol. I of these Reports, 548, distinguished.

A Promissory-note given by a husband to a wife, is not enforceable by the wife, either against the husband in his life time, nor against his Executors after his decease: and this, though the note be given in consideration of the husband having neglected to maintain the wife for many years.

Action to recover $7,200, as the indorsee of a Promissory-note dated 29th November, 1880, made by the defendant's Testator, Cheah Pek Ee deceased, payable on demand to one Boey Sin Neoh, and by her indorsed to the plaintiff. The defendants were the Executors of the said Cheah Pek Ee, and in their statement of defence denied the note was made by him: they further submitted that the note, if made by the deceased, the same was illegal and void as given for an immoral consideration. At the trial, the Promissory-note was proved to have been given by the deceased, and it was alleged that the consideration for his giving it was, that the said Boey Sin Neoh was his second wife, but he having neglected to maintain her for twenty years, had, on the date aforesaid, given her the Promissory-note in lieu of such twenty years' maintenance, which was calculated at $30 per month. The defendants maintained that the said Boey Sin Neoh, was only the kept mistress of the deceased, and the note was given for her maintenance as aforesaid in consideration of past co-habitation. The point of fact whether the said Boey Sin Neoh was the second wife, or only the kept mistress of the deceased, was not decided, owing to the view the Court took of the law applicable to the case. The promissory-note, on being produced, had a three cents Revenue Stamp thereon, properly cancelled as required by the Stamp Ordinance 8 of 1873, Section 12, the Ordinance in force at the time the note was given. This Ordinance was repealed, and the Stamp Ordinance 2 of 1881, became law on 1st September, 1881. By Schedule 1 of this latter Ordinance, under the head "Bill of Exchange or Promissory-note," is the following:

> "No Promissory-note, Bill of Exchange, or other similar instrument executed and payable, in either case, in the Colony, for a sum exceeding $50, payable on demand, shall be held to be payable at any time longer than 60 days from the date of the making, unless it bears the proper stamp for a Promissory-note or Bill of Exchange [b], [c], or [d], or otherwise, as the case may require."

B. C. and D. provide for *ad valorem* duties on Bill and Notes drawn in sets, or payable by instalments, &c. This action was commenced on 24th August, 1883. It was admitted at the trial, that the plaintiff had given no consideration for the indorsing of the note to him by Boey Sin Neoh: that he was aware of the circumstances under which the note was given, and in fact was suing for her, as she was his mother, who could not well attend Court.

Van Someren [*Capel* with him] for the defendants contended, that the promissory-note could not now be sued on, as being more than 60 days; it was not *payable* under the aforesaid clause of the Stamp Ordinance 1881, and therefore not suable—*Kunja Pillay* v. *Visuveraden Daven* [*a*] decided by Mr. Justice WOOD. In that case the note was made after the Ordinance of 1881, but that was immaterial as the Court of Appeal had held in *Palaniapah Chetty* v. *Lim Poh* [*b*] that the Ordinance in force at the time of trial, and not the one under which the document was stamped or made, must be the one to govern the case in a question of Stamp Law. The case therefore, having to be decided at this date, when the Ordinance of 1881 was law, the note was not payable after 60 days, as it was for more than $50, was payable in the Colony on demand, and had only a three cents stamp on it. They further contended that the said Boey Sin Neoh was only the kept mistress of the deceased, and past co-habitation being the consideration for promising the maintenance and giving of the note, the same was illegal and void, and cited *Beaumont* v. *Reeve*, 8 Q. B. 483; *Robinson* v. *Cox*. 9 Mod. 263. They also contended that if the said Boey Sin Neoh was the second wife of the deceased, the note was still void and could not be enforced, as husband and wife were but one person, and the wife's chose in action vested in the husband, and he could not therefore make a promise to himself or sue himself. *Chitty on Contracts*, 152, 714. The Plaintiff as indorsee, was in no better position than the woman Boey Sin Neoh, as he gave no value for the note, and took it with notice of the circumstances under which it was made and in fact was suing for her.

Thomas, for the plaintiff contended that Boey Sin Neoh was the lawful second wife of the deceased, and although during her lifetime she could not have sued him, and as between her and the deceased the note was valueless, yet since his death her rights thereunder accrued to her, and there was no reason why it should not be enforced against the defendants, his Executors. On the point raised on the Stamp Ordinance, he was stopped by the Court.

Sidgreaves, C.J.—The point raised on the Stamp Ordinance is untenable. To uphold the defendants' contention would be to give a retrospective operation to the Ordinance of 1881, and to defeat vested rights. In *Dwarris on Statutes*, p. 540 it is said, "A retroactive Statute would partake in its character of the mis-"chiefs of an *ex-post facto* law, as to all cases of crimes and penal-"ties: and in matters relating to contracts or property, would "violate every sound principle." It then cites the case of *Gilmore* v. *Shuter*, 2 Lev. 227, *s. c.*, 2 Mod. 310; and proceeds, "the Court "said, 'It cannot be presumed that the Statute was to have a "retrospect, so as to take away a right of action which the plaintiff "was entitled to before the time of its commencement'." [*c*].

[*a.*] Not reported.
[*b.*] Volume 1, Civil Cases, p. 548.
[*c.*] See *In the Goods of* William Caunter, *deceased*, Ecclesiastical Cases, Volume II, p. 20, and *In re* Ex-Sultan Abdullah, Habeas Corpus Cases, Volume II, p. 2. J. W. N. K.

SIDGREAVES, C.J. 1885.

CHEAH BOON EAN v. CHEAH CHONG BENG & ANOR.

Here, the plaintiff had undoubtedly a cause of action before the Ordinance of 1881, but if the passage in the Schedule to that Act, is to be held applicable to this note, the effect of it would be to render the note not suable after 60 days from its date, by operation, as at that date, of a law which was then not in existence. The case of Palaniapah Chetty *v.* Lim Poh, which has been referred to, was in reference to the *admissibility* of the note in evidence, which is quite a different matter from the objection raised here, where the admissibility of the note is not objected to, but the question is as to the legal effect of the note at this date, and under the new Act. I may add Mr. Justice WOOD concurs with me on this point [*a*]. On the other point, I am of opinion that even on the supposition that the payee of the note [Boey Sin Neoh] was the lawful second wife of the deceased Cheah Pek Ee, the note is void, inasmuch as husband and wife cannot contract with each other. I can see no distinction in point of law, between the rights of the wife on such a note as against the husband, and as against his Executors. They stand in the husband's place; and what he was not liable for, surely they cannot, as in his place, be made liable.

I hold that the note is void as against both the husband and his Executors, and cannot be enforced. Judgment will be entered for the defendants.

Judgment for defendants.

TAN CHYE HOON *v.* LIM SEOW CHONG & ANOR.

PENANG.

SIDGREAVES, C.J. 1885.

March 9.

An Executor of an Administrator with the Will annexed of a third person deceased, does not represent the Estate of such third deceased; and this, notwithstanding the Administrator purports in his Will, to delegate his powers as Administrator to his Executor.

The Executor, after entering into possession of the Estate of such third deceased, under the idea that he represented the said deceased's Estate, cannot on discovering his error and continuing his possession, set up his possession under the Statute of Limitations, against such Estate.

Action to recover possession of title deeds wrongfully detained by defendants, and for a declaration that the lands situate at Batu Lanchang in Penang, comprised in a Deed of Conveyance, registered No. 4,484, dated 24th January, 1877, from the Defendant Lim Seow Chong to the defendant Lim Chye Neow, was fradulent and void, and to have same cancelled. It appeared that the lands and title deeds aforesaid belonged to one Lim Mah Hee, deceased, who died in 1848, leaving a Will, by which he appointed one Tan Kim Neow, his Executrix. The said Tan Kim Neow, died without having proved the said Will, and on the 8th September, 1856, the said Will was proved by Lim Hong Guan, a son of the deceased Lim Mah Hee, and letters of administration, with the said Will annexed, were granted to him. The said Lim Hong Guan died in 1864, without having fully administered

[*a*.] The point was raised at an early stage of the case, and his Lordship had conferred with Mr. Justice WOOD thereon. J. W. N. K.

the Estate of the said Lim Mah Hee. On 15th October, 1883, letters of administration *de bonis non* to the Estate of the said Lim Mah Hee, were granted to the plaintiff, as his grand niece; who in that capacity now brought this action. The said Lim Hong Guan left a Will in which he stated: "Whereas by virtue of letters "of administration granted to me by Her Majesty's Court of "Judicature ... ... appointing me Administrator of the estate "and effects which were of Lim Mah Hee, which estate I have "not fully administered, now I, as such Administrator, hereby "nominate and appoint Lim Seow Chong [1st defendant] Adminis- "trator in my place and stead, to administer the affairs of the "said Lim Mah Hee's estate, according to the wordings of the "Will of the said deceased." The defendant, Lim Seow Chong, proved the Will of the said Lim Hong Guan deceased, and obtained probate thereof; and thereupon took possession of the aforesaid lands, and title deeds thereof belonging to the said Lim Mah Hee, deceased. He, as such Executor, remained in possession of these lands and deeds, for several years, and on the 24th January, 1877, by the aforesaid Conveyance of that date, sold and conveyed the land and title deeds aforesaid, to the defendant, Lim Chye Neow, claiming to do so by virtue of long possession which he alleged extended over 30 years. The said defendant Lim Seow Chong, had neither administered these lands in accordance with the Will of the said Lim Mah Hee, deceased, nor distributed the proceeds of such sale among his relatives. This action was commenced on the 8th May, 1884.

Van Someren, for plaintiff, contended that the plaintiff on these facts, was entitled to the possession of the title deeds sued for, and also to have the aforesaid Conveyance of 24th January, 1877, delivered up, to be cancelled. He submitted that as Executor of an Administrator, notwithstanding the attempted delegation by the Will of the Administrator, the defendant Lim Seow Chong did not represent the estate of the original deceased Lim Mah Hee, but such estate was represented by the plaintiff as Administrator *de bonis non*. Broom's Com. p. 605; that as Administrator, the said Lim Hong Guan could not delegate his powers, *delegatus non potest delegare*. The defendant Lim Seow Chong could therefore confer no estate or interest by his Conveyance to the defendant Lim Chye Neow, unless it was by virtue of his alleged long possession. The possession, from the dates given, could not however have been for 30 years as the defendant Lim Seow Chong came in only after Lim Hong Guan who did not die till 1864; but even if such possession was for more than 12 years, it was not a possession adverse to the estate of Lim Mah Hee deceased, as the defendant took and kept possession of the lands and deeds, claiming through Lim Hong Guan to represent Lim Mah Hee. He was in fact trustee for the next-of-kin of Lim Mah Hee, and could not set up his possession as against them or the plaintiff who represented their interest.

G. H. S. *Gottlieb*, for the defendants, conceded that as Executor of the Administrator Lim Hong Guan, the defendant Lim Seow Chong did not represent the original deceased Lim Mah Hee, and

SIDGREAVES, C. J. 1885.

TAN CHYE HOON v. LIM SEOW CHONG & ANOR.

the fact that Lim Hong Guan was Administrator with the Will annexed or his attempted delegation of his powers, made no difference: but he submitted that as the defendant Lim Seow Chong never in law represented Lim Mah Hee's estate, his possession was adverse to that estate; and the fact that he took possession under the supposition that he did represent it, made no difference: he having discovered his error, was at liberty to set up his possession as against the estate of Lim Mah Hee, which he had in fact done, by his Conveyance of 1877, having then had more than 12 years' possession. Act XIV. of 1859, s. 1 cl. 12.

Van Someren, in reply.

Sidgreaves, C.J. held, that as Administrator, although with the Will annexed of Lim Mah Hee, deceased, the said Lim Hong Guan had no power to delegate his authority, and the defendant Lim Seow Chong did not, as Executor of the Administrator, represent the estate of Lim Mah Hee. He further held that although this was so, yet, the defendant Lim Seow Chong having entered into possession of Lim Mah Hee's estate, as his representative, could not afterwards claim adversely to that estate; but such possession was only that of a trustee, for the benefit of the next-of-kin: he had no authority to convey the lands to the defendant Lim Chye Neow and the Conveyance by which he purported to do so must be cancelled and the title deeds of the land returned to the plaintiff. The decree would be in terms of the prayer of the statement of claim, and the plaintiff would have her costs against the defendants.

WEMYSS *v.* ATTORNEY-GENERAL.

PENANG.

SIDGREAVES, C. J. 1885.

March 10.

The owner or lessee of land adjoining the sea shore has a private right of access to the sea, and any person even the Crown interfering with such access, as by raising an embankment in front of his land, so as to deprive him thereof, is liable to him in damages.

Lyon v. *Fishmongers' Company*, 1 L. R. App. Ca. 662, considered and applied.

A lessee of land with its easements and appurtenances for a term of years with a covenant for a renewal at his option by giving six months' previous notice, within the six months' gave the notice and claimed the renewal. Some time after the expiration of the lease he and the lessor arranged that the new lease should contain several further and different covenants and include portion only of the lands in the former lease together with additional lands which had been excepted from the old lease, with certain rights in specific terms over the sea frontage. The new lease was accordingly made and was declared to be a renewal and made in pursuance of the covenant for renewal. The lessor, subsequently to the receipt of the aforesaid notice, but prior to making the aforesaid arrangement and executing such new lease, made an agreement with the Crown the effect of which was to give up all rights he had to object to the Crown reclaiming a mud bank in front of the lands by which his access to the sea might be cut off. The Crown under this agreement proceeded to reclaim the bank and erect a quay, and for so doing, was sued by the lessee for depriving him of his access to the sea. The Crown objected that the new lease was not in law or equity, a renewed lease made in pursuance of the covenant for renewal and the notice,—and that the agreement they held being prior in point of date to the new lease, the lessee had no rights against them.

Held, by the Court of Appeal affirming the judgment of the Court below, that although the lessee could not have compelled his lessor to grant a renewal of a lease in terms with such new lease, yet as the lessor had executed such new lease intending it should be a renewed lease made in pursuance of the covenant for renewal, the Crown

had no right to dispute such new lease as not being a renewal, and that such new lease was a renewal made in pursuance of the covenant and the alterations in parcels and conditions and verbiage as to the easements and appurtenances did not prevent it being so.

SIDGREAVES, C. J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

Judgment of the Court of Appeal affirmed by the Privy Council.

This was a petition of right to recover $40,000 from the Government for depriving the petitioner of his access to the sea by their reclamation works at the back of Beach Street commonly called Weld Quay. The material statements in the petition and statement of defence, and evidence adduced at the trial, except the several exhibits which are here set forth at full length, sufficiently appear in the judgments of the learned Judges. The following were the exhibits put in at the trial :—

A.

This Indenture made the 2nd day of July, in the year of Our Lord one thousand eight hundred and seventy-seven, between Tunkoo Muda Nyah Malim, of Simpang Oolim, in Sumatra, hereinafter called the lessor of the one part, and Francis Watson Mackie and Walter Oldham, of Penang, Merchants, trading under the style or firm of Oldham, Mackie and Company [hereinafter called the lessees] of the other part, witnesseth, that in consideration of the rent and lessee's covenants hereinafter reserved and contained, he the said lessor doth demise and lease unto the said lessees their executors, administrators, and assigns all the godown or messuage situate and being No. 37, Beach Street, George Town, Penang, aforesaid, with the actual and reputed rights, members easements and appurtenances, except and always reserved unto the said lessor his heirs, executors, administrators and assigns a piece of land at back or sea side of the said premises and outside and adjoining the present back wall thereof, and measuring from the northern wall or boundary of the said premises thirty-six feet in breadth by thirty-feet in length measured from the said back wall with liberty for the said lessor his heirs, executors, administrators and assigns to build on the land so reserved as aforesaid, and with full and free liberty of egress and regress for all legitimate purposes, along, over, and through the cartway and wharf situate along the southern portion of the premises hereby demised for the said lessor, his heirs, executors, administrators or assigns, and his and their Agents, friends, servants and workmen, and the tenants and occupiers for the time being of the land hereby excepted, or of any building to be erected thereon and whether to or from the sea or Beach Street aforesaid; to have and to hold the said messuage or tenement and all and singular other the premises hereinbefore expressed to be demised with the appurtenances unto the said lessees their executors, administrators and assigns for the term of six years from the 2nd day of July, instant, yielding and paying therefor monthly and every month during the said term the rent or sum of one hundred and thirty dollars [$130] payable on the 2nd day of every calendar month the first of such payments to be made on the 2nd day of August, next; and also yielding and paying a proportionate part of the said rent for any period which may elapse between any of the aforesaid days of payment and the period of the determination of the said term in case the same shall happen to determine under the proviso for that purpose hereinafter contained, such proportionate rent to become payable immediately upon such determination. And the said lessees do hereby for themselves, their heirs, executors and administrators and assigns covenant with the said lessor, his executors, administrators and assigns in manner following, that is to say, that they the said lessees their executors and administrators will, during the said term, pay unto the said lessor, his heirs, executors, administrators or assigns the rent hereby reserved at the time and in manner hereinbefore mentioned and appointed for payment thereof without any deduction or abatement whatsoever, and also will pay rates and all Municipal assessments and rates now payable or hereafter to become payable in respect of the said premises or any part thereof and will indemnify the lessor

SIDGREAVES, C. J. 1885. — WEMYSS v. ATTORNEY-GENERAL.

therefrom. Provided always, and it is expressly agreed that if the rent hereby reserved or any part thereof shall be unpaid for one month after any of the days on which the same ought to have been paid although no formal demand shall have been made thereof, or in case of the breach or non-performance of any of the covenants and agreements herein contained on the part of the lessees, their executors, administrators or assigns, then and in either of such cases it shall be lawful for the said lessor, his heirs, executors, administrators or assigns to re-enter and the same to have again, repossess and enjoy as of his or their former estate anything herein contained to the contrary notwithstanding. And it is hereby expressly agreed between the lessor, his heirs, executors, administrators and assigns and the lessees, their executors, administrators and assigns that the lessees, their executors, administrators, and assigns shall be entitled at any time during the said term at their own cost and charge to make any alterations and improvements to the buildings now standing and erected, and also to erect new buildings and structures whether of wood and iron or bricks and tiles upon the land and premises hereby demised. Provided, that should the lessees, their executors, administrators and assigns desire to erect any buildings or structures of bricks and tiles on the said land, and be willing to lend and advance to the lessor, his heirs, executors, administrators and assigns the costs of erecting such building or structures of bricks and tiles, and also to enter into a covenant with the lessor, his heirs, executors, administrators and assigns to pay an increased rent for the said premises equivalent to the interest charged by the lessees, their executors, administrators and assigns for the money so lent as aforesaid, then the lessor, his heirs, executors, administrators or assigns shall forthwith erect such buildings or structures if he or they shall approve of the plans and designs thereof. And further, that the lessees, their executors, administrators and assigns shall be at liberty at the expiry of the said term to remove and take away all buildings and structures whether of wood or iron or of wood and iron which may have been erected by them, provided such removal and taking away shall not injure or damage the present existing buildings; and also that if the lessees, their executors, administrators or assigns shall be desirous of taking a renewed lease of the said premises for the further term of six years from the expiration of the said term hereby granted, and of such desire shall prior to the expiration of the said term give to the lessor, his executors, administrators or assigns or leave at his or their last known place or places of business six calendar months' previous notice, in writing, and shall pay the rent and observe the several covenants and agreements herein contained on the part of the lessees, their executors, administrators or assigns to be observed and performed up to the expiration of the said term hereby granted he the lessor, his executors, administrators or assigns will upon the request and at the expense of the lessees, their executors, administrators and assigns and upon their executing and delivering to the lessor, his executors, administrators or assigns a counterpart thereof, forthwith execute and deliver to the lessees, their executors, administrators and assigns a renewed lease of the said premises for the term of six years at such rent as may be at the time of execution of such renewed lease either agreed upon by mutual consent, or fixed by four arbitrators, two of whom shall be chosen by the lessees, their executors, administrators or assigns and two by the lessor, his heirs, executors, administrators or assigns. Provided, that the lessees and their assigns shall only be entitled to a renewal of this for only one term of six years after the expiry of the present term, and the said lessor doth hereby for himself, his heirs, executors, administrators and assigns covenant with the said lessees, their executors, administrators and assigns that he and they paying the rent hereby reserved and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said term hereby granted without any interruption or disturbance from or by the said lessor, his executors, administrators or assigns or any other person or persons lawfully claiming by, from, or under him, them, or any of them; and also that the lessor his heirs, executors, administrators or assigns shall and will as often as the said premises hereby demised shall be burnt down or damaged by fire forthwith and expeditiously re-build or repair the said premises or such parts thereof as shall be burnt down or damaged by fire as aforesaid.

In witness whereof, the said parties have hereunto set their hands and seals, the day and year first hereinbefore written.

Signed, sealed and delivered in the presence of } [*Sd.*] TUNKOO MUDA NYA MALIM. [seal] [*in Malay characters.*]

[*Sd.*] SHAIK ISMAIL,
„ P. B. PEREIRA.

„ F. WATSON MACKIE, *by his Attorney.* [seal]

„ W. OLDHAM,
„ WALTER OLDHAM. [seal]

B.

This Indenture made the eighteenth day of March, in the year of Our Lord one thousand eight hundred and seventy-nine (1879). Between John Finlayson, of Penang, Merchant and Trustee of the Estate and Effects of Walter Oldham and Francis Watson Mackie, Bankrupts, of the one part, and John Leith Wemyss and Farquhar Matheson McLarty, both of Penang, trading as Engineers and Iron Founders under the name of the Penang Foundry Company of the other part. Whereas, by an Indenture of Lease, dated the 2nd day of July, 1877, and made between the Tunkoo Muda Nya Malim, of Simpang Oolim, in Sumatra, therein called the lessor of the one part, and Francis Watson Mackie and Walter Oldham trading under the style of Oldham, Mackie and Company thereinafter called the lessees of the other part, all the godown or messuage situate and being No. 37, Beach Street, George Town, Penang, aforesaid, with the actual and reputed rights, members easements and appurtenances except, and always reserved unto the said lessor, his executors, administrators and assigns a piece of land at the back or sea side thereof in the said lease more fully set out, were demised by the said lessor to the said lessees, their executors, administrators and assigns from the 2nd day of July then last past, for the term of six years at the monthly rent of dollars one hundred and thirty [$130] and under and subject to the covenants and conditions in the said Indenture of Lease contained, and on the part of the lessees their executors, administrators, and assigns to be observed and performed; and whereas under or by virtue of a petition in the Supreme Court of the Straits Settlements in its Division of Penang in Bankruptcy on the 17th day of April, 1878, the said Francis Watson Mackie and Walter Oldham were adjudicated Bankrupts, and the said John Finlayson was on or about the 14th day of May, 1878, duly chosen the Trustee of the Estate and Effects of the said Bankrupts; and whereas the said John Finlayson as such Trustee as aforesaid has agreed with the said John Leith Wemyss and Farquhar Matheson McLarty for the absolute sale to them of the hereditaments and premises comprised in the said Indenture of Lease for the residue of the said term of six years, subject to the several covenants and conditions aforesaid but free from all other incumbrances at the price of Dollars One hundred, [$100]; Now This Indenture Witnesseth that in pursuance of the said Agreement and in consideration of the sum of Dollars One hundred [$100] the receipt whereof the said John Finlayson doth hereby acknowledge, the said John Finlayson as such Trustee as aforesaid doth hereby assign unto the said John Leith Wemyss and Farquhar Matheson McLarty, all the godown, messuage and premises comprised in and demised by the hereinbefore recited Indenture of Lease or expressed so to be, and all the estate, rights, title, interest, claim and demand whatsoever of the said John Finlayson as such Trustee as aforesaid to the said premises or any part thereof. To have and to hold the messuage and premises hereby assigned or expressed so to be unto the said John Leith Wemyss and Farquhar Matheson McLarty, their executors, administrators or assigns for all the residue now unexpired of the said term of six years at the rent reserved by the said Indenture of Lease and under and subject to the covenants and conditions in the same Indenture contained and which henceforth on the part of the lessees, their executors, administrators or assigns ought to be observed and performed; And the said John Finlayson as such Trustee as aforesaid doth hereby for himself, his executors or administrators covenant with the

SIDGREAVES, C. J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

said John Leith Wemyss and Farquhar Matheson McLarty, their executors, administrators and assigns that he the said John Finlayson as such Trustee as aforesaid, hath not at any time heretofore done or committed or knowingly suffered or been party or privy to anything whereby the said leasehold premises hereby assigned or expressed so to be or any part thereof are, is, can or may be in any wise incumbered.

In witness whereof the parties aforesaid have hereunto set their respective hands and seals in Prince of Wales' Island the day, month and year first hereinbefore written.

Signed, sealed and delivered in the presence of } [*Sd.*] J. FINLAYSON, *Trustee.* [seal.]

[*Sd.*] C. V. BOUDVILLE. ,, J. L. WEMYSS, [seal.]

,, F. M. McLARTY, [seal.]

B—1

ENDORSED ON LEASE B.

This Indenture made the day of July, 1879, between Farquhar Matheson McLarty, of Penang, Engineer, of the one part, and John Leith Wemyss of the same place, Engineer, of the other part. Whereas the said Farquhar Matheson McLarty has for the consideration of $ agreed to transfer his estate and interest in the premises, and for the term described and created by the Lease recited in the within written presents unto the said John Leith Wemyss; Now this Indenture Witnesseth that in consideration of the sum of $ paid by the said John Leith Wemyss to the said Farquhar Matheson McLarty, he the said Farquhar Matheson McLarty doth hereby assign to the said John Leith Wemyss, his executors, administrators or assigns all the godown, messuages and premises therein described with their appurtenances; To hold the same unto the said John Leith Wemyss, his executors, administrators and assigns for all the residue and unexpired of the term of six years created by the lease recited in the within written Indenture and at the rent and subject to the covenants therein reserved and contained and on the lessees part to be paid and performed; And the said Farquhar Matheson McLarty doth hereby for himself, his executors, administrators and assigns covenant with the said John Leith Wemyss, his executors, administrators and assigns that the said lease is now valid and subsistingly lease in laws and in full force for the unexpired residue of the said term notwithstanding anything by the said Farquhar Matheson McLarty done or suffered to the contrary and that the rent has been paid and the covenants and conditions thereof have been performed to this date. And that the said Farquhar Matheson McLarty now hath good right to assign the premises in manner aforesaid notwithstanding anything done or suffered by him to the contrary, and that free from all incumbrances made, created, or occasioned by the said Farquhar Matheson McLarty or any person or persons, lawfully or equitably claiming under or in trust for him; And that the said Farquhar Matheson McLarty and all such persons will, at all times hereafter, at the request and costs of the said John Leith Wemyss, his executors, administrators and assigns execute all such acts and things for more effectually assigning the said premises in manner aforesaid as shall or may be reasonably required. And the said John Leith Wemyss doth hereby for himself his heirs, executors, administrators and assigns covenant with the said Farquhar Matheson McLarty, his heirs, executors and administrators that from this date the rent reserved by the said lease and the covenants therein contained shall be performed by him, his executors, administrators and assigns that he will, at all times, keep indemnified the said Farquhar Matheson McLarty, his executors and administrators and his estate and effects from all actions, suits and other proceedings and from all costs, claims and expenses which may be incurred by reason of the non-observance or non-performance thereof.

In witness whereof the said parties have hereunto put their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of } [*Sd.*] F. M. McLARTY, [seal.]

B—2

Endorsed on Lease B.

I the within named Tunkoo Muda Nyah Malim hereby demise unto John Leith Wemyss, his heirs, executors, administrators and assigns the premises of land at the beach or seaside of the said premises and adjoining the present back wall thereof, and further described in the exception contained in the within-mentioned lease subject to the covenants and conditions therein contained, and in like manner in all respects as if it had been included in the said lease; provided thereof the rent payable therefor shall be $15 [Fifteen] Dollars] per month.

SIDGREAVES, C. J. 1885. — WEMYSS v. ATTORNEY-GENERAL.

In witness whereof the said parties have hereunto put their hands and seals the day and year first above written.

Signed sealed and delivered in the presence of [*Sd.*] J. NIEUKY.

[*Sd.*] HABIB OOSMAN IDID, [*in Arabic characters.*]
„ J. L. WEMYSS.

C

This Indenture made the 15th day of November, 1883, between Lee Chin Tuan and Lee Chin Soon, of Beach Street, Penang, land-holders [hereinafter called the lessors] of the one part and John Leith Wemyss, of Penang, aforesaid, Engineer, trading under the style of the Penang Foundry Company, [hereinafter called the lessee] of the other part. Witnesseth that in pursuance of the proviso for renewal in the former lease [which the said John Leith Wemyss is the assignee of the original lessees] and under which he held the premises hereinafter mentioned, dated the second day of July, 1877, and made between Tunkoo Muda Nyah Malim of the one part and Francis Watson Mackie and Walter Oldham of the other part, and of the agreement as to the rent and terms entered into by the said lessee with the said lessors [who were the assignees of the original lessor] in their respective letters of the 22nd day of June last past, and in consideration of the rent and lessee's covenants hereinafter reserved and contained, they the said lessors do demise and lease unto the said lessee, his executors, administrators and assigns, all that piece of land situate and being the back part of the premises numbered 37, Beach Street, in Penang, on the seaside thereof, outside and adjoining the wall of the present godowns, and extending from that godown, to the sea upon which the offices, store-rooms, machinery, working shops and slip of the said lessee now stand, and as the same is now occupied by him; together with the right of way adjoining the southern portion of the said godown from the sea to Beach Street either by land from Beach Street or by the sea and whether by hand or bullock carts, horses, ox, by foot or by day or by night when necessary to do so with the right of the approaches of boats or vessels to the foreshore or wharf and landing place of the said premises for the purpose of docking and repairing boats and vessels and of landing or shipping machinery and other wares, goods and merchandises; And also all privileges, sewers, drains, water-courses, lights, liberties, easements and appurtenances whatsoever to the said land or wharf belonging, or in any wise appertaining or connected therewith respectively; And reserving to the lessors or either of them their or either of their heirs, executors, administrators or assigns the like liberty of using the said right of way provided that this latter reservation shall not be permitted to interfere with the exclusive right of the lessee to use the said premises or any part thereof as a Dock or slip-way for vessels to which right this latter reservation shall be held in all cases to be subject. To have and to hold the land or tenement and all and singular other the premises hereinbefore expressed to be demised with the appurtenances unto the lessee, his executors, administrators and assigns for the term of six years computing from the second day of July, 1883, yielding and paying therefor monthly and every month during the said term the rent or sum of one hundred and forty-five dollars [$ 145] payable on the second day of each calendar month. And the said lessee doth hereby for himself, his heirs, executors, administrators and assigns covenant with the lessors, their heirs, executors,

Stamp Office 14 No. 1883. Penang.

Impressed Stamp Fifty Cents.

SIDGREAVES, C. J. 1885. —— WEMYSS v. ATTORNEY-GENERAL.

administrators and assigns in manner following that is to say, that he the said lessee, his executors, administrators and assigns will, during the said term, pay unto the said lessors, their heirs, executors, administrators or assigns the rent hereby reserved at the time, and in manner hereinbefore mentioned and appointed for payment thereof without any deduction or abatement whatsoever, and shall and will also keep the right of way and passage on and alongside his part of the premises herein demised in repair at his own cost, and shall at the expiration of the term herein created peaceably surrender and yield up the said land unto the lessors, in the same condition as it may then be. Provided always, and it is herein expressly agreed that if the rent hereby reserved or any part thereof shall be unpaid for one month after any of the days on which the same ought to have been paid although no formal demand shall have been made thereof, or in case of the breach or non-performance of any of the covenants and agreements herein contained on the part of the lessee, his executors, administrators and assigns, then and in either of such cases, it shall be lawful for the said lessors, their heirs, executors, administrators and assigns to re-enter, and the same to have again, re-possess and enjoy as of their former estate anything therein contained to the contrary, notwithstanding subject in all cases to the proviso hereinafter expressed for removal of all buildings and substructures erected by the lessee on the land hereby demised. And it is hereby expressly agreed between the said lessors and each of them, their and each of their heirs, executors, administrators and assigns that the lessee, his heirs, executors, administrators and assigns shall be entitled at any time during the said term at their own cost and charges to make any alterations and improvements to the buildings already erected by him on the said land, and to erect new buildings and structures of wood and iron or brick, and to make excavations thereon; Provided further that the lessee, his executors, administrators and assigns shall be at liberty at the expiry of the said term to remove and take away all buildings and structures whether of wood or iron which may have been erected by him or them, provided such removal or taking away shall not injure or damage the present brick-buildings of the lessors or on the land adjoining. Provided also that the said lessee shall, during the term hereby created, be allowed to keep his present water service pipe from the main in Beach Street along the side of the passage or way above-mentioned above ground. And the said lessors for themselves their or either of their heirs, executors, administrators and assigns covenant with the lessee, his executors, administrators or assigns that he [the lessee] paying the rent hereby agreed and performing the covenants hereinbefore mentioned on his or their part shall and may peaceably possess, hold and enjoy the land and premises herein demised during the full end and term hereby granted without any molestation or disturbance from or by the lessors their and each of their executors, administrators or assigns or any other person or persons lawfully claiming by, from or under them or any of them. And that the said lessors shall and will, during the said term bear, pay and discharge the Municipal Assessment rates and taxes whatsoever chargeable on the land and premises hereby demised, and that the said lessors shall and will, at their cost and charges, keep in repair the right of way and passage from Beach Street to the land herein demised.

In Witness whereof the said parties have hereunto set their hands and seals at Penang the day and year first hereinbefore written.

Signed, sealed and delivered in the presence of } [*Sd.*] LEE CHIN TUAN *by his Attorney L. Chin Soon.* [seal]

Clerks to E. F. Thomas, Solicitor. { [*Sd.*] L. T. DEMELLO, [*Sd.*] L. CHIN SOON, [seal]
„ K. TUCK CHOON. „ J. L. WEMYSS. [seal]

Messenger to above. { [*Sd.*] SHAIK MYDIN, *in Tamil characters.*

„ EDW. F. THOMAS.

D.

Penang, 16th December, 1882.

To

LEE CHIN TUAN,

AND

LEE CHIN SOON, ESQUIRES,

Present.

GENTLEMEN,

I beg to give you notice that I am desirous and intend taking a renewed lease of the premises now occupied by me in Beach Street, under 2 leases, dated respectively, the 2nd day of July, 1877, and the 12th day of July, 1879, from Tunkoo Muda Nyah Malim, and an assignment thereof from John Finlayson, Trustee of the estate of Oldham and Mackie, dated the eighteenth day of March, 1879, to myself and Mr. McLarty, dated the 3rd day of July, 1879, for the further term of six years from the expiration of the term created by the said lease, and upon the like rent and conditions therein reserved and contained.

I am, Gentlemen,

Yours faithfully,

[*Signed*] J. L. WEMYSS.

True copy

[*Signed*] EDW. F. THOMAS.

E.

Penang, June 22nd, 1883.

CHIN TUAN, ESQ.

MY DEAR SIR,

Stamp Office 14 No. 1883. Penang.

As the first term of my lease is nearly expired, and wishing to remain in occupation of the premises I now occupy with my works for the next term of six years as allowed in the lease, I now submit the following proposal :—

Impressed Stamp. Fifty Cents.

The present godowns and offices are in such a bad state that they are useless to any one, and believing you will repair them and re-build where necessary, if I give you possession of them, I am willing to do so on the following conditions : I will occupy the space from the present back wall of the godowns on the east side to the sea and on the same terms as the present lease with right of way by day or night on the present passage to Beach Street, and to keep my present water service from the main on the side of the passage above ground, you keep the passage in proper order, you pay all assessments and rates, and give me the use of the east godown for two months until I shift my stock into the works, I give you possession of the four godowns and the offices with godowns underneath, also right of way to the sea by night or by day. I pay you the same rental as at present, less the assessments and rates before mentioned. I keep the roadway opposite my works in repair. This, I trust, will be agreeable to you and save a lot of time being wasted by arbitration or otherwise quarrelling over the matter. This can take effect on and after the 2nd July this year, 1883, but if you agree to give me a note to that effect, I will proceed at once to give you possession of the front offices and godowns by removing my goods.

Duly Stamped. [*Sd.*] G. Norris, Collector of Stamps. 14-11-83.

I remain, Dear Sir,

Yours faithfully,

[*Signed*] J. L. WEMYSS.

SIDGREAVES, C. J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

Stamp Office 14 No. 1883. Penang.

F.

22nd June, 1883.

J. L. WEMYSS, ESQ.

Impressed Stamp Four Dollars.

MY DEAR SIR,

I have received your letter of this day's date, with reference to your tenancy of my property in Beach Street, and agree to, and hereby accept, the terms set forth in the said letter. I desire at once to take possession of the front offices and godowns, and should feel obliged if you would kindly remove your goods from them as soon as possible.

I am,

Yours faithfully,

[*Signed*] LEE CHIN TUAN.

[*in Chinese characters.*]

Impressed Stamp Ten Dollars.

Duly Stamped
[Sd.] G. NORRIS,
Collector of Stamps.
14-11-83.

G.

It is this day mutually agreed between Oldham Mackie & Co., of the one part, and the Penang Foundry Company of the other part, as follows:—

Oldham Mackie & Co., agrees to sublet unto the Penang Foundry Company, part of the property, 37, Beach Street, owned by Tunkoo Muda Nyah Malim from whom the said Oldham Mackie & Co., holds a lease of said property for a term of six years, dating from 2nd July, 1877.

In consideration of the monthly rent of seventy dollars to be paid by Penang Foundry Company to Oldham Mackie & Co., the said Oldham Mackie & Co., agrees to sublet unto the said Penang Foundry Co., three portions of the property named as follows: that part measuring from the red line on the east to the boundary of the reserved Achinese ground on the West, and that part measuring from the wall at the back of the said Achinese ground to the end of the godowns on the West, and the whole of the lower part of the building facing Beach Street, extending from Beach Street eastwards to the small store that is situated between the said lower part of building and next to the principal godowns. The Penang Foundry Co., agrees on their part to pay from this date the monthly rent of seventy dollars unto the said Oldham Mackie & Co., for the right of ground and part of building aforesaid. This agreement to hold good until a formal lease shall have been drawn up yielding to the said Penang Foundry Co., all the rights and privileges which the said Oldham Mackie & Co., hold in virtue of the lease, dated 2nd July, 1878. Entry to the two back pieces of ground named to date from to-day, and entry to the lower part of front building to date from 1st July, 1878, till then Oldham Mackie & Co., yields to the Penang Foundry Co., all the use of that godown nearest the sea in lieu of lower part of building.

The expenses incurred in drawing up the lease to be borne by the Penang Foundry Co.

[*Signed*] OLDHAM MACKIE & Co.
[*Signed*] PENANG FOUNDRY & Co.

Penang, 12th March, 1878.

H.

AN AGREEMENT made the twenty-ninth day of November, 1882, BETWEEN THE LIEUTENANT-GOVERNOR OF PENANG for and on behalf of the GOVERNMENT of the STRAITS SETTLEMENTS [hereinafter called "THE GOVERNMENT"] of the one part, and the several persons whose signatures are affixed hereto being owners of lots of land on the EAST SIDE OF BEACH STREET, PENANG, [hereinafter called the OWNERS] of the other part.

1. The Government will reclaim and fill up so much of the mud bank in the harbour of Penang lying between the land owned by the owners on the East side of Beach Street, and a line drawn two hundred and fifty feet to the East of the line marked on Government map of the harbour of Penang, and commonly known as the "RED BOUNDARY LINE," such reclamation to commence from the Jetty and to terminate at the mouth of the PRANGIN RIVER.

2. The Government will construct, along the sea end of such reclaimed land a road way of Quay 60 feet wide, extending from the Jetty to the mouth of Prangin River with approaches thereto from Beach Street through the present Ghauts, and will also construct suitable and convenient landing Jetties on the said Quay in front of every such approach. The said Quay, Jetties and approaches shall be reserved for the use of the public, subject nevertheless, to the rights of the Municipal Commissioners of Penang in and over the present Ghauts.

3. All the reclaimed land between the inner line of the Quay and the land already reclaimed by the said owners shall be filled up and raised to the level of the Quay.

4. The said reclamation and Quay shall be commenced and completed with as little delay as possible, and if possible, within a term not exceeding three years from the date of the Secretary of State's sanction to the undertaking being received by the Government.

5. In consideration of the Government executing the said work, the owners agree to repay to Government the cost thereof in the following manner: every owner of a lot of land situate on the East side of Beach Street will pay to Government a sum not exceeding sixty-five cents [65 cents] for each and every square foot of land reclaimed between his present lot and the inner edge of the Quay, and between the extended boundary lines of his present lot to the Quay.

6. The said cost has been calculated so as to cover that portion of the reclamation which is appropriated for the Quay approaches and Jetties, and the construction of the Quay and Jetties, and Government will contribute in the same proportion as the owners for that portion of the reclaimed land lying between the Government Offices and the Quay, and also for that portion of any land reclaimed at the end of any Ghaut and lying between such Ghaut and the Quay, and in the event of the said work being completed for less then the said calculated cost, Government will make a reasonable proportionate deduction from the said sum of sixty-five cents [$—65 cents] per square foot.

7. The said payment of sixty-five cents per square foot shall be made by the owners as the reclamation progresses, and at such times, and in such portions as Government may require, but twenty days' notice of every payment shall be given by Government to the owners.

8. On failure by any of the owners to pay any instalment of the said sum of sixty-five cents [65 cents] per square foot, interest on the amount for which due notice of payment shall have been given to the owners or any of them at the rate of nine per centum per annum shall be added to the said instalment.

9. On the completion of the said reclamation and Quay and on payment of all the said instalments, Government will give to each of the owners a grant in fee simple of the portion of land lying between his present lot and the Quay, but such grant will contain a reservation in favour of Government of a sum of one dollar and fifty cents [$1.50] as quit-rent per annum for every one thousand square feet of land or fraction thereof therein granted.

SIDGREAVES, C. J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

10. All the reclaimed land lying between the said Quay and the present lots on the East side of Beach Street which shall not be paid for as hereinbefore mentioned, or as provided in the next succeeding paragraph of this agreement shall be Government property, and shall be sold in such manner and at such prices as the Government may decide, and all instalments already paid shall thereupon be forfeited, and all claims for compensation [if any] in respect of any damage done or alleged to be done to such present lots or any of them shall thereupon be deemed to be waived and released to the Government by the party or parties so being in default.

11. The Government will appoint a Committee to consider and decide whether any of the owners are unable, owing to want of pecuniary resources to pay any instalment, and in the event of the said Committee deciding that any of the owners are so unable to pay any such instalment in the manner required by the Government, the Government will give time to such owner for the repayment of the said instalment and interest on the amount of the said instalment at the rate of seven per centum per annum shall be added to the said instalment, and the said instalment and interest shall be paid, if not paid before, at the expiration of twelve years from the date of the commencement of the reclamation work, but the aggregate amount of all such instalments for which time shall be so given to the owners for repayment shall not exceed in the whole the sum of one hundred and fifty thousand dollars [150,000].

12. Every grant given to any of the owners under the provisions of the 9th paragraph of this agreement, and every grant given to a purchaser under the provisions of the 10th and 11th paragraphs of this agreement shall contain a covenant by the grantee for himself, his heirs, executors, administrators and assigns that he or they will not erect or suffer to be erected along the Quay front of the said reclaimed land any building or buildings without first submitting to the Government a plan showing the style and elevation of the buildings and obtaining the approval of Government for the same, and no such buildings shall be erected unless the approval of Government, in writing, be first obtained for the same.

13. The prospective boundary lines between the different lots from the present frontages of the owners up to the said Quay will be defined and marked by the Surveyor-General, and in the event of any dispute between adjoining occupants as to the directions which these prolongations of boundaries shall take the same will be left to the decision of Government.

IN WITNESS WHEREOF, the said parties have hereunto set their hands, the day and year first above written.

Here follow the signatures.

I.

EXTRACT FROM THE REGISTER OF GRANTS OF LANDS,

1ST AUGUST, 1801.

Date.	No.	To whom Granted.	Article.	Measurement and Description.	Situations and Remarks.
	234	Mr. John Colhoun.	A piece of Ground.	Bounded as follows:— East 106 feet by the sea. West 107 feet by Beach Street. North 80 feet by Mr. McIntyre's ground. South 80 ft. by the Ghaut. Estimated to contain 584 square jumbahs.	East side of Beach Street subject to one dollar quit-rent annually.

No. 122. J.

GRANT OF LAND.

STRAITS SETTLEMENTS.

[Signed] A. E. H. ANSON,
Administrator of the Government.

VICTORIA. by the Grace of God of the United Kingdom of Great Britain and Ireland. QUEEN, Defender of the Faith, to all to whom these Presents shall come, Greeting:

Know Ye, that for good considerations Us thereunto moving We, for Us, our Heirs and Successors do hereby grant unto Tuan Syed Oosman his Heirs and Assigns: All that piece of land situate in George Town, Prince of Wales Island, containing an area of Seventeen thousand One hundred and Sixty-eight square feet, and bounded as follows:—

East—by the sea—Forty-six feet,
West—by the said Tuan Syed Oosman's land—Fifty-three and a half feet,
North—by Forbes Scott Brown's land—Three hundred and fifty-six feet.
South—by Messrs. Fraser & Co.'s land—Three hundred and seventy-one feet.
As the same is delineated in the plan endorsed hereon, with all the rights and appurtenances thereto belonging:

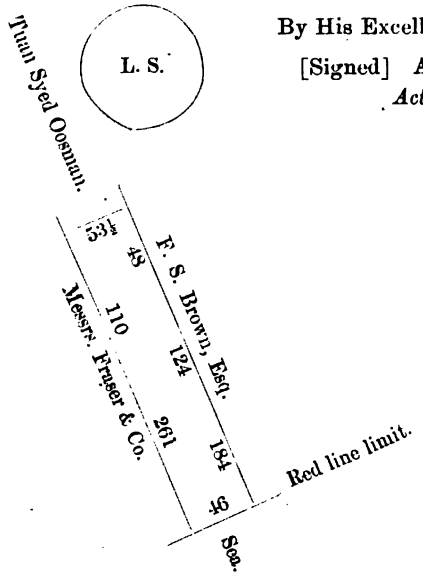
To have and to hold the same unto the said Tuan Syed Oosman, his Heirs and Assigns for ever.

In witness whereof, His Excellency the Administrator of the Government of the Straits Settlements hath hereunto set his hand, and caused the Public Seal of the said Colony to be affixed, this Sixteenth day of June in the year of Our Lord One thousand Eight hundred and Seventy-one.

L. S.

By His Excellency's Command,

[Signed] ARTHUR N. BIRCH,
Acting Lieutenant-Governor.



Scale 100 feet to an inch.
George Town.
No. 6,758..... Area 17,168 Square feet.

[Signed] JOHN B. PEEL,
Assistant Surveyor,
for the Surveyor-General, Straits Settlements.

SIDGREAVES, C. J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

No. 123. K.

GRANT OF LAND.

STRAITS SETTLEMENTS.

[Signed] A. E. H. ANSON,
Administrator of the Government.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland, QUEEN, Defender of the Faith, to all to whom these Presents shall come, Greeting:

Know Ye, that for good considerations Us thereunto moving We, for Us our Heirs and Successors, do hereby grant unto Tuan Syed Oosman, his Heirs and Assigns: All that piece of land situate in George Town, Prince of Wales Island, containing an area of Two thousand Eight hundred and Seventy square feet, and bounded as follows:—

East—by the said Tuan Syed Oosman's land—Fifty-three and a half feet,
West—by the said Tuan Syed Oosman's land—Fifty-one feet,
North—by Forbes Scott Brown's land—Sixty-six feet,
South—by Messrs. Fraser & Co.'s land—Forty-eight feet.

As the same is delineated in the plan endorsed hereon, with all the rights and appurtenances thereto belonging:

To have and to hold the same unto the said Tuan Syed Oosman, his Heirs and Assigns for ever.

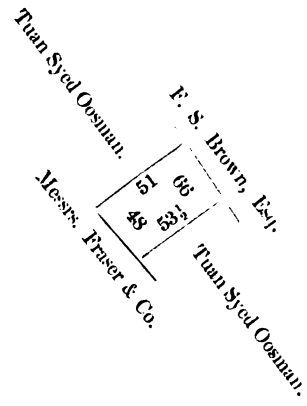
In witness whereof, His Excellency the Administrator of the Government of the Straits Settlements hath hereunto set his hand and caused the Public Seal of the said Colony to be affixed, this Sixteenth day of June in the year of our Lord One thousand Eight hundred and Seventy-one.

L. S.

By His Excellency's Command,

[Signed] ARTHUR N. BIRCH.

Acting Lieutenant-Governor.



Scale 100 feet to an inch.
George Town.
No. 6,867.....Area 2,870 Square feet.

[Signed] JOHN B. PEEL,
Assistant Surveyor,
for the Surveyor-General, Straits Settlements.

Ross for the defendant contended—[I.] That the lease of 15th November, 1883, [C.] was not a renewed lease, but a new lease of new premises—the Godown No. 37, Beach Street, was leased by A. with portion of the lands reserved to the lessor—the covenant for renewal was in respect of those premises only—the lease covenanted to be given by way of renewal was also to be on the same terms and conditions, except as to the rent which was to be settled by arbitrators. The lease of 15th November, 1883, [C.] was a lease of something very different—the Godown No. 37 was given up, and the lands at the back which had been reserved, were leased in its place—the covenants and conditions in the two leases, as also the rights of the lessee on the sea frontage were entirely different. If the lessee chose to take new lands and on new terms, he could not say it was in pursuance of covenant for renewal in the old lease. The plaintiff could not have compelled his lessor to grant him such a lease on the covenant for renewal, *Finch* v. *Underwood*, 2 L. R. Ch. Div. 310; *Bastin* v. *Bidwell*, 18 L. R. Ch. Div. 238; *Corbett* v. *Plowden*, 25 L. R. Ch. Div. 678. The lessee having taken a new lease, he should have enquired as to whether his lessor had not changed his position—he could then have discovered the agreement of 29th November, 1882, and the rights of the Crown to make the reclamation thereunder.

[II.] That the Crown was entitled to the foreshore and to use it for the benefit of the public; the plaintiff's loss as an individual was counter-balanced by his gain as one of the public. *Phear on Waters*, 44, and for any loss he would recover of his lessor, *Woodfall* [12th Ed.] 88; *Wright* v. *Colls*, 19 L. J. C. P. 60; *Ford* v. *Tiley*, 6 B. & C. 325. The accretions belonged to the Crown. Grant No. 234 described the land by metes and bounds, and shewed the plaintiff was entitled to 80 feet from Beach Street to the sea, and that was the then high-water mark. In construing grants from the Crown it was to be construed most strictly against the grantee, and nothing passed which was not specifically mentioned. *Feather* v. *Queen*, 6 B. & S. 283; *Hall on Sea Shores*, 17 [3rd Ed.]. From the accretions, seawards from the 80 feet, the plaintiff's predecessors had taken out grants [J. & K.] The accretions beyond the red line shewed by those grants was the Crown's, and mere user by the plaintiff was not sufficient to establish a right in him against the Crown. *Attorney-General* v. *Chamberlaine*, 6 Jur. [N. S.] 745.

Thomas [*Presgrave* with him] for the plaintiff contended [I.] that the lease C. was a renewal; that it was true, part of Beach Street premises had been given up, but under the old lease they had a right of way and access to the sea. The reserved piece they had acquired [B. 2] a year or two before lease C. The defendant in paragraph one of his statement of defence admitted the present lease was a renewal. The giving up of the Beach Street godown was nothing, the effect was the same as if they had taken a lease and then re-assigned those godowns to the lessors. The cases cited on this point were all distinguishable as being

SIDGREAVES, C. J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

between lessor and lessee, *Bogg* v. *Midland Railway Co.*, 4 L. R. Eq. 310. They were in possession, and the Crown should have enquired as to their rights. *Williams* v. *Wilcox*, 8 Ad. & E. 314; *Wright* v. *Colls*, 8 C. B. 150; *Woodfall L. & T.* 120. The agreement of 29th November, 1882, [H.] only bound the reversion, *Woodfall*, 61. [II.] Their boundary was the red line, and they were well within it. The accretions beyond, having been formed gradually belonged to them—the Crown was therefore a trespasser, *Scratton* v. *Brown*, 4 B. & C. 485. [III.] As a littoral proprietor they had a private access to the sea which they had been deprived of, and were entitled to damages. *Lyon* v. *Fishmongers' Co.*, 1 L. R. App. 662; *Rose* v. *Groves*, 5 Man. & G. 613; *Duke of Buccleuch* v. *Metropolitan Board of Works*, 5 L. R. Eng. & Ir. Appls. 418; *Metropolitan Board of Works* v. *McCarthy*, 7 L. R. Eng. & Ir. App. 243; *Rex* v. *Ward*, 4 Ad. & E. 384; *Coulson on Water*, 14, 33.

Ross in reply, contended the question here was not a right of navigation, but of private access, but no case had been cited to shew a *littoral* proprietor had a private right of access, or if deprived of it he was entitled to redress. *Lyon* v. *Fishmongers' Co.*, which was relied on was the case of a *riparian* proprietor and was considered and explained in *Bell* v. *Corporation of Quebec*, 5 L. R. App. Ca. 84, and *Fritz* v. *Hobson*, 14 L. R. Ch. Div. 542. He submitted the case of *Kearns* v. *Cordwainers' Co.*, 6 C. B. [N. S.] 388, and *Blundell* v. *Catterall*, 5 B. & Ad. 268, were against the plaintiff. A *littoral* proprietor, in fact, had no greater rights on the foreshore than the general public. As to the second point, *Scratton* v. *Brown* was not applicable as the land here was described by definite measurements. As to the alleged admission of the renewal in paragraph one of the statement of defence it was qualified by calling for production and inspection of the lease, and on production, it was found to be different from the old lease, and to be based on the letters E. and F.

Sidgreaves, C. J. said this was so.

Cur. Adv. Vult.

30th March, *Sidgreaves*, C. J. The petitioner is an Engineer and Shipwright, Boiler-maker and Iron founder, of No. 37, Beach Street, Penang, and alleges in his petition that he has for the last seven years under his present firm, or in partnership with his former partners, carried on business at the above address upon land and premises bounded by the sea and harbour of George Town, Penang, which he leased from the owner of the freehold of the said land under certain ancient grants from the Crown, which by the description therein contained give "the sea" as the Eastern boundary [by those words] of the land thereby vested in fee, in the respective grantees thereof.

This statement is traversed by the defendant, and, as a matter of fact, the boundaries as given in the original Grant of 1802 define the boundaries of 37, Beach Street, thus:—"Bounded as follows,—East 106 feet by the Sea; West 107 feet by Beach Street; North 80 feet by McIntyre's ground; South 80 feet by the Ghaut, estimated to contain 58 square jumbahs."

In the second paragraph of the petition, the petitioner alleges that he has leased from the present owners, in fee, part of the premises No. 37, Beach Street, described as "all that piece of land situate and being the back part of the premises numbered 37, Beach Street, in Penang, on the sea side thereof, outside and adjoining the wall of the present godowns, and extending from that godown to the sea upon which the offices, store-rooms, machinery, working-shops and slip of the said lessee now stand, and as the same is now occupied by him, together with the right of way adjoining the southern portion of the said godown from the sea to Beach Street, either by the land from Beach Street, or by the sea, and whether by hand or bullock-carts, horses or by foot, or by day, or by night, when necessary to do so, with the right of the approaches of boats or vessels to the foreshore or wharf and landing place of the said premises for the purpose of docking and repairing boats and vessels, and of landing or shipping machinery and other wares, goods, and merchandise, with all the privileges and appurtenances to the said land belonging."

The third paragraph of the petition alleges that "his lessors had, under their grants from the Crown to their predecessors in title, good right and full power to make the above mentioned lease to your petitioner, with the privileges of access to and egress by sea from the land and premises thereby leased, by navigation thereto and therefrom, which he has hitherto enjoyed as hereinafter mentioned."

The petitioner further alleges that under clauses for building, contained in his previous leases, he has erected large offices and store-houses, engine-works, and a wharf and a channel for repairing vessels and steam-ships, having enjoyed access and egress to and from the premises by sea during his occupancy thereof, and during such time exercised the right of navigation over the sea to the shore at his premises, in order that he might overhaul, dock, and repair vessels brought by sea thereto, and beached on, or brought alongside his premises, for the purpose of his trade or business.

Since the original Grant of No. 234 in 1802, the sea which at that time came up to within 80 feet from the thereby demised premises No. 37, Beach Street, has gradually receded; and before the Reclamation Works were commenced, it is admitted that the line of the medium high-tides was 15 feet, 3 inches, inside the red boundary line referred to in the 7th para. of defendant's answer, as forming petitioner's Eastern boundary under Grant No. 122:—

"The petitioner alleges that the land forming the seaward portion of the premises, from time to time, since the original grant of the land adjoining Beach Street, has been *de die in diem*, and by slow and gradual imperceptible projective subsidence and accretion of ooze, mud, and matter, and by the sea having imperceptibly and daily, gradually receded therefrom, and by gradual and imperceptible increase of soil for a long period cast up and settled from the daily flux and reflux of the tides and waves of the sea, in and upon and against the land comprised in such original grant and the same when, and as it was so daily and imperceptibly formed, became and formed part of the land comprised in such original grant, and alleges that his lessors as grantees from the Crown, and he as lessee under them of the seaward portion

SIDGREAVES, C. J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

of the said lot are entitled to the use, possession, and occupation of the land lying between the high springs and the ordinary tidal low-water mark, and, if necessary, to use and occupy the same, apart and distinguished from his right as an occupier of land in the sea shore, and also as one of the public of the Island of Penang, to navigate to and from the shore in harbour of George Town, and of egress and regress and right of way to the shore now covered by the Reclamation Works. That the land now forming your petitioner's premises and the sea and shore adjoining thereto, have been previously to your petitioner's occupancy thereof, used by the owners and occupiers of the said premises from time immemorial for the purpose of beaching vessels, fishing boats and prahus and repairing the same, there having always been at this spot a natural inlet from the sea."

Petitioner further alleges that the right of navigation over the sea to his premises, and access and egress by the sea thereto and therefrom, is of the utmost pecuniary value and importance to him, forming, in fact, the sole and intrinsic value of his works to him; and were he deprived thereof, he would not only sustain grievous and permanent and irreparable loss and damage in his business, but would have to quit his premises and seek another site elsewhere. That he claims a right to the navigation of the sea opposite his present frontage as it existed previous to the said Reclamation Works being carried across them, and to access to the shore and egress therefrom by sea as one of the public resident in Penang, in addition to his further claim as lessee.

In his pleas the defendant states that in 1867 disputes arose between the proprietors of land on the East side of Beach Street and the Crown, as to their respective rights in the land occupied by the former in excess of the measurements contained in the different Government Grants under which they claimed.

Such disputes, it is alleged, were finally settled by an Agreement, dated the 10th May, 1869, the effect of which is set out. At the hearing of the cause, however, this document was not forthcoming, and although a copy was tendered in evidence, on its admissibility being objected to, it was withdrawn, so that I am unable to take it into consideration.

The defendant admits the carrying out of the Reclamation Works, and says that they have been commenced and are carried out under the provisions of an Agreement, dated the 29th day of November, 1882, and made between the Government of the one part, and the several owners of the lots of land on the East side of Beach Street of the other part. That the petitioner's lessors as such owners as aforesaid, executed the said agreement, and that the petitioner as their lessee is estopped from making any claim.

By this agreement, however, which was not under seal, the lessors could not do more than bind their own reversionary interest; whatever rights the petitioner had under his lease from them could not be affected by it.

The petitioner further alleges that the said Reclamation Works, besides inflicting great and irreparable loss upon him, and depriving him of access, ingress and regress by sea, and of the use of the shore, are a trespass upon the land vested in him under his lease from the owners in fee thereof; that such Reclamation Works are not a general public benefit to this Island and the

community of George Town, and that, in effect, they are so far a public nuisance as not only will the general public be unable to beach boats and vessels thereon, but they will be deprived of the right of navigation, access and egress over the sea, which they at present rightfully enjoy.

In the 1st paragraph of defendant's answer, defendant admits that petitioner leased the premises so occupied by him from Lee Chin Tuan and Lee Chin Soon, under a six years' lease terminating in July, 1889, and made in pursuance of a covenant contained in a prior expired lease, but for greater certainty defendant craved leave to refer to the said lease when produced. The lease was referred to, and it was stated to be made "in pursuance of the proviso for renewal in the former lease [which the said John Leith Wemyss is the assignee of the original lessees] and under which he held the premises hereinafter mentioned, dated the 2nd day of July, 1877." On reference to the deed, Mr. Ross contended that the lease of the 16th November, 1883, to the petitioner, was not to a continuance of the lease under the covenant for renewal running with the land, but was a new lease of new premises with different covenants; and that assuming that the lessors had parted with their property and right by the Agreement with the Government of the 29th November, 1882, this new lease was inoperative.

The original lease under which the petitioner claims, was made on the 2nd July, 1877; and it conveyed the whole of the premises, except a small reserved portion at the back, measuring 36 feet by 30 feet. This reserved portion, however, came into the possession of the petitioner by assignment of the 12th July, 1879, subject to the same covenants as the original lease. The petitioner was then by various assignments, in possession of the whole of the property on the terms contained in the lease of 2nd July, 1877, and entitled to a further lease for six years on the same terms on giving six months' notice of his intention, which it is not disputed that he did. This covenant for renewal was carried out by the lease of 15th November, 1883, and as the petitioner found the godown and offices in Beach Street in such a bad state of repair as to be usuless to him, he gave them up and took a renewal of the lease of the rest of the premises in pursuance, as it appears to me, of the proviso for renewal contained in the original lease.

It becomes important, in the first place, to define the exact boundaries of the land in the occupation of the petitioner under the three grants before referred to. It will be seen that petitioner claims that the whole of the land between high and low-water mark accrued to him under the terms of his grant, and that the Reclamation Works were carried out on land in his occupation and so constituted a trespass. This proposition is quite untenable, however. The case of *The Attorney-General* v. *Chambers*, 4 De G. M. & G. 206, decided that the shore is that portion of the soil which lies between high-water and low-water mark at ordinary tides. The property in the sea-shore belongs to the Crown; and it can only vest in the subject by ancient Charter or Grant from the

SIDGREAVES, C. J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

Crown, of which there is no proof whatever in the present instance. It would be difficult to produce any, inasmuch as the Crown itself has been restrained and rendered incapable of alienating any portion of the sea shore since the passing of the Statute 1 Anne, Chap. 7.

It being claimed by the petitioner and admitted by the defendant, that the petitioner's Eastern boundary extended to the red line boundary and the ordinary high-water mark being inside that boundary, the whole of the land outside and to the East of that red boundary line, indisputably belonged to the Crown.

Upon this land so belonging to the Crown the Reclamation Works were carried out. The position of the Crown is thus defined in *Hall on the Sea Shore*, 2nd Edn., p. 181: "Every per-"manent occupation of the shore by exclusion of the sea is an "embankment or in-taking; and every owner of the soil whether the "King or subject proving his ownership has a right to appropriate "such soil; but subject and without prejudice to existing rights of "others." We have to consider then whether any existing rights of the petitioner have been prejudiced by the action of the Government in this matter.

The Government not having obtained any Legislative sanction for the Reclamation Scheme, can claim no better right than a private proprietor could have, to make a similar use of his lands. As such proprietors they have by Grant 122, given the petitioner's lessors a boundary by the sea, and, as before stated, at the time of the Reclamation Works being commenced, the sea came inside such boundary. The Grant was given manifestly and taken for the purpose of making use of such boundary and the Grantors must have been aware of it at the time. They have now however, by building these Reclamation Works on their own land between high and low-water mark, deprived the petitioner of the boundary which they had previously given him, and cut him off from all access to the sea, and so deprived him of what was the main consideration for the original grant. Finding, as I do, that his rights were not affected by the Agreement of the 29th November, 1882, he occupies the position which the original grantee of the premises would have occupied previously to any such agreement being entered into.

The position of a proprietor of land on the sea shore, though widely different from that of a riparian proprietor where the river is a non-tidal one, is precisely analogous to that of a proprietor on the bank of a tidal navigable river. In the former case, the riparian proprietor on each bank has a property in the river extending to the middle of the stream, but in the latter the same property only as he would have as an occupier of land adjacent to the sea shore. The same law, therefore, which governs the case of a proprietor on a tidal navigable river must apply to the proprietor of lands adjacent to the sea shore.

"The King of England's exclusive dominion not only extends over the open seas, but also over all creeks, arms of the sea, havens, ports and tide rivers as far as the reach of the tide around the coasts of the Kingdom. All waters, in short, which communicate with the sea and are within the flux and reflux of its tides are part and parcel of the sea itself, and subject in all respects to the same ownership." *Hall on the Sea Shore*, p. 3.

The petitioner, being in the occupation of land thus adjoining the sea, has a private right of access to and egress from the sea totally distinct from his public right to the fishery and navigation therein—none of the public could make use of his land for that purpose, and it could be regarded, therefore, in no sense as a public right. It is on the invasion of this private right that the petitioner's case, I consider, must finally rest. The case of *Lyon* v. *The Fishmongers' Co.*, L. R., H. of L. Cases, Vol. I. p. 662, reversing the decision of the Lords Justices, has settled the law upon the matter as regards the owners of lands adjoining tidal navigable rivers. It establishes that "the right of navigating a "tidal river is common to the subjects of the Realm, but it may "be connected with a right to the exclusive access to particular "land on the bank of the river, and the latter is a private right "to the enjoyment of the land, the invasion of which may form "the ground for an action for damages or for an injunction." In his judgment, the Lord Chancellor [*Cairns*], says:—

"Unquestionably the owner of a wharf on the river bank has, like every other subject of the Realm the right of navigating the river as one of the public. This however, is not a right coming to him *quâ* owner or occupier of any lands on the bank; nor is it a right which *per se* he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place, and it becomes a form of enjoyment of the land and of the river in connection with the land the disturbance of which may be vindicated in damages by an action or restrained by an injunction."

And per Lord *Selborne*:

"Even if it could be shown that the riparian rights of the porprietor of land on the bank of a tidal navigable river are not similar to those of a proprietor above the flow of the tide, I should be of opinion that he had a right to the river frontage belonging by nature to his land, although the only practical advantage of it might consist in the access thereby afforded him to the water for the purpose of using when upon the water the right of navigation common to him with the rest of the public. Such a right of access is his only, and is his by virtue and in respect of his riparian property; it is wholly distinct from the public right of navigation."

In the words of Lord Justice MELLISH, "the right of embarking and disembarking and so using his property as a wharf for the loading and unloading of goods is a most valuable right." In the present instance there has been an invasion of a valuable private right of the petitioner in a similar way, and one for which he is entitled to claim damages.

Without prejudice to the rights of the defendant to appeal, the question as to the amount of damages was referred to arbitration, and the arbitrators awarded the plaintiff $35,000.

Bonser [*Attorney-General*] thereafter appealed against the judgment of the Court below, on the following grounds:—

I. That the Court was wrong in deciding that the petitioner as lessee of the land adjoining the sea had a private right of access to and egress from the sea, and that for the invasion of such private right he was entitled to damages.

FORD, C. J. WOOD & SHERIFF, J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

II. That the Court was wrong in deciding that the lease, dated the 15th day of November, 1883, under which the petitioner was in occupation, was a renewed lease granted in pursuance of the covenant for renewal contained in the former lease, dated the 3rd day of July, 1877.

III. That the lease of the 15th of November, 1883, having been executed by the lessors after they executed the reclamation agreement, dated the 29th November, 1882, the rights granted by such lease to the petitioner were subject to the rights of the Crown under the said reclamation agreement.

IV. That the petitioner if entitled to any damages was not entitled to such damages from the Crown, but should have sued his lessors for the same.

16th June, 1886. The appeal now came on to be heard before the Court of Appeal, consisting of *Ford*, C.J., *Wood* and *Sheriff*, J.J.

Bonser [*Attorney-General*], *D. Logan* [*Solicitor-General*], and *Ross*, for appellant.

Van Someren, *Thomas*, and *Presgrave*, for respondent.

Bonser. This is an appeal from the judgment of His Honor the late Chief Justice, Sir THOMAS SIDGREAVES, by which he found the Crown was liable in damages to the respondent by reason of its having erected certain works at the back or sea side of Beach Street, and thereby deprived, as it was alleged, the appellant of his access to the sea. The judgment of the Court below rests on a supposed analogy between the rights of a proprietor on the sea shore, and that of one on a tidal navigable river. The words of the learned Chief Justice in his judgment are "the position of a "proprietor of land on the sea shore though widely different from "that of a riparian proprietor where the river is a non-tidal one, "is precisely analogous to that of a proprietor on the bank of a "tidal navigable river," and then applying the law as laid down in the case of *Lyon* v. *Fishmongers' Co.*, 1 L. R., Ap. Ca. 662, finds the plaintiff, the respondent, is entitled to damages for his loss of access. Now, on looking at the authorities, it will be found that this is the first time such a doctrine has been enunciated, and they are if anything the other way. We propose, therefore, to shew a difference between the rights of such two classes of proprietors. The first difference to be found is, that a littoral proprietor may embank against the sea, although he may thereby cause injury to his neighbour, while a riparian proprietor cannot. *Regina* v. *Commissioners of Pagham Level*, 8 B. & C. 355. The Commissioners in that case, who must be taken to be the owners of the land, embanked against the sea, thereby causing the sea to flow with greater violence on the adjoining land and doing injury to it. It was held the injured party was not entitled to damages. Lord *Tenterden*, C.J., at pages 360-1, says:

"It is contended that this new groyne has caused the sea to flow with greater violence against the land of Mr. Cousens, and made a greater inroad upon it than possibly it might otherwise have done, and that as the Commissioners acting for the benefit of the level have occasioned this damage they must make compensation for it. It may be conceived that such is the effect of the groyne; but the sea is the common enemy to all proprietors on that part of the coast, and I cannot see that the Commissioners acting for the common interest of several land-owners are, as to this question, in a different situation from any individual proprietor. Now, is there authority for saying that any proprietor of land, exposed to the inroads of the sea may not endeavour to protect himself by erecting a groyne or other reasonable defence,

although it may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principal of law which can prevent him from so doing..... The extent to which the principle must be carried, if once admitted, satisfies me that it cannot be sustained in reason or in law. I am, therefore, of opinion that the only safe rule to lay down is this, that each land-owner for himself or the Commissioners acting for several land-owners, may erect such defences for the land under their care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy."

Bayley J., [p. 361-2 | says:

"It seems to me that every land-owner exposed to the inroads of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose, and the Commissioners may erect such defences as are necessary for that purpose, and the Commissioners may erect such defences as are necessary for the land entrusted to their superintendence.....It has been argued that Mr. Cousens having sustained damage from the groyne erected by the Commissioners is entitled to compensation. I do not agree to that as an abstract proposition. If a man sustain damage by a wrongful act of another, he is entitled to a remedy; but to give that title, two things must concur, damage to himself and a wrong committed by the other: that he has sustained damage is not of itself sufficient. Now here, Mr. Cousens may have sustained damage, but the Commissioners have done no wrong."

Then, in *Rex* v. *Trafford*, 1 B & Ad. 874, which was the case of an embankment on a river, we find Lord *Tenterden* again saying [p. 887–888]:

"It has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these feeders cannot be justified. No case was cited, or has been found that will support such a construction."

In that case the defendant relied on the *Pagham Case* already cited, but the Court distinguished it, Lord *Tenterden* saying [p. 888].

"The Pagham Case quoted in the argument for the defendant is of a very different kind. It is a well-known fact that the sea occasionally by some change proceeding from natural and well-known causes makes gradual inroads on parts of a coast, which had been free from its water for centuries. On such occurrences it has been compared, and justly compared, to a common enemy against which every person may defend himself as he can; but this is perfectly different from an occasional course of superabundant inland water flowing in the same direction, whenever the occasion happens, and the ordinary channel is become insufficient to carry it off. In the one case if the works be successful, the water is prevented from coming where within time of memory at least it never has come; in the other it is prevented from passing in the way in which when the occasion happened, it had been always accustomed to pass."

These cases shew there is a difference between a riparian and littoral proprietor, and the learned Chief Justice below was therefore wrong in saying these rights were "precisely analogous."

[*Wood*, J. Was *Rex* v. *Trafford* the case of a tidal navigable river?]

FORD, C. J. WOOD & SHERIFF. } J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

No—but the Pagham Case having failed to be extended to a non-tidal river, it was attempted to be applied to a tidal navigable river in a subsequent case. The case is that of the *Attorney-General* v. *Lonsdale*, 7 L. R. Eq. 377. It was attempted in that case to extend the rights of a proprietor embanking against the sea to that of one embanking against a tidal estuary. The river in that case was the river Eden, a tidal navigable river. The plaintiff there complained that the defendant had put up a bulwark and jetty, which caused the water to flow with greater violence than before. Jessel, Q.C., arguendo, at page 382, says:

"The place in question is what in law is considered an estuary or arm of the sea, since the tide runs up to the *locus in quo*, and according to the law as decided in *Regina* v. *Pagham Commissioners*, a man may erect any works he finds necessary for the protection of his land against the sea, notwithstanding that an injury may thereby be caused to his neighbour's land. In Viner's *Abr. Prerog. of the King*, it is stated that every water which flows or re-flows is called an arm of the sea; so far as it flows, such river participates of the nature of the sea and is, therefore, said to be an arm of the sea. The defendant was consequently justified in erecting this jetty, which is proved to be for the protection of his land from the encroachments of the tide."

Sir ROUNDELL PALMER argued on the other side, so that we may take it that the case was thoroughly sifted. He says [p. 385]:

"As to the alleged distinction between a tidal and non-tidal stream the difference is wholly imaginary, and if anything the injury is greater upon a tidal river. It would be absurd to suppose that a line could be drawn at the termination of a tidal stream such for instance as Teddington upon Thames above which a riparian proprietor should have rights which one below would not have."

In a considered judgment, *Malins*, V. C. [page 387-8] says:

"Supposing this not to be a tidal river, or that the rights of riparian proprietors on tidal and non-tidal rivers are the same, the law is now settled that no riparian proprietor can without the consent of the opposite proprietor erect any buildings or make any change in the *alveus* of a river..... Unless, therefore, the fact of the Eden being a tidal river distinguishes the present case, these authorities are conclusive against the defendant..... Does then the fact of the river being a tidal river make any difference? I am of opinion that it does not. It was strongly contended by the Counsel for the defendant that the place where the jetty is erected is an estuary and therefore an arm of the sea, and that the defendant has consequently all the rights of protecting his land which he would have had if it had been on the sea shore instead of the river Eden, and *Regina* v. *Pagham Commissioners* was cited.....This would have been conclusive for the defendant if his land had been on the sea shore, but is this principle applicable to a riparian proprietor on a navigable river? It must be borne in mind that the greatest work of man must be insignificant as compared with the power of the sea, but that this is not so with reference to a navigable river. If the principle contended for were sustainable, it would follow that every riparian proprietor on a navigable river however distant from the sea, and however gentle the flow of the tide at the place, might throw any works into the *alveus* that he might deem necessary for his protection however injurious such works might be..... In a sense there is no doubt, that every water which flows and reflows is called an arm of the sea as stated in Vin. Abr. But I find no authority for the proposition contended for; on the contrary, all the cases including those cited by the defendant's Counsel tend in the opposite direction..... I am, therefore, of opinion upon principle and authority that a riparian proprietor on a tidal river has no greater rights against an adjoining or opposite proprietor than such a proprietor on a private or non-tidal river, and that the defendant cannot therefore justify the erection of the jetty on this ground."

[*Ford*, C.J. Do you understand the Court below meant to state that their rights were the same *in all respects*, or only in respect of the subject-matter of the decision; the right of access, egress and ingress?]

The Court below certainly so considered it, the words of the Court are "the position of a proprietor of land on the sea shore ... .. is *precisely analogous* to that of a proprietor on the bank of a tidal navigable river."

[*Ford*, C.J. Surely such expressions must be considered in reference to the matter immediately before the Court?]

Not necessarily; and we are entitled to take advantage of the learned Judge's own expressions to shew the foundation of his judgment is wrong. One more case will be cited, and it points to a second difference between the two classes of proprietors. The case is that of the *Attorney-General* v. *Tomline*, 12 Ch. Div. L. R. 214. In that case, the Crown was held to have a right to restrain a littoral proprietor from doing an act which might cause the sea to encroach.

[*Ford*, C.J. It was there held the Crown had the right to protect its own property.]

Not exactly, *Fry*, J. [p. 232-3] says:

"In *Hudson* v. *Taylor*, when before the Court of Appeal, the existence of the prerogative was referred to, the Court said: "The King has probably from the very earliest times, had a right as part of the prerogative to defend the realm against waste of the sea, and to order construction of defences at the expense generally of those who are to be benefitted by them".....I come therefore to the conclusion that there exists in the Crown this prerogative right and duty, a duty, of course, to its subjects of which the law must take cognizance, although the law does not enfore the performance. And, if this prerogative and right exists in the Crown, it seems to me impossible to suppose that the subject can have a right to do that which the defendant claims to do. It would be absurd that the subject should be at liberty to destroy that which the Crown is bound to protect There are, I should observe, traces in the earlier books of some public right in the banks of the sea .....I do not rely upon either of those authorities as being conclusive with regard to the rights of the public; but they seem to me not unimportant as shewing that our earlier writers considered that the bank of the sea was not absolutely private property, free from all public use, in the same way as other private land might be." The word "bank" here does not mean the sea shore; the bank is the upper portion above medium high-water mark, while the sea shore is that strip of land lying between medium high and low-water mark."

[*Wood*, J. Technically called the foreshore.]

Yes, as we understand it. That case was affirmed on appeal, 14 L. R. Ch. Div. 58, and it is important to observe that the defendant was only doing an act which was but a natural use of his land.

Ford, C.J. On looking into the case, I see there was there a Martello Tower; it was wanted for the protection of the realm probably, and it was possibly in danger of being injured by the defendant's act.]

The reason for the decision is clearly set out in the passage of Fry J.'s judgment already cited, and he found, as a fact, the

FORD, C.J. WOOD & SHERIFF. J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

defendant was only making a natural use of his land in removing and selling the shingles, but nevertheless his Lordship restrained him from so exercising his natural rights. It would seem therefore that it would be inconsistent for a private individual, as here, to acquire a right over the foreshore, the interfering with which renders the Crown liable in damages. Any private rights a littoral proprietor may have, are subject to the rights of the Crown to embank against the sea.

[*Wood*, J. For all purposes?]

For purposes of protecting the realm against the sea.

[*Wood*, J. What about the Martello Tower then?]

It only happened as an accident to be there.

Ford, C.J. I expect if the Martello Tower had not been there, we would never have heard of the case. Did not that case only decide that the Crown had a right to prevent an act being done, which might bring about that which it was its duty to protect the land from?

That is not the only ground on which that case went.

[*Ford*, C.J. Do I understand you to say then, that case shews the Crown can do anything which may be for the public benefit.]

Yes.

[*Ford*, C.J. I don't so understand it.]

[*Sheriff*, J. Should not the Crown shew a *necessity* first?]

I admit it is, but if the Crown *has* the right, then it is inconsistent that a private person should have a right which might interfere with it.

[*Sheriff*, J. Here they shut out the plaintiff without any necessity from the sea, and from placing a boat on it from his land.]

That is a right of navigation as one of the public; there can be no right to maintain a private action for such a claim. The claim here is for such a private right of access to the sea. There is no authority for such a claim.

[*Ford*, C.J. One hardly wants an authority for it. There seems to have been no occasion to raise it as probably the point was too clear.]

It is for the other side, who claim the right to support it by authority. In the present case too, the plaintiff's [the respondent's] predecessors in title, acquiesced in the rights of the Crown by accepting grants from time to time of the accretions from the sea; this acknowledged the right of the Crown over those lands; how then can he claim a right inconsistent with their rights. The plaintiff claims a right of egress and ingress over these accretions which form gradually as the sea recedes, but his predecessors acknowledge the accretions to be the Crown's.

[*Ford*, C.J. The plaintiff here only claims a right of access, an easement.]

That is so, but such a right is inconsistent with the rights of the Crown, and can at most be acquired by prescription.

[*Ford*, C.J. Suppose a person have a wharf or jetty, has he no right to get to the sea by it? By it he gets his access, plies his boats, and loads and unloads his cargo.]

There the pier would be his, and he has therefore the right to it.

[*Ford*, C.J. He would be entitled to walk over it.]

Certainly; but he must have a grant for his pier.

[*Ford*, C.J. I am assuming that; but I only put the case in reference to your contention that the rights are inconsistent.]

If the plaintiff had a right of access, he would claim a right of way over the accretions already accrued, and for which his predecessors have taken grants as well as over that which might hereafter accrue.

[*Ford*, C.J. The accretions since the embankment are caused by your acts in building that embankment. I much suspect the reclamation here is similar to that in Singapore which was only a filling of stuff in one place, and squeezing it out in another.]

Then the learned Judge below assumed that plaintiff was in the same position as if he were the owner of the fee in the land he is on—but according to his own case he is only a lessee. In *Lyon* v. *Fishmongers' Co.* already referred to, it was held there was no difference between rights of riparian proprietors on a tidal and non-tidal river, but in both cases they are proprietors and owners of the land; and not mere lessees. That case also only dealt with and decided as to the rights of a riparian proprietor—and it was held that a tidal and non-tidal river were substantially the same. There is not however, a word in the whole case as to a littoral proprietor, and the supposed right of access of such a proprietor was never alluded to, or relied on as analogous or as affording an illustration. The facts of that case were these—the plaintiff was the owner of certain freehold land and buildings on the North bank of the Thames known as Lyon's Wharf the whole of the Southern side of which fronted the river. At the Western extremity of this frontage there was an inlet which extended about forty feet to the Northward and formed the Western boundary of the plaintiff's property—this inlet communicated with the main river, and was called Winkworth's Hole, and at the bottom of it stood a wharf belonging to the defendant-company known as Winkworth's Wharf. The plaintiff had thus a double river frontage. The defendant-company by the erection of an embankment in front of their wharf [Winkworth Wharf] up to the main line of the river entirely shut out the plaintiff from using the inlet as he had previously done, and it was for this the House of Lords held he was entitled to damages. The plaintiff and defendants were both riparian proprietors, and the case rests entirely on the right of such a proprietor. Such a proprietor is, undoubtedly, entitled to an uninterrupted flow of the river along his frontage, but in the case alluded to the plaintiff had his access to one of his frontages interfered with. In *Duke of Buccleuch* v. *Metropolitan Board of Works*, 5 L. R. Eng. & Ir. App. 462, 3, Lord CAIRNS, says: "It has appeared to me throughout that the property of the

FORD, C.J. WOOD & SHERIFF. J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

plaintiff in error in this case was what is commonly called riparian property. The meaning of that is, that it had a water frontage. The meaning of its having a water frontage is this, that it had a right to the undisturbed flow of the river which passed along the whole frontage of the property in the form in which it had formerly been accustomed to pass."

[*Ford*, C.J. That was the case of the Thames Embankment?]

Yes. The plaintiff there was a riparian proprietor, whose right to the uninterrupted flow of water was disturbed, and he was held entitled to damages. In *Lyon* v. *Fishmongers' Co.*, the learned Lords who decided it confined themselves to strictly *riparian* rights.

[*Ford*, C.J. On a tidal navigable river.]

Quite true, but no allusion is made as to littoral proprietors. The decision of the Lord Justices in that case was reversed, and that of Malins, V.C., restored. The Lord Justices considered that because it was a tidal river, the plaintiff had not the right he claimed; but the sea is tidal, so that if a littoral proprietor had a right as is here claimed, their Lordships could never have found any difficulty, or made the distinction they did on that ground. They neither allude to the supposed rights of such a proprietor, nor seek to distinguish it from the case before them. The House of Lords on the other hand, while considering the fact of the river being a tidal river made no difference, also, neither alluded to the rights of a littoral proprietor, nor relied on it as affording an analogy. The inference to be drawn is, that a littoral proprietor has no such rights as are here claimed for him. Lord CAIRNS in *Lyon* v. *Fishmongers' Co.*, [p. 671–3] says:

"Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This however is not a right coming to him *qua* owner or occupier of any lands on the bank, nor is it a right which *per se* he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to, or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction. It is, as was decided by this House in the cases to which I have referred, a portion of the valuable enjoyment of the land, and any work which takes it away is held to be an injurious affecting of the land, that is to say, the occasioning to the land of an *injuria* or an infringment of right ..... The title of the appellant, however, appears to me to stand still higher than I have thus put it. Lord Justice MELLISH takes notice that it was contended on behalf of the wharfinger that the owner of premises abutting on a navigable river where the tide flows and reflows, has rights belonging to him as a riparian proprietor, wholly distinct from the public right of navigation, and he goes on to observe that the Lord Justices had been unable to find any authority for holding that a riparian proprietor where the tide flows and reflows has any rights or natural easements vested in him, similar to those which have been held in numerous cases to belong to a riparian proprietor on the banks of a natural stream above the flow of the tide. With much deference for the Lord Justice, I should have thought that some authority should be produced to shew that the natural rights possessed by a riparian proprietor, as such, on a non-navigable river, are not possessed by a riparian proprietor on a navigable river."

[*Ford*, C.J. The Lord Justices held that the plaintiff only had a right of navigation as one of the public. The House of Lords held that he had a right of access as something distinct from his right as one of the public.]

Yes. The Lord Justices had drawn an arbitrary line that while higher up a river a riparian owner had a private right of access, those lower down the river had none, because the river was tidal in such lower parts; and they relied on the want of authority to shew the rights were the same. The House of Lords said if you admit such rights on one part of a river, the *onus* is on you to shew that because the site is shifted lower down such rights do not follow. This right of access on a tidal river was not inconsistent with the right of the public. In the case of the littoral proprietor it would be. The whole case of *Lyon* v. *Fishmongers' Co.*, then, is confined to rights of riparian owners *as such* but it is a great leap from such rights to say that similar rights are vested in a littoral proprietor. I venture to say, no authority can be cited to shew the rights are the same. Lord CAIRNS relies on Lord WENSLEYDALES' judgment in *Chasemore* v. *Richards*. He says, [p. 673-4]—

"The late Lord WENSLEYDALE observed in this House in the case of *Chasemore* v. *Richards*, 'the subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface, *ex-jure naturæ*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity or quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbours' soil for his own, in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbour .....' I cannot entertain any doubt that a riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights, as an ordinary riparian owner, underlying and controlled by, but not extinguished by the public right of navigation."

This shews Lord CAIRNS was dealing exclusively with streams of water. Lord CHELMSFORD, says [p. 677.]—

"The Lord Justices said, they were unable to find any authority for holding that a riparian proprietor where the tide flows and reflows has any rights or natural easements vested in him, similar to those which have been held in numerous cases to belong to a riparian proprietor on the banks of a natural stream above the flow of the tide? But with great respect, I find no authority for the contrary proposition, and I see no sound principle upon which the distinction between the two descriptions of natural streams can be supported."

That is to say, a stream does not cease to be a stream by the tide flowing into it. Lord SELBORNE, says [p. 681-3.]—

"The judgment under appeal seems to be founded upon these two propositions: First, that a riparian proprietor on the bank of a tidal navigable river has no rights or natural easements similar to those which belong to a riparian proprietor on the bank of a natural stream above the flow of the tide; secondly, that a riparian proprietor whose frontage and means of access to such tidal

FORD, C.J. WOOD & SHERIFF. } J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

river is cut off by an encroachment from adjoining land into the stream suffers no loss or abridgment of a private right belonging to him as such riparian proprietor, but is only damnified in common with the rest of the public by the diminution of the water space in the navigable stream, and by such obstruction of the navigation as may be consequent thereon. The Lord Justices were of opinion that there was no authority at variance with these propositions. To me the propositions appear to be at variance with the opinions delivered in this House, both by the Judges who attended your Lordships, and by the noble Lords who took part in the decision in the case of the *Duke of Buccleuch* v. *The Metropolitan Board of Works*, by which opinions the decision of this House was governed ..... It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good, *jure naturæ*, as vertical ..... It is true the bank of a tidal river, of which the foreshore is left bare at low-water, is not always in contact with the flow of the stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right."

All those passages shew that the House of Lords was only dealing with rivers or streams and riparian rights, and to these it confined itself. As regards a littoral proprietor, it is no authority.

[*Ford*, C.J. How came the Government to make an agreement with the various proprietors if it had no doubt they had no right?]

That was done *ex-abundanti cautelæ*; and also not so much for the public as for the interests of those littoral proprietors, who were bound to pay Government for the land reclaimed. Here, that agreement was concealed by the plaintiff's lessors from him, and the lease was concealed by them from the Crown.

[*Ford*, C.J. Have you no direct authority for the distinction you contend for?]

No, but the *onus* is on the plaintiff to shew the rights are the same, he must shew both *injuria* as well as the *damnum*. But even if the Court is of opinion that the rights are the same, yet looking at the term of the grants under which the plaintiff claims, he had no private right of access. In paragraph one of his petition of right he says the sea is mentioned as his boundary. Exhibit I. shews the exact measurements of the grant, and under it he can only get 80 feet from Beach Street. The sea is now and was at the time the works were put up much beyond that limit. In 1872 the plaintiff's predecessors obtained two further grants [Exhibits J. and K.] which comprised the accretions, and together bring him down to the red line. So that, whatever rights he had, [if any] under the words "the sea" in the original grant are waived.

[*Ford*, C.J. How does he waive his rights to the accretions under the original grant, by taking grants therefor for the Crown? He may have done so *ex-abundanti cautelæ*.]

We say he had no rights, but supposing him to have had any, [which we do not admit] then we say he has waived them. He however, had no right for it, is a well-settled rule that in construing grants from the Crown a different rule of construction prevails from that between subject and subject. In *Feather* v. *The Queen*, 6 B. & S. 283, *Cockburn*, C.J., says:

It is established on the best authority that in construing grants from the Crown a different rule of construction prevails from that by which grants

from one subject to another are to be construed. In a grant from one subject to another every intendment is to be made against the grantor and in favour of the grantee in order to give full effect to the grant; but in grants from the Crown an opposite rule of construction prevails. Nothing passes except that which is expressed. or which is matter of necessary and unavoidable intendment in order to give effect to the plain and undoubted intention of the grant."

[*Ford*, C.J. Is that a dictum only?]

No, but the foundation for the whole decision. Now to apply that rule of construction, it will be seen that different measurements are given, and a plan is expressed to be made part of the description. [Exhibits J. and K.]

[*Sheriff*, J. Is it not a maxim which is corollary to the one you have alluded that the Crown cannot derogate from its own grant?]

We are not derogating from our own grant.

[*Sheriff*, J. The question is whether the words "the sea" are mere matter of description, or really intended as a boundary.]

The fact that the parties have taken out grants from time to time shews it was only matter of description at the time the expression was used.

[*Sheriff*, J. The fact that they have taken out grants from time to time, shews clearly the sea was the one all-important matter to them.

To the grantees perhaps, but not to the lessee, the plaintiff.

[*Ford*, C.J. He claims under them and is entitled to all rights they had.]

Court adjourns for half-an-hour.

Bonser [in continuation]—When the Court rose, I was about referring to *Smart* v. *Magistrates of Dundee*, 8 Bro. Par. Cases 119, where it was held that grantees whose boundary was described as "by the sea flood" had no right to follow the sea.

[*Ford*, C.J. That is obvious, we will grant you that.]

I am glad to hear your Lordship say so, as it is a case exactly like this. It was held that words "by the sea flood" was matter of description, and being a Scotch case is a strong authority for us, as it was decided contrary to the ordinary presumption of law in Scotland. In Scotland, the foreshore is *primâ facie* in the owner of the adjoining land: in England it is in the Crown. The facts were [p. 129] the appellant was the owner of a yard [also called a garden] in the burgh of Dundee, the South boundary of which was described in all the title deeds as by the sea flood, and which was, in fact, the boundary at the time of his purchase [p. 136, 37], this situation of the property enhanced its value, and it was this circumstance alone that induced him to purchase it. The appellant then proceeded to embank a part of the sea shore when he was interrupted by the respondents; they in turn, notwithstanding the appellant's repeated objections, embanked the remainder of the beach, and took possession of that portion of it which had been enclosed by the appellant. By these acts the respondents entirely shut out the appellant from the sea as a

FORD, C.J. WOOD & SHERIFF. J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

boundary, and it was for this the appellant brought his action. The Lord Ordinary in Scotland had found in the appellant's favour [p. 120], but his decision was reversed by the Court of Sessions [p. 128] and the appellant then appealed to the House of Lords [p. 128] with the result that the judgment of the Court of Sessions was affirmed [p. 145]. The reasons for the judgment of the House of Lords are unfortunately not set out, and the arguments of the House of Lords also are unfortunately not set out, but the arguments on the respective sides are, and from what appears to be a statement signed "J. Scott," [presumably Lord ELDON] we find the following:—

"The respondents have no occasion to dispute the general doctrine that where a person's property reaches to the sea or river, he has a right to the soil that may be acquired from the sea or river by their receding naturally, or by his own industry in embanking, where no other person can shew a title to that soil. But to apply this to the site of a tenement or to a garden within a burgh, where the incorporation is entitled to all the soil not expressly granted away, because the property is described as close to the sea or river at the time of the grant, is absurd. It is evident that such a description or boundary is a limitation of the subject of the grant, in the same way as stating that it is bounded by the tenement of another person; and in the latter case it might with parity of reason be maintained that if the adjoining tenement became waste it would accrue to the grantee. Nothing but an express declaration of an intention to grant the soil which might be acquired [a declaration, the validity of which would be most questionable] could support the idea that the corporation meant to renounce their inherent right to the bed of the sea or river, and to bestow it on the grantee."

That case is very similar to the present and the passage read is applicable exactly to it. The Crown [the respondent] of course being here in the same position as the Corporation there, and what is noticeable is that not a word as to the appellant's right of access as a littoral proprietor is to be found in the whole case. The importance of the passage I have read, will be seen when we look into the judgment here of the learned Judge below, he says:

"The Government have by grant 122 given the petitioner's lessors a boundary by the sea, and as before stated, at the time of the reclamation work being commenced, the sea came inside such a boundary. The grant was given manifestly and taken for the purpose of making use of such boundary, and the grantors must have been aware of it at the time: they have now however, by building the reclamation works on their own land between high and low-water mark, deprived the petitioner of the boundary which they had previously given him, and cut him off from all access to the sea, and so deprived him of what was the main consideration for the original grant."

[*Ford,* C.J. That is only an eliptical way of putting it.]

Whatever it be, I am entitled to criticise the language of the learned Judge as his observations form the basis of his judgment.

[*Sheriff,* J. All that is meant is that you have *altered* his boundary.]

The Court below practically says we have given him a boundary *against ourselves,* and then deprived him of it. We never gave him a boundary against ourselves. We never guaranteed him such a boundary.

[*Ford*, C.J. No one guarantees a boundary even on land as it may be removed by an earthquake. You gave him the land "with all the rights and appurtenances thereto belonging." Exhibit J.]

That only means what was appurtenant to the land *at the time of the grant*, and which was so when the land was in the Crown; that is before the grant.

[*Sheriff*, J. There was evidence of user was there not?]

Yes, but not sufficiently long enough, and then not on the accretions to the land granted in 1871, [Exhibit J. and K.] Then as to objections two, three and four; the point here is that the plaintiff does not claim under lease A., but under a lease made *after* the reclamation agreement.

[*Sheriff*, J. That is the lease of the 15th November?]

Yes, 15th November, 1883, [Exhibit C.].

[*Ford*, C.J. There is nothing in the agreement of 29th November, 1882 [Exhibit H.] to destroy private rights?]

No, but that agreement is earlier in point of date to the lease of 15th November, 1883, and the question is whether the second lease is a renewal of earlier lease.

[*Ford*, C.J. On reading through the case I could see nothing but renewal. The lease of 1883 purports to be a renewal made under the covenant in the original lease. You have not had it set aside for fraud or otherwise.]

No, but the lease cannot bind third parties. The parcels in the original lease, [Exhibit A.] are as follows:—

"All the godown or messuage situate and being No 37, Beach Street, George Town, Penang aforesaid, with the actual and reputed rights, members, easements, and appurtenances, except and always reserved unto the said lessor, his heirs, executors, administrators and assigns, a piece of land at the back or sea side of the said premises, and outside and adjoining the present back wall thereof, and measuring from the Northern wall or boundary of the said premises, thirty-six feet in breadth by thirty feet in length, measured from the said back wall, with liberty for the said lessor, his heirs, executors, administrators, and assigns, to build on the land so reserved as aforesaid, and with full and free liberty of egress and regress for all legitimate purposes, along, over, and through the cart-way and wharf situate along the Southern portion of the premises hereby demised, for the said lessor, his heirs, executors, administrators or assigns, and his and their agents, friends, servants and workmen, and the tenants and occupiers for the time being of the land hereby excepted, or of any building to be erected thereon, and whether to or from the sea or Beach Street aforesaid."

The covenant for renewal is as follows:—

"And also that if the lessees, their executors, administrators or assigns, shall be desirous of taking a renewed lease of the said premises for the further term of six years from the expiration of the said term hereby granted, and of such desire shall, prior to the expiration of the said term, give to the lessor, his executors, administrators or assigns, or leave at his or their last known place or places of business, six calendar months' previous notice, in writing, and shall pay the rent and observe the several covenants and agreements herein contained on the part of the lessees, their executors, administrators, or assigns to be observed and performed up to the expiration of the said term hereby granted; be the lessor, his executors, administrators or assigns will, upon the request and at the expense of the lessees, their executors, administrators and assigns, and upon their executing and delivering to the lessor, his executors, administrators or assigns, a counterpart thereof, forth-

FORD, C.J. WOOD & SHERIFF. } J.J. 1885

WEMYSS v. ATTORNEY-GENERAL.

with execute and deliver to the lessees, their executors, administrators and assigns, a renewed lease of the said premises for the term of six years, at such rent as may be, at the time of execution of such renewed lease, either agreed upon by mutual consent, or fixed by four arbitrators, two of whom shall be chosen by the lessees, their executors, administrators or assigns, and two by the lessor, his heirs, executors, administrators or assigns."

The only term that is provided may be changed, is the rent. A renewed lease is a similar lease as the first, altered only in so far as the proviso provides might be done. In the present case, the only thing that might be altered, is the rent.

[*Ford*, C.J. Not necessarily.]

No, not even that, necessarily. Then Exhibit B². is relied on, and plaintiff claims that its effect is to bring the land therein mentioned [the land excepted in lease A.] within the proviso of the original lease A. On 16th December, 1882, plaintiff gives notice of his desire for a renewal, [Exhibit D.] Nothing was done under that; no counterpart was delivered nor renewed lease executed. Then comes letter E. by which the previous notice D., is rendered useless and is gone. The letter is promptly answered by F. and these exhibits E. and F. are stamped.

[*Sheriff*, J. What is the stamp on a renewed lease?]

The same as on an original lease. Now, if A. and C. are compared they will be found to be entirely different.

[*Ford*, C.J. Why should not the parties to a renewed lease alter such things as they choose?]

They might of course; but here the lessors had previously made the agreement with us of 1882. The lease C. differs from A. in its parcels, a right of way is given, a way for oxen and beasts, for landing of machinery, beaching of boats, &c., rights not to be found in A. These words, no doubt, were put in for some reason, but the lease cannot be said to be a renewed lease on the same terms.

[*Wood*, J. Surely if the subject-matter is the same, that is all that is required? The general words as to "easements and appurtenances" are not used, but specific words of things included in the general expression.]

The enlargement of words, works perhaps to our prejudice. It possibly affected the views of the arbitrators.

[*Ford*, C.J. What is there in it affecting your right?]

[*Sheriff*, J. The question is does the verbiage alter the lease.]

The whole question here refers to the slipway—the lease C. in words and terms, gives more than A.

[*Wood*, J. You admit then that the subject-matter is the same in both?

No, I don't; I say the larger words are not included in the original expressions in the first lease.

[*Ford*, C.J. That is what we want you to shew us. The parties acted under a compulsory covenant.]

Not so, for had the lessor been sued, the Court would not have granted him specific performance of a lease like C. *Finch* v. *Underwood*, 2 L. R. Ch. Div. 310.

[*Ford*, C.J. You admit the thing given is the same, but the extra words might prejudice the views of the arbitrators?

No; I do not admit the same thing was given—that is just what I am contending against.

[*Ford*, C.J. The right of egress and regress is granted in the first lease A.]

No, that right is reserved to the lessor.

[*Ford*, C.J. But even if so, B². gives him all that is reserved by the exception in lease A. and C. purports to be made in pursuance of A.]

That is only a recital in C. which is not always consistent with fact—and as to B². I shall refer to it later on. I am now only dealing with A. and C. and when they come to be compared, I say they will be found so entirely different that the one cannot be said to be a renewal of the other.

[*Ford*, C.J. Did not the fact that the lease A. had expired when the lessor made the agreement of 1882 with the Government, bind the lessor by his covenant to renew?]

The agreement was made with us *before* the lease A. had expired. I say, would anybody reading these two documents A. and C. say the latter was a renewal—and when we consider that in law a covenant for renewal will be construed strictly the objection receives immense strength.

[*Wood*, J. Such a covenant is to be construed strictly *inter partes*.]

[*Ford*, C.J. Not where it does not affect you.]

It is impossible to say how far it will not affect us. The effect of the letters of June 1883, E. and F. is to do away with the covenant for renewal and the notice D.

[*Wood*, J. The expressions in E. clearly shew the parties did not intend to do so, but acted with a view to give effect to the covenant.]

Whether they intended it or not may be doubtful, but the legal effect of the letters is to waive the covenant and the notice D. Then to come to B². This document is not a lease. It is not signed by Tunku Muda Niah Malim, but by Habib Oosman.

Van Someren.—Habib Oosman, as my learned friend Mr. Ross knows and will admit, was the attorney of Tunku Muda Niah Malim.

Ross. I don't know it of my own knowledge; I have heard so.

[*Ford*, C.J. If there is any question on that subject we will give the respondent leave to adduce evidence on the point.]

But B². is invalid as it is not under seal.

[*Ford*, C.J. That is not required *in this Colony*.]

Supposing B². to be available for the respondent, still C. is not a renewal of even A. and B². together, and *Finch* v. *Underwood*, shews that no specific performance will be decreed where the leases are different as it is not a renewal.

[*Ford*, C.J. But it does not shew that where the second lease *is granted* it is held not a renewal. Can you shew us that the second lease here threw any extra burden on the Crown?]

It will be sufficient if it might do so, it is impossible to say what its effect would be on a Jury.

FORD, C.J. WOOD & SHERIFF. J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

[*Ford*, C.J. Surely that is too remote a thing for us to consider.]

Possibly the arbitrators were influenced by the wording of it. To sum up then—Firstly, I have shewn that the rights of a littoral and riparian proprietor are not the same. Secondly, even if they be the same, that rule [if any] is not applicable to this case, as the grants only give the plaintiff's predecessor's land by definite metes and bounds; and Thirdly, the lease C. is not a renewal. The judgment of the Court below should therefore be reversed, and the plaintiff for any losses he has sustained, can recover them of his landlord, by whose acts really, he has suffered.

Ross [on same side]—I propose to deal with the question of renewal first, and in so doing, I will lay down certain propositions from which I shall draw my arguments. The first is, supposing if the plaintiff based his claim on lease C. only, not as a renewal, but as a distinct lease he would be out of Court as our agreement of 1882 is prior in date. Secondly, if the plaintiff had sued his lessors for specific performance in terms of lease C. of the covenant for renewal, basing his claim on A. B. B^1. B^2. and D. only, without the letters E. and F. he could not have succeeded.

[*Ford*, C.J. I am sure he could not.]

[*Wood*, J. There can be no doubt of it.]

Then let us look at the covenant for renewal in lease A. It is as follows:—

"And also that, if the lessees, their executors, administrators or assigns, shall be desirous of taking a renewed lease of the said premises for the further term of six years from the expiration of the said term hereby granted, and of such desire shall, prior to the expiration of the said term, give to the lessor, his executors, administrators or assigns, or leave at his or their last known place or places of business, six calendar months' previous notice, in writing, and shall pay the rent and observe the several covenants and agreements herein contained on the part of the lessees, their executors, administrators or assigns to be observed and performed up to the expiration of the said term hereby granted; he, the lessor, his executors, administrators or assigns will upon the request, and at the expense of the lessees, their executors, administrators and assigns, and upon their executing and delivering to the lessor his executors, administrators or assigns, a counterpart thereof, forthwith execute and deliver to the lessees, their executors, administrators and assigns, a renewed lease of the said premises for the term of six years, at such rent as may be, at the time of execution of such renewed lease, either agreed upon by mutual consent, or fixed by four arbitrators, two of whom shall be chosen by the lessees, their executors, administrators or assigns, and two by the lessor, his heirs, executors, administrators or assigns."

The effect of that covenant is only to provide for a lease on the same terms and the same conditions; only the rent was liable to be altered. Then by notice D. plaintiff shews he so understood the covenant and so wished it. Notwithstanding this notice, however, nothing is done in pursuance of it till June, 1883, when letters E. and F. are written. These two letters made a clear agreement and by them the lessee waives his rights under the covenant for renewal and his notice D. After those letters

plaintiff could not have sued for specific performance for a lease in terms with A. Now, this agreement affects us, and it is made subsequently to ours.

[*Ford*, C.J. How does it affect you injuriously?]

I admit, if the plaintiff had a new lease in exactly the same terms as A., I should have been out of Court; but here they have altered the terms. The lease C. therefore, made in pursuance of the altered terms cannot be a renewal.

[*Sheriff*, J. Notwithstanding that under a solemn document the parties have declared it is a renewal?]

Only by a recital which we can always dispute.

[*Ford*, C.J. Does the fact that in minor details they have modified the terms, and in other matters have used different language, make the lease less a renewal?]

[*Wood*, J. Do you really contend there is a waiver of the covenant when the parties in their letters of June, although they do not say so in words, clearly imply they had it in view?]

These letters do not refer to the notice. They do not claim a right, but only submit a proposal which is accepted.

[*Ford*, C.J. In the letter E. the lessee refers to the lease and says he wants "to remain *as allowed in the lease.*" He seems to do all in view of that lease and its provisions.]

But they do not refer to the notice D. and they stamp the letters as a lease from fear of the lessor withdrawing.

[*Ford*, C.J. I don't see the reference you wish us to draw from the stamps. Please repeat what you said.]

I say that the plaintiff knew he could only sue his landlord on E. and F., and could have no claim on the covenant in the old lease, because it had been varied and waived by arrangement made by those letters, and the fact that he stamps those letters shews clearly he so knew it. The terms of the new intended lease were then altered from the old lease, and *Finch* v. *Underwood* comes in to shew that unless the terms are precisely the same there can be no renewal.

[*Wood*, J. Do you mean that the landlord must have his pound of flesh and nothing more nor less?]

Yes.

[*Sheriff*, J. Was it not within the power of the parties to modify their terms?]

Yes, but then it would not be a renewed lease.

[*Ford*, C.J. In a covenant for renewal for lives there must be a change as you cannot have always the same lives?]

That is a mere accident and is beyond the control of the parties, though not beyond that which they contemplated; but here they have voluntarily altered their position by these letters.

[*Ford*, C.J. The letters are based on that very covenant to renew as I have already pointed out.]

They may purport to be, but when the leases themselves [A. and C.] come to be compared, they will be found to be quite distinct. The Attorney-General's point as to B2. was not to affect the action of the parties *inter se*, but to shew that unless they

FORD, C.J. WOOD & SHERIFF. J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

have acted in a strictly legal way, we can call in question their acts where it affects us. All that he meant was that it was not a legal demise as it was made by an Attorney, and we have no evidence he had power to lease.

[*Ford*, C.J. Is that what you meant, Mr. Attorney-General?]

[*Bonser*. Certainly, my Lord.]

The plaintiff was bound to prove his case in every point.

[*Ford*, C.J. You should have objected to $B^{2.}$ at the trial. It was certainly recognized by the landlord Chin Tuan, and what have you got to do with it?]

Everything I submit, when our rights are affected. The signature to it was in Malay, and the document passed in as evidence at the trial, Counsel for the Crown thinking it was the signature of Niah Malim. It was only discovered when the papers in this present appeal were being prepared.

[*Ford*, C.J. The Crown chose to let it go in unchallenged and without formal proof of execution. How can they now object to it?]

On looking at the plaintiff's evidence it will be seen the lease A. and its endorsements B., $B^{1.}$ and $B^{2.}$ were put in in a bundle; it was this which brought about this oversight on our part.

[*Ford*, C.J. If you think you can still insist on the objection, we shall, as already intimated, give the plaintiff, if necessary, leave to adduce evidence on the point.]

Assuming $B^{2.}$ to be good it does not help the plaintiff's case, but as it is half-past four, and I shall still be sometime on this point, perhaps your Lordships will adjourn for the day.

[*Ford*, C.J. We shall adjourn till to-morrow at 11 A.M.

17*th June*, 1886. [*Ford*, C.J. Before you begin Mr. Ross, I wish to call your attention to paragraph one of the statement of defence. You there admit the second lease is a renewed lease made in pursuance of the covenant for renewal in the previous lease. You there treat the plaintiff as a tenant in possession with a good title against the whole world; should not the Government have therefore enquired before they made their agreement with his landlord?]

Ross. The first paragraph of our defence is qualified. It admits the lease and alleged renewal, but craves leave to refer to it at the trial to see if it bore out the allegation.

[*Ford*, C.J. At the trial, the lease bore out your statement].

Not exactly, for the lease did not only refer to the covenant for renewal, but also to the letters E. and F. which introduce new terms. However, the point that we are concluded by our admission in the paragraph in question is not a new point, it was raised in the Court below and disposed of. To take up my argument from last evening. The premises included in lease C. are not the same as those in the original lease; it included a second piece which it is supposed the plaintiff acquired under $B^{2.}$, but $B^{2.}$ is not a legal demise.

[*Sheriff*, J. I thought that point was disposed of yesterday.]

[*Ford*, C.J. How does that concern you; he was in possession of it long before.]

I am entitled to rely on the objection to shew the second lease was not a renewal—his previous possession was not a possession with the benefit of renewal as to that piece.

[*Ford*, C.J. You are bound to take your agreement with all the existing incumbrances, one being the fact of the plaintiff being a tenant in possession. He had a possessory title at least.]

Yes, possessory, but not a legal title.

[*Ford*, C.J. Is not a possessory title a legal title?]

In one sense it is, but he alters his possession by trying to better his title by taking a lease.

[*Ford*, C.J. Supposing the Court should be of opinion the second lease was not a renewal, but the plaintiff had a possessory title, how does that better you?]

It does, as there could be no continuing title by lease. On the 2nd July, 1883, the first lease expired, the second lease is not made till November, 1883. In the interval, the plaintiff's title was only possessory. If that were not so, it is only because of the letters E. and F., but these letters we say gave different premises and different rights. In lease A. the words "easements and appurtenances" may have included the right of way if it had stood alone, but that right of way is especially reserved to the lessor. B2. does not give the right of way, but only the reserved land. That was the right of way which gave "access" [to use the term of the Lords in *Lyon* v. *Fishmongers' Co.*] to the sea. On turning to lease C., we find the words "together with the right of way adjoining the Southern portion of the said godown from the sea to Beach Street, either by land from Beach Street, or by the sea and whether by hand or bullock carts, horses, ox, [*sic*] by foot, or by day or by night when necessary to do so, with the right of the approaches of boats or vessels to the foreshore or wharf and landing place of the said premises for the purpose of docking and repairing boats and vessels and of landing or shipping machinery and other wares, goods and merchandizes .....and reserving to the lessors or either of them their, or either of their heirs, executors, administrators, or assigns, the like liberty of using the said right of way, provided that this latter reservation shall not be permitted to interfere with the exclusive right of the lessor to use the said premises or any part thereof as a dock or slipway for vessels, to which right this latter reservation shall be held in all cases to be subject." So that the reserved right of way under lease A., is now subject to certain rights of the lessee.

[*Ford*, C.J. The lessor's right of way under lease A. was surely always subject to the right of way of the lessee.]

True, but here the plaintiff has a slipway, and he claims in his petition a channel to bring in his ships into the slipway.

[*Ford*, C.J. The slipway was on the plaintiff's own land?]

Yes, but it is for *the loss of the use of this slipway that he claims damages.*

FORD, C.J. WOOD & SHERIFF. J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

[*Ford*, C.J. We have nothing to do with the damages, only the invasion of a private right, his access to the sea.]

In *Lyon's Case* the damages claimed were in connection with his wharf, here it is in consequence of his loss of his slipway. By lease C. the lessor's right of way is subject to the slipway, and as to the premises, about half was given up.

[*Ford*, C.J. The sea frontage is however the same. How can the portion given up have anything to do with the sea frontage? Surely that is quite immaterial?]

Whether it be immaterial or not is not the question, my point is that if the parcels are not the same, the lease is not a renewed lease, and if not a renewal we are first in point of date under our agreement of 1882.

[*Sheriff*, J. The lessor's agreement can only bind his reversionary interest.]

[*Ford*, C.J. Not existing rights.]

But the lessor's reversionary interest came into possession on the termination of lease A. If plaintiff had then obtained a lease in exactly the same terms, under the covenant for renewal, the Crown would have been out of Court—but when he does not do that, but takes a lease giving different premises, different rights, and with different covenants, it makes all the difference. Then to point out these differences between the two leases. By A. the lessee pays assessment, in C. the lessor does so; in A. if the premises are burnt down, the lessee has to rebuild, in C. the lessor. In one there is a covenant to repair, in the other not; the parcels, the terms, the rights, under the one, are entirely different from the other. How can the one then be said to be a renewal of the other. Lessee C. then, not being a renewal, the equities of the Crown and the plaintiff are equal, and *qui potior est in tempore potior est in jure*, and the plaintiff has no claim on us. Then as to the point about the foreshore. The Court below says: "the position of a proprietor of land on the sea shore ..... is precisely analogous to that of a proprietor on the banks of a tidal navigable river." The judgment therefore proceeds on a supposed analogy between the rights of a riparian proprietor on a tidal navigable river and of a littoral proprietor. In *Lyon's Case*, not the slightest allusion is made to littoral rights. Nor is there so much as a hint that a littoral proprietor has such rights. If we can show the basis of the judgment is wrong, we go far to prove our case. The cases of the *Pagham Commissioners*, and *Attorney-General* v. *Lonsdale* shew there are differences, and *Rex* v. *Trafford* lays down the distinction between a littoral proprietor who embanks against the sea, and the same done by a riparian proprietor. Then a further case of *Bickett* v. *Morris*, 1 L. R. Sc. and Div. App. 47, carries the law still further. In that case the defendant who was the owner of property on a non-tidal river had built on the *alveus* or bed of the river; his erections caused no injury to his neighbours, yet he was restrained from proceeding with his buildings, at the suit of the plaintiff an opposite riparian proprietor,

as the *alveus* was held to be sacred, and it was not necessary to prove an injury, or even the likelihood of injury, from the buildings. Lord CHELMSFORD, says [p. 56.]—

"It was asked in argument, whether a proprietor on the banks of a river might not build a boat house upon it? Undoubtedly this would be a perfectly fair use of his rights, provided he did not thereby abstract the river or divert its course; but if the erection produced this effect, the answer would be, that essential as it might be to his full enjoyment of the use of the river, it could not be permitted. *A fortiori*, when the act done is the advancing solid buildings into the stream, not in any way for the use of it, but merely for the enlargement of the riparian proprietor's premises, which must be an infringement upon the right and interest of the proprietor on the opposite bank. Upon principle, then, the respondents had a cause of action in respect of the defendant's buildings, and were entitled to a declaration against the encroachment, and a decree to have the obstructions removed. The authorities cited in the argument at the Bar support the principle and establish a satisfactory distinction. The proprietor on the banks of a river are entitled to protect their property from the invasion of the water by building a bulwark, *ripae muniendae causa*, but even in this necessary defence of themselves they are not at liberty so to conduct their operations as to do any actual injury to the property on the opposite bank of the river."

[*Ford*, C.J. On looking at *Goddard on Easements*, I find he says [p. 55], "Every landowner has a right at common law to protect his land from damage from floods, and for that purpose to erect drains or other defences to divert the flood water from its natural course," and cites *Trafford* v. *The King*, 8 Bing. 204, and *Nield* v. *London and North Western Railway Co.*, 10 L. R. Ex. 4.]

Nield's Case was the case of a flood, and the difference is there pointed out between a natural stream and an artificial watercourse. It is submitted it has no bearing on the present question, but if it has, and is inconsistent with *Bickett* v. *Morris* then the latter being a decision of the House of Lords must be taken as over-ruling it.

[*Ford*, C.J. *Bickett* v. *Morris* is a Scotch case.]

[*Sheriff*, J. And decided on Scotch law.]

That is so, but it has been approved of in subsequent English cases, and Lord CRANWORTH [p. 58] distinctly says the law of England and Scotland in this respect are the same. Lord WESTBURY [p. 60-62] says:

"This is the first decision establishing the important principle that an encroachment upon the *alveus* of a running stream may be complained of by an adjacent or an *ex adverso* proprietor, without the necessity of proving either that damage has been sustained or that it is likely to be sustained from that cause .....The interest of a riparian proprietor in the stream is not only to the extent of preventing its being diverted or diminished, but would extend also to prevent the course being so interfered with, or affected as to direct the current in any different way *that might possibly be attended with damage at a future period to another proprietor*.....It is wise therefore, to lay down the general rule that even though immediate damage cannot be described, even though the actual loss cannot be predicated, yet, if an obstruction be made to the current of the stream, that obstruction is one which constitutes an injury which the Courts will take notice of, as an encroachment which adjacent proprietors have a right to have removed."

FORD, C. J. WOOD & SHERIFF. } J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

This case then shews that no encroachment whatever, even if it has caused no damage is allowed on a river. In *Attorney-General* v. *Lonsdale*, the facts were these. A Mr. Mounsey at whose relation the Attorney-General sued, and the defendant, were opposite riparian proprietors on the banks of the river Eden which was a tidal navigable river; at the particular point where the river ran passed their properties it did so with considerable force, so much so, that it had at all times caused a washing away of both the defendant's and plaintiff's lands. For the purpose of preventing this, the plaintiff and his predecessors in title, had been in the habit of erecting bulwarks on his land, and the defendant and his predecessors in title, also erected certain works. The plaintiff's works were erected on his own land; the defendant's projected a considerable distance into the bed of the river. The plaintiff from time to time complained of the defendant's works as throwing the water with greater violence on to the plaintiff's land, but took no further action in the matter. Just before the suit, the defendant proceeded to construct a new jetty for the protection of his land, which was to extend one hundred yards into the *alveus*; to prevent this the plaintiff sued. Upon these facts, it was said by *Jessel*, Q.C. [p. 382] "The place in question is what in law is considered an estuary or arm of the sea, since the tide runs up to the *locus in quo*, and, according to law as decided in *Regina* v. *Pagham Commissioners*, a man may erect any works he finds necessary for the protection of his own land against the sea, notwithstanding that an injury may thereby be caused to his neighbour's land." And after citing Viner's Abridgment to shew every water that flows and reflows is called an arm of the sea so far as it flows, and remarking that the river partakes of the nature of the sea, and is, therefore, an arm of the sea, he submitted the defendant was justified in erecting the jetty for his own protection. Sir ROUNDELL PALMER in reply said, "On this third point as to interference with private rights, *Bickett* v. *Morris* is a conclusive authority where, as in this case, there is proof of actual injury. As to the alleged distinction between a tidal and non-tidal stream, the difference is wholly imaginary, and, if anything, the injury is greater upon a tidal river .....The right established by *Bickett* v. *Morris* is to have the banks protected and that right applies *a fortiori* to the banks of a tidal river." He then refers to *Regina* v. *Pagham Commissioners*, and points out how there the defendants only fortified their own banks, whereas in this case the defendant's works extended nearly one hundred yards into the *alveus* of the river. From this it will be seen that it was contended that a tidal river was more like the sea, being an arm of the sea; but *Malins*, V.C., in giving judgment, [p. 387-8] says:

"Unless, therefore, the fact of the Eden being a tidal river distinguishes the present case, these authorities are conclusive against the defendant, for it is admitted that his jetty is a solid pier extending eighty-eight yards obliquely and fifty-three yards perpendicularly into the *alveus* of the river. Does then the fact of the river being a tidal one make any difference? I am of opinion that it does not. It was strongly contended by the Counsel for the defendant that the place where the jetty is erected is an estuary, and therefore an arm of the sea, and that the defendant has consequently all the

rights of protecting his land which he would have had if it had been on the sea shore instead of the river Eden, and *Rex* v. *Pagham Commissioners of Sewers*, was cited to shew that a proprietor of land on the sea shore has a right to erect any works he thinks proper, for the purpose of protecting it against the inroads of the sea, though such works may be injurious to a neighbouring proprietor, and that case is undoubtedly authoritative on that subject. This would have been conclusive for the defendant if his land had been on the sea shore; but is this principle applicable to a riparian proprietor on a navigable river? It must be borne in mind, that the greatest work of man must be insignificant as compared with the power of the sea, but that this is not so with reference to a navigable river. If the principle contended for were sustainable, it would follow that every riparian proprietor on a navigable river however distant from the sea, and however gentle the flow of the tide at the place, might throw any works into the *alveus* that he might deem necessary for his protection, however injurious such works might be to the adjoining or opposite proprietor; and thus taking the Thames for an example, any riparian proprietor between Vauxhall Bridge and Teddington, where the tide ceases, might, by such works, obstruct the navigation at his pleasure, because the Thames is there a tidal river, and therefore an estuary or arm of the sea. In a sense, there is no doubt, that every water which flows and reflows is called an arm of the sea as stated in *Vin. Abr. Prerog. of the King.* But I find no authority for the proposition contended for; on the contrary, all the cases, including those cited by the defendant's Counsel tend in the opposite direction. In both the case of *Rex* v. *Russell, and Rex* v. *Ward*, the rivers the Tyne and Medina, in which the navigation was impeded, were tidal rivers and it does not appear to have been suggested, either at the Bar or by the Bench, that the parties indicted for the nuisances had any greater right in these rivers than they would have had if they had been non-tidal. The same principle was acted upon in *Attorney-General* v. *Johnson*, I am therefore of opinion, upon principle and authority, that a riparian proprietor on a tidal or navigable river has no greater rights against an adjoining or opposite riparian proprietor than such a proprietor on a private or non-tidal river, and that the defendant cannot therefore justify the erection of the jetty in question on this ground."

[*Ford*, C.J. How do you apply that to this case?]

In this way, the *Pagham Case* shews that a littoral proprietor may embank against the sea though he thereby causes damage to his neighbour. *Bickett* v. *Morris* shews a riparian owner cannot embank against a river though he thereby causes no damage to any body. *Attorney-General* v. *Lonsdale* shews that the fact that though a tidal river is an estuary, an arm of the sea, it does not alter the case, there can be no embankment; and *Rex* v. *Trafford* shews that it is the same on a non-tidal river, and there the distinction between the rights of riparian and littoral proprietors as to embanking are clearly pointed out.

[*Ford*, C.J. Those cases only decide there is a difference in that particular.]

These cases shew there is a distinction between these two classes of proprietors, and they lay a foundation for my arguments now about to follow. In *Lyon's Case*, Malins, V.C., following the same reasoning that there was no distinction between a tidal and non-tidal river as regards embanking, decided in favour of the plaintiff. The Lord Justices in 10 L. R. Ch. Ap. 679, took a different view, but their decision was reversed by the House of Lords who considered that there was no distinction.

[*Wood*, J. What we are anxious to point out is that the cases which have been referred to, only shew that while the case of

FORD, C.J. WOOD & SHERIFF. J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

embanking on a tidal and non-tidal river is the same, there are differences between the sea and a river, but it is only in the *one particular* of embanking.

[*Ford*, C.J. The cases don't go to the length you contend for, that because they are different in *one* respect, therefore they are different in all respects.]

They shew that one difference it is true, but further cases shew further differences.

In *Attorney-General* v. *Tomline*, it was first claimed that there was a right in a private individual to prevent a man using his land, although in a natural way, from doing so to the injury of his neighbour, but eventually the claim was based on the prerogative of the Crown to protect the land against encroachment by the sea.

[*Sheriff*, J. Is not that case only an illustration of the maxim *sic utere tuo, &c.*]

No; for the defendant was using his land in a natural way. That case is important as shewing that there is a *liability* to which a littoral proprietor is subject. If the Crown has a right to protect the land from encroachment by embanking, it has also the right to prevent anything being done which would bring an encroachment by the sea. The Crown therefore acts in doing or preventing a thing being done for the benefit of the public, and applying that principle to this case it follows that the Crown has a right to do that which will be for the public benefit, though a private individual might suffer by it.

[*Ford*, C.J. That was not the defence in the Court below.]

Not in the pleadings, but it was raised in argument at the trial. This reclamation was done and will be for the benefit of the public; the littoral proprietors it is true get a benefit too, but only by paying for it; the benefit to the place and the community at large is the main object of the work.

[*Ford*, C.J. According to the authorities the Crown can only embank when there is a *necessity* for it. How has the necessity arisen to give rise here to that prerogative?]

[*Sheriff*, J. As a fact, has the sea here given offence?]

It is sufficient if it might arise according to *Bickett* v. *Morris*, as nobody can tell what turn the sea might take. However the case closest approaching to the present, but one which has not as yet been referred to, is *Laird* v. *Briggs*, 19 L. R. Ch. Div. 22; unfortunately however it went off on the point that the plaintiff had no right to sue. The facts of that case were, the plaintiff was in possession of the foreshore belonging to the Marquis Conyngham under an agreement made with him as the Lord of the Manor; the foreshore was part of the manor. The defendant was a tenant of certain premises called the "Clifton Baths," and he claimed to use the foreshore for the purpose of bathing and placing thereon his bathing machines. In his statement of defence he claimed this right as an easement to the "Clifton Baths" premises, which he alleged had been enjoyed by the various owners of the Baths since 1829. He failed to prove so long a user. In his statement of defence, he denied the plaintiff was in

possession of the foreshore, "save subject to the rights of the owners of the Clifton Bath's property and their tenants over and upon such foreshore."

[*Ford*, C.J. There the foreshore was in the hands of a private owner.]

True, but a grantee from the Crown has no greater rights than the Crown itself. I cite the case to shew that the plaintiff's claim there was not based on a right of access to the sea, but on prescription. He claimed to enter upon the foreshore fronting his property, and to place bathing machines thereon. That is practically the case here where the plaintiff claims the same right, but in order to reach vessels for purposes of repairing them. At the trial we see [p. 445.] North, Q.C., asks leave to amend his defence by denying absolutely the plaintiff's claim, but FRY J., refused leave, saying [p. 445-6.]—

"The application made is to allow an amendment of the statement of defence. In that statement it is in effect admitted that the plaintiff is in possession of the foreshore, subject to the rights of the defendant. This is only a qualified denial of possession, that is to say, the possession is denied, save subject to the rights of the defendant, which is equivalent to admitting possession subject to those rights. I am now asked to allow the defendant to insert in his statement of defence an unqualified denial of the plaintiff's possession. The effect of that would be very serious in the conduct of the case. The plaintiff is now entitled to rely upon his possession as giving him a *primâ facie* title; if I allow the amendment to be made, he will not be able to rely upon it in any way."

In giving judgment in the case, [p. 447] he says:

"According to the admission of the defendant he [the plaintiff] is in possession of the foreshore in question, and as it appears to me, he is in possession in some way or other under the present Marquis Conyngham, and derives from him at any rate an estate-at-will, if nothing more. The defendant has from the year 1829, according to the statement of his Counsel, exercised certain rights which may amount to evidence of an easement over the foreshore in question. But it appears that the estates of the Marquis have been settled, and that there has been from the year 1829, downwards, a period occupied by tenancies for life, which, when deducted from the actual period of enjoyment, will bring that period to less than forty years. That being so a question arises upon the 8th section of the Prescription Act."

His Lordship then deals with that question.

[*Ford*, C.J. There I see the person claiming the use of the foreshore was the defendant.]

Yes, but he was a littoral proprietor, and I say if such a right of access was in him as such proprietor, could his Counsel have overlooked it. Why, they could then have dispensed with their amendment and user, and would have had a complete right of access to the sea for their own purposes. Here, the plaintiff claims such right and seemingly this is the first time such a claim has ever been made. He claims to draw his vessels across the beach into his slip.

[*Ford*, C.J. He only brings in his vessels during the high-tides, and then it is within his boundary as the high-water mark is on the land side of the red line which has been given him as a boundary by grants.]

FORD, C. J. WOOD & SHERIFF. } J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

But part of his vessel would continue on the foreshore when the tide recedes. Supposing the whole foreshore belonged to the plaintiff, still the public would have a right of passage along it; but to allow him to obstruct them by portion of his vessel projecting across the foreshore! Why, he would himself be liable to an action for it, and the nuisance might be abated by the Crown as a prepresture. The embankment here does not deprive him of access to the sea, for he can still get to it across the reclamation work though the particular use he desires to make of the foreshore in drawing across his vessels and beaching them would be obstructed; but such a right he never had. The case of *Laird* v. *Briggs* was carried up to the Court of Appeal, 19 L. R. Ch. Div. 22, but there the point was not decided, as the case went off on another point. The case however is important as here again Counsel and all the Judges must be taken to have forgotten this right of access. It is impossible they could have done so.

[*Ford*, C.J. Why not?]

Surely it would be supposing too much? The presumption therefore is that a littoral proprietor has no such right.

[*Ford*, C.J. You say because one plaintiff in an action he brings, does not claim a right he has, *ergo* another plaintiff in another action has not the right?]

No, but when we see learned Counsel and Judges, and that in two Courts say not a word as to such a right, it is a fair inference that such a right does not exist. The case of Lyon relied on by the Court below does not show that a littoral proprietor has such a right of access; as already pointed out it is confined to riparian rights. Here also the plaintiff claims even something more, he claims the *use* of the foreshore; he could not make use of his slipway without bringing his vessels across the foreshore. It is for this that he claims such heavy damages—but when his ship is in the slip, it is several feet beyond the red line.

[*Wood*, J. You say he has no right of access, because he perhaps commits a trespass by allowing his vessel to be six, eight, or ten feet on your land?]

[*Ford*, C.J. Which you have hitherto permitted him to do? However that is, that is not the point before us; you are not here to question the award and the amount of damages the arbitrators have awarded.]

But the preventing by the reclamation works of such user of the foreshore by the plaintiff could not but have been taken into consideration by the arbitrators.

[*Ford*, C.J. We know nothing of the principles by which they were guided.]

[*Wood*, J. The only question here is, has or has not the plaintiff a right of access—in other words, whether the analogy he relies on does or does not hold.]

I have shewn there is no such analogy. Then as to the second head of the first point made by the learned Attorney-General, do the words "by the sea" in the plaintiff's grant, give him the sea as a fixed boundary, so that he can follow the sea as it recedes, in order to keep his access to the sea.

[*Sheriff*, J. You admit the sea is his boundary. Do you mean he has no right to take advantage of that boundary, and so have recess to the sea?]

We admit the sea is now his boundary, but the words I have referred to are in his original grant, they do not however in law give the sea as a fixed boundary. Unless that were so the Crown would have been bound to allow him a right of way over the accretions. He has now taken those accretions under grants, [J. and K.] which give the sea as his Eastern boundary, but that does not of itself give him a right of access to the sea.

[*Sheriff*, J. You mean that if the Crown gives a row of apple trees for your boundary, you are not permitted to take the apples from the trees?]

You could not, it is conceived, take the apples on the other side of your boundary.

[*Sheriff*, J. Suppose a person has the sea for his boundary, has he not *qua* owner the right to go and bathe in it?]

We say not—The public certainly have not the right of bathing in the sea or using the foreshore for that purpose. *Blundell* v. *Catterall*, 5 B. & Ald. 268.

[*Ford*, C.J. You say he might have a private right of bathing in a river?]

Yes.

[*Ford*, C.J. Well, why not then in the sea?]

Because the river flows against his land, but the sea is not always so. On the whole, the rights of a riparian and littoral proprietor are, it is submitted, not the same; the analogy relied on in the Court below therefore fails, and the judgment should be reversed.

Van Someren. I propose first addressing myself to the question of the foreshore. There can be no doubt there is one difference between the rights of littoral proprietors and of riparian proprietors, and that distinction is clearly pointed out in the three cases of *Regina* v. *Pagham Commissioners*, *Rex* v. *Trafford*, and *Attorney-General* v. *Lonsdale*; but that I submit is the only distinction to be found. It is supposed however by the other side that the right or duty of the Crown to protect the land from encroachment by the sea, by embankment, is a burden which is peculiar to a littoral proprietor, but not to a riparian owner; and it is assumed that herein lies a second difference between the two classes—but we propose to shew that this right on the part of the Crown to interfere by embankment with the rights of a littoral owner is applicable to the riparian owner also. In *Chitty's Prerogative of the Crown*, p. 173, it is said:

"Under this head it may be mentioned, that the King possesses the sovereign dominion in all the narrow seas, that is, the seas which adjoin the coasts of England, and other seas within his dominions. This prerogative power is vested in the King, as the protector of his people, and guardian of their rights. It is subservient, however, to the *jura communia*, which nature and the principles of the constitution reserve for his Majesty's subjects. It can neither prevent them from trading or fishing. As a consequence of this prerogative, the King possesses also the power of reforming, preventing, and punishing any nuisances or obstructions in the seas *and rivers* over which his

FORD, C.J. WOOD & SHERIFF. J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

jurisdiction extends, and it was held on the same ground, and on the consideration that all matters of a public nature are in a special manner under the King's care and protection, that he might [before any Statute made for Commissioners of Sewers] provide against any inundations, by embankments, or other necessary means."

This passage, it is true is not so clear as one could wish, but it is to be noticed that the author evidently speaks of both the sea shore and banks of a river in the same terms. Then in *Coulson on Waters*, p. 24., we find the following:—

"The King has probably from the very earliest times had a right as part of the prerogative to defend the realm against the waste of the sea, and to order the construction of defences at the expense severally of those who are to be benefitted by them. The power to erect a sea-wall or embankment as a protection against the sea, *or from the influx of the tide in rivers*, is one of those things which emanate from the prerogative of the Crown for the general safety of the public; and no doubt the ordinary rights of property must give way to that which is done for the *protection* and *safety* of the public, but only to the extent to which it is *necessary* that private rights and public rights should be sacrificed for the larger public purposes—the general common weal of the public at large."

This last passage are really the words of *Cockburn*, C.J. in *Board of Works for Greenwich* v. *Maudslay*, 5 L. R. Q. B. 397, 401. It is a distinct authority to shew that the Crown has the same rights to embank against a river as it has against the sea, and it is a further authority as shewing that that right of the Crown arises only when a necessity arises. That burden therefore exists both as to the littoral as well as to the riparian proprietor, and the distinction therefore sought to be made out between such proprietors, based on this prerogative, fails. The only distinction between the rights of such proprietors is the one first refered to, namely, the right of a littoral proprietor to embank against the sea, although he may thereby cause damage to his neighbour, and the want of such right in the riparian proprietor—but the reason for this distinction is obvious.

[*Ford*, C.J. Why do you say *obvious*?]

Because the necessity for it is that which gives rise to it—and this is clearly pointed out in the well-considered judgment of *Malins*, V.C. in *Attorney-General* v. *Lonsdale*. At p. 387–88 his Lordship says:

"It must be borne in mind that the greatest work of man must be insignificant as compared with the power of the sea, but that this is not so with reference to a navigable river. If the principle contended for were sustainable, it would follow that every riparian proprietor on a navigable river, however distant from the sea, and however gentle the flow of the tide at the place, might throw any works into the *alveus* that he might deem necessary for his protection, however injurious such works might be to the adjoining or opposite proprietor."

To hold that a riparian owner however high up the stream where he was exposed to no injury, had the right to embank, would have worked considerable evil, as his neighbours might be affected by his acts without any necessity for it; but unless the distinction between the sea shore and river bank was held and confined to them only, it would introduce a distinction between

riparian owners higher up and those lower down the stream, a distinction indeed sought to be made by the Lord Justices in *Lyon* v. *Fishmongers' Co.*, but disallowed by the House of Lords. To avoid this distinction as well as the evil already referred to, the only line to draw was between a riparian proprietor [whatever part of the stream situate] and a littoral proprietor. The reason for the distinction between these two classes is therefore obvious—but that distinction in no way detracts from the analogy relied on by the learned Chief Justice in the Court below. These were the only two distinctions attempted to be made out; the second proceeds on an erroneous assumption, the first on a reason wholly inapplicable here. The incidents to the rights of the littoral and riparian proprietor are otherwise the same. Now Earl Cairns in *Lyon* v. *Fishmongers' Co.*, says the right of access of a riparian proprietor is *qua* owner and not as one of the public, and so far back as 1812 we see this private right as distinct from the public was alluded to in *Parmeter* v. *Attorney-General*, 10 Price 378, 412, in connection with the sea shore. The defendants there claimed under a Charter and put up certain erections on the foreshore at Portsmouth and Lord REDESDALE [p. 435] asked this question, "Did these letters patent grant all the land between high and low-water mark, from the county of Sussex to the county of Dorset excluding every individual from access to their lands from the sea, as well as the public, supposing their enjoyments to have been equal in extent to the granting of the letters patent." No reply was given to this question as regarded the access of the individual owner, but as regarded the public it was said it was not meant to contend that the letters patent were to be taken to exclude public rights—and at page 450 we see Counsel saying, "In the present case there is not a shadow of evidence that by the building remaining, any subject has been prevented from landing on any part of the shore where it was possible for him to land, or that any access was prevented either to an individual disposed to go there, or to people having property not being able to get at it by reason of obstruction from these buildings." He was interrupted by the Attorney-General who said, "There is no part of the case, no part of the evidence is directed, to shew that these buildings are injurious to the landing, the injury is to the King's moorings in the harbour of Portsmouth." There was no necessity therefore to decide the point alluded to by Lord REDESDALE. This passage however is only a hint on the point though it shews that his Lordship thought private access was something distinct from public rights on the foreshore. However, authority is not wanting to shew no distinction [save in the one respect already mentioned] exists between the banks of a river and the sea shore; so that *Lyon's Case* is applicable to the present. In *Blundell* v. *Catterall*, which was the case of the sea shore, we find Counsel for plaintiff [p. 270] relying on *Ball* v. *Herbert*, 3 T. R. 361; but in answer Counsel for the defendant sought [p. 271] to distinguish *Ball* v. *Herbert*, as being a river case; *Best*, J., dissenting Judge indeed says [p. 286] "Lord HALE makes the distinction between the shore of the sea and the banks of a river which Lord KENYON points out in *Ball* v. *Herbert*; the former is

FORD, C. J. WOOD & SHERIFF. } J.J. 1885.

free for all to come and unload, but the King cannot grant a liberty to unload in the latter *without the consent of the owner*," evidently referring to a private non-tidal or non-navigable river, but *Abbott*, C.J., says [p. 312].

WEMYSS v. ATTORNEY-GENERAL.

"Commerce is a matter greatly favoured in our law, by reason of the public and natural benefits derived from it; but, even as to this favoured matter, I have found no authority in the law of England in support of such a proposition. Bracton, in the passage so often referred to, speaks not of the waters of the sea generally, but of ports and navigable rivers. It may be admitted, *that whatever is true of navigable rivers and their banks, may be true of the sea and of its shore.* But the case of *Ball* v. *Herbert* shews that the doctrine of Bracton, as to the banks of navigable rivers, however warranted by the Civil Law, is not conformable to the law of England."

The majority of the Court there therefore applied the *ratio decidendi* of *Ball* v. *Herbert*, the case of a navigable tidal river to the sea shore, and that is just what the late learned Chief Justice did here, when he applied *Lyon* v. *Fishmongers' Co.* In *Bridgwater Trustees* v. *Bootle-cum-Linacre*, 2 L. R. Q. B. 4, it was held there was no distinction between the sea shore and the banks of a tidal navigable river. The head note there somewhat narrows the judgment. It is as follows:—

"Where a parish extends up to a tidal river, but there is nothing to shew whether it does or does not extend beyond the line of ordinary or medium high-water mark, land between such high-water and low-water mark cannot be assumed to be within the parish: as there is no distinction *in this respect* between land on the sea shore and land on the shore of a tidal river."

The facts giving rise to the question there were, the respondent had rated the appellant's docks as being within the township of Bootle: the docks were built on the foreshore of the river Mersey, below the ordinary high-water mark, but the land had been reclaimed and the tide no longer flowed over it. Before the docks were built, the township of Bootle extended on its Western side along part of its course as far as the sea, and along other parts as far as the Mersey. There was no evidence to shew whether the township on that side did or did not extend to the line of ordinary high-water. The question was whether the docks were within the township so as to be liable to be rated or not. *Aspinall*, Q.C., for appellant contended [p. 6].

There is a distinction between the sea shore and the shore of a tidal river. In *Rex* v. *Landulph*, the parish of Landulph was indicted for the non-repair of a highway. The road led across a small inlet or estuary of the river Tamar, not far from its mouth. It was not passable at high-water. It was *inter alia* contended that this road was not in the parish of Landulph. PATTESON, J. held, on reference to the question of boundary, that where two parishes are separated by a river, and there is no positive evidence of the boundary line between them, it is to be presumed to coincide with the middle line of the channel; and a verdict was accordingly found against the defendants. In *McCannon* v. *Sinclair*, which was the case of the Thames at Rotherhithe, Lord CAMPBELL, C.J., makes the distinction between that case and *Reg.* v. *Musson*, by saying: 'There the parish abutted on the sea.'

Mellish, Q.C. for respondent said, [p. 6-7.]—

"There is no distinction between the sea shore and the shore of a river where the tide flows. The treatise *de Jure Maris*, whether by Hale or not, is

always received as an authority; and after treating of fresh-water rivers, the author in C. 4, proceeds to treat of 'the sea and its arms,' and says [*Hargraves Law Tracts*, p. 12]: 'That is called an arm of the sea, where the sea flows and re-flows, and so far only as the sea flows and re-flows..... But it seems that although the water be fresh at high-water, yet the domination of an arm of the sea continues if it flow and re-flow, as in the Thames above the bridge.' He then proceeds to treat of the sea shore without any distinction between sea and tidal river; and treating [at p.p. 26, 27.] of the land which is covered by the ordinary flux of the sea, he points out, in the passage already cited by the other side, how such land may be shewn to be within a parish.....There must be some mistake in what is attributed to PATTESON, J., in *Rex* v. *Landulph*; at all events there is no authority to support the ruling as applied to tidal river."

In delivering judgment, *Mellor*, J., says [p. 7.]—

"In the absence of any evidence such as perambulations or other acts by the parish authorities, the land between medium high-water and low-water mark cannot be presumed to be within the adjoining parish; the presumption seems rather to be that it is extra parochial; and here there is no evidence on the point. I cannot help thinking that there must have been some misapprehension in the report of *Rex* v. *Landulph*, as what is attributed to PATTESON, J. seems quite inapplicable to the circumstances of the case; at all events the ruling as reported is inconsistent with the authorities on the point; *for there seems to be no distinction between the sea shore and shore of a tidal river.* There is no foundation for this rating either on the above principle or on the construction of the Highway Act."

As before stated, in the head-note we find the principle here enunciated somewhat narrowed; it says there is no distinction "in this respect."

[*Wood*, J. Mr. Justice MELLOR there appears to have used language too large, just as the Court below did here, when it said the rights of littoral and riparian proprietors were "precisely analogous"—the head-note is meant probably to narrow the language to the facts of the particular case, just as as you would say we should do here?]

Yes. The other Judges *Shee* and *Lush*, J.J., concurred with *Mellor*, J. The Court there doubtless had in mind what had been pointed out by Mellish, Q.C., as to Hale *de Jure Maris* making no distinction between the sea shore and tidal rivers. In conclusion on this point, and at the request of my learned friend, Mr. Presgrave, I shall refer to one authority more, and that is *Angell on Watercourses* [7th ed.], p. 732-33 [note] where we find the following:—

"In *Lyon* v. *Fishmongers' Co.*, App. Ca. L. R. 662, it was held that the right to the exclusive access to particular land, on the bank of the tidal river is a private right to the enjoyment of the land the invasion of which may form the ground for an action for damages or for an injunction. It is not necessary that the access should be entirely destroyed. This right of access is not held by the owner of the particular land, in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land and of the river in connection with the land the disturbance of which is actionable. The right of access to and from a tidal river was treated in the above case as depending on the same principle with the right of access which a man has from a public highway to his house adjoining. Lord SELBORNE said: the cases as to the alterations of the level of public highways by which houses immediately adjoining have been deprived of their access to and

FORD, C. J. WOOD & SHERIFF. J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

from the highway, seem to be authorities *a fortiori* on this point, because they had not the element of a right *jure naturæ*. See *Moore* v. *The Great Southern and Western Railway Co*, 10 Ir. C. L. Rep. [U. S.] 46; *Hickok* v. *Hine*, 23 Ohio St. 523; *Potter*, J. in *Clark* v. *Peckham*, 10 R. 1 38. *It is a doctrine recognized by a great number of cases, that while the shore itself and the space between high and low-water mark, is public for passage, the littoral owner has a right of access to the great highway of nations of which he cannot be deprived: Clement* v. *Burns*, 43 N. H. 609, 617, 619; *Boman* v. *Wathen*, 2 McLean 376; *Blanchard* v. *Collins*, 10 Ohio, 138; *Crawford* v. *Delaware*, 7 Ohio St. 459; *Martin* v. *Waddell*, 16 Pet. 367; *Clark* v. *Peckham*, 10 R. I. 35, 38; *and this littoral right of access is valuable, is property, and can only be taken on compensation being made. Yates* v. *Milwaukee*, 10 Wallace 497, 504. *So far as concerns the front of his land, the littoral owner has the undoubted right of access to it; and no one could do anything in front of his land to make it less accessible without rendering himself liable for damages. Richardson* v. *Boston*, 24 How. [U. S.] 188; *Harrison* v. *Sterrett*, 4 H. & Mc Hen. 540. *But wherever the tide water flows, and so long as it flows, it is a portion of the great highway.*"

[*Sheriff*, J. Is that then an American work?]

Yes. The passage read deals first with and applies *Lyon* v. *Fishmongers' Co.*, and then proceeds with rights of littoral proprietors. It is exactly in point, and concludes the question in favour of the respondent. Then as to the point about the renewal.

[*Ford*, C.J. We shall not trouble you on either of the remaining points, neither about the grants nor the renewal.]

Thomas, [on same side.]—I have but little to add to that which has fallen from my learned friend, Mr. Van Someren. If this embankment was an exercise of prerogative, why should the Crown have gone to the various littoral proprietors and made the agreement of November, 1882? But the fact is, this is not an embankment: it is no less than three hundred feet in breadth, and as to any supposed necessity for it, there is not a word of evidence to shew there had been an encroachment by the sea. It was notorious that the reverse was the case, for the sea was gradually receding. With regard to authorities, and not to take up too much of the time of the Court, I shall only refer to the pages of *Coulson on Waters*, and Hales *de Jure Maris*, which bear on the case; it might help your Lordships in finding the passages. *Coulson on Waters* p.p. 53, 45, 46, 54, 74, 87, 98, 111, 135, 140, 154, 160, and 214; Hales *de Jure Maris*, 7, 9, 12, 14, 16, and 18.

Bonser in reply—As to Mr. Thomas' remark that there was no reason for the Crown making the agreement of November, 1882, we say it was done in order to prevent disputes. It was not done from any idea we had not the right to embank. The Crown was the best judge of the necessity of the embankment. As to the American Cases referred to by Mr. Van Someren, although such cases are instructive and convenient to borrow arguments from, yet they are not binding. *Angell on Watercourses* is only a text book, and cannot be taken as of any great authority. As to *Bridgwater Trustees* v. *Bootle*, Mellish, Q.C., it is true says, Hale makes no distinction between the sea shore and a tidal river, and perhaps that may be so,—but the subsequent cases we have referred to show a distinction—and especially *Attorney-General* v. *Tomline* shews the rights of the Crown on the sea shore. Hale on

doubt is an authority, but it is a very old work. As to what was said by MELLOR, J. in the same case, the answer is that it is not true, and what his Lordship only meant, at most, as the reporter has corrected him. If it means more than that, it goes beyond the necessity of the case, and is merely an *obiter dictum*; it cannot upset the cases deliberately decided on points expressly raised. In *Attorney-General* v. *Lonsdale* it was said if an embankment is allowed at the mouth of a river, to be consistent with riparian owners, it must be allowed the whole course, and *Lyon* v. *Fishmongers' Co.* shews the absurdity of such a rule—so here, to allow the plaintiff a right of access, would be to permit all littoral proprietors to make the like claims, to the prejudice of the public good, for which alone the sea shore is vested in the Crown—If this Court holds there is an analogy between the sea shore and a tidal river, it will be an enunciating of that principle for the first time.

[*Ford*, C.J. We shall only decide as to this particular reclamation work and to this particular case.]

The other side admits there is a distinction, as to embanking, between riparian and littoral proprietors; this is a substantial distinction, and it cuts down the basis of the judgment of the Court below, and the superstructure topples over. In *Blundell* v. *Catterall* it was held, the puplic had no right of bathing in the sea, or using the foreshore for that purpose, as otherwise it would be to strike sterility on the whole sea shore, as any one might then anywhere, claim the right, and so prevent improvements—So here, it would be the same; this reclamation is beneficial to the public—the private rights of the plaintiff should not be allowed to interfere with it. He alleges the work is a private nuisance, the *onus* is on him to shew it. He has not attempted to prove it, and it must be taken as not being a nuisance. The case is of great importance as settling the law as to the rights of littoral proprietors. We have produced all the cases which might be said to have any bearing on the point, and it now remains with the Court only, to decide it.

Cur. Adv. Vult.

24*th June*, 1886. *Ford*, C.J. I have had the advantage of perusing and considering with my brother, Mr Justice WOOD, the judgment he is now about to deliver, and as it expresses precisely the view which I take of this case, my learned brother will read it as our joint judgment. I only desire to add to it by saying that in my view, the configuration of the sea at the *locus in quo*, the fact that this portion of the sea has long been within the limits of the Harbour of Penang, and has always been used as a means of transit for cargo and other boats belonging to the respective owners of land abutting upon it, make the littoral owners' claim in this particular in strict analogy with the rights conceded to riparian owners on a navigable and tidal river.

Wood, J. In this case, I can see no material difficulty. Mr. Wemyss being tenant in possession and in actual occupation of

FORD, C. J. WOOD & SHERIFF. J.J. 1885.

WEMYSS v. ATTORNEY-GENERAL.

land with a frontage to the sea, the Crown without the knowledge of the tenant purchases of the superior landlord the sea frontage. So purchasing the Crown has constructive knowledge of the rights of the tenant, one of which is to take a 6 years renewed lease of that sea frontage, and being the actual obstructors to the enjoyment by the petitioner of this right, is answerable for the injury done.

It is argued, I think without any valid reasoning, that because Mr. Wemyss when he took his renewed lease took something different from what he had a bare right to demand, has altered his condition for the worse, but I am at a loss to see how Mr. Wemyss who in all simplicity was dealing with his landlord as if he and his landlord were free agents, has in any way weakened his right to have the sea frontage granted to him or has forfeited his equity.

It is enough that the Crown knowing, constructively it may be, but still in law knowing, that the superior landlord had agreed to give it to the lessee, got for itself the subject-matter of this suit, the sea frontage; and it is a matter which seems to me to have no bearing on the case, that Mr Wemyss took the lease of the sea frontage ultimately in a form or with adjuncts different from what he had contemplated as advisable when the covenant for renewal was entered into.

That Mr. Weymss on getting his new lease obtained some advantages which he could not have demanded may probably be the case, and if so, these advantages may have swelled the amount of damages which the arbitrators eventually gave, but the answer to this is that if such advantages existed that matter should have been brought before the arbitrators or have possibly been made the ground of opening the award, but as no objection is raised against the finding of the arbitrators it must be taken that this matter was rightly decided by them.

The question of whether a man having a sea frontage has a right of access to and from the sea for the purpose of hauling up boats on to his land is, I consider, equally clear.

It may be called in one sense a case *primæ impressionis* because there is no case which actually shows that for purposes such as this, what is true of tidal rivers is true of the sea shore, and it may be conceded that the cause is different for certain other and different purpose of navigation. It is difficult to conceive any distinction between a tidal river and the sea, and it may be taken as conceded that had this case been a case of a tidal river, the authority of *Lyon* v. *The Fishmongers' Co.* is decisive of the question. Such a right of access and of beaching and landing and hauling up boats on the sea shore is matter of common notoriety and common usage, generally exercised and apparently generally conceded and as fairly referable to the shore of the sea as to a tidal river.

The only remaining point is whether the Crown has at law or in fact granted such a right. It may be true that grants from the Crown must generally be specific in terms; but in the authority relied on by the Crown, *Feather* v. *The Queen*, 6, Best & Smith 283, COCKBURN, C.J., speaking of Grants of the Crown says:

"Nothing passes but that which is expressed or which is matter of necessary and unavoidable intendment in order to give effect to the plain and undoubted intention of the grant." And tried by this test it can hardly be contended that the use of the foreshore for purposes of access, and the beaching of boats is not a right necessary to the reasonable enjoyment of the land granted.

Sheriff, J. This is an appeal from the decision of Sir THOMAS SIDGREAVES, late Chief-Justice of the Straits Settlements. The respondent is an Engineer and Shipwright, Boilermaker and Ironfounder of 37, Beach Street, Penang. I would briefly refer to those facts which form the groundwork upon which certain points of law have arisen and upon which the decision in the Court below was based.

The appellant in his answer to the respondent's petition of right says in paragraph 1 :—

"I admit that the petitioner for the last 7 years under his present firm or in partnership with his former partner carried on business at the back part of the premises numbered 37, Beach Street, Penang, and that he leased the premises so occupied by him from Lee Chin Tuan and Lee Chin Soon under a six years lease terminating in July, 1889, and made in pursuance of a covenant contained in a prior expired lease, but for greater certainty I crave leave to refer to the said lease when produced.

2. I say that Lee Chin Tuan and Lee Chin Soon claim the said premises No. 37, Beach Street under a grant from the Crown No. 234, dated 2nd November, 1802, and two Government Grants Nos. 122 and 123 respectively, dated the 10th of June, 1871.

In Exhibit J, Grant No. 234 is defined as to the Eastern boundary which only is material to the present case as "bounded as follows: East 106 feet by the sea."

In Exhibit I, the piece of land thereby granted is described as to its Eastern boundary as "bounded as follows: East by the sea 46 feet."

Since the grant in 1802 the sea has gradually receded, and from the judgment of the Court below it is stated to have been admitted that the line of the medium high tides was 15 feet 3 inches inside the red boundary line referred to in the 7th para. of defendant's answer as forming petitioner's Eastern boundary under grant No. 122 [see plan Exhibit J.]

The petitioner alleges that among other things done by him on the land he made a wharf and a channel for repairing vessels and steamships. On the 29th day of November, 1882, an agreement was entered into [not under seal] between the Government and certain persons described as "being owners of Lots of Land on the East side of Beach Street, Penang," and this agreement was signed by Lee Chin Tuan and Lee Chin Soon as owners of Lot 37, they being the persons under whom the respondent claims. The purport of this agreement was to settle the terms upon which the Government were to carry out certain reclamation works.

The learned Chief Justice found that the Government "by building these reclamation works on their own land between high and low-water mark deprived the petitioner of the boundary which they had previously given him and cut him off from all

FORD, C.J. WOOD & SHERIFF. J.J. 1885. — WEMYSS v. ATTORNEY-GENERAL.

access to the sea, etc., etc." Upon these facts and upon the authority of *Lyon* v. *The Fishmongers' Co.*, L.R., II. of L. cases, vol. I page 662, the Court below decided:—"That the position of a proprietor of land on the sea shore though widely different from that of a riparian proprietor where the river is a non-tidal one, is precisely analogous to that of a proprietor on the bank of a tidal navigable river."

The Court further decided that the petitioner being in the occupation of land thus adjoining the sea had the private right of access to and egress from the sea, etc., etc., and concludes in the words of Lord Justice MELLISH in the case of *The Fishmongers' Company*: "The right of embarking and disembarking and so using his property as a wharf for the loading and unloading of goods is a most valuable right. In the present instance there has been an invasion of a valuable private right of the petitioner in a similar way, and one for which he is entitled to claim damages" The correctness of this decision is impeached on the part of the Crown on four grounds, and I will deal with each *seriatim*.

1st.—It is said:—

"That the Court was wrong in deciding that the petitioner as lessee of land adjoining the sea had a private right of access to and egress from the sea and that for the invasion of such private rights he was entitled to damages."

Under this head the Attorney-General tried by citing authority, to show that the passage in Sir THOMAS SIDGREAVES' decision to which I have previously referred, in which he asserts that the position of: "A littoral proprietor is precisely analogous to that of a proprietor on the bank of a tidal navigable river," is incorrect. He cited *Regina* v. *The Commissioners of Sewers of Pagham Level*, 8 B. and C. 355; *Rex* v. *Trafford*, 1 B. & Ald., 874, or 8 Bing. 204; and *A. G.* v. *the Earl of Lonsdale*, 7 L. R. Eq. 337. The first case established that a littoral proprietor may, acting in good faith, bank the sea though he thereby injures others, but the like authority does not appear to hold good in the case of a riparian proprietor on a tidal navigable river; and in the Earl of Lonsdale's case, it was held that a riparian owner who owned the soil of a navigable river had no greater rights to use the *alveus* of a tidal river than of a non-tidal river. As was observed however during the argument it is quite possible that the words of the learned Chief Justice "precisely analogous" are too large, but that they must be read as modified to mean *quo ad* the particular point he was then about to decide, because it does not matter how widely the littoral owner's position may differ from that of a riparian owner on a tidal navigable river so long as for the purposes of this case, these private rights in relation to access, &c., to and from a private wharf, together with the other rights incident to such ownership, are analogous. In this view I quite concur, and I therefore fail to see how these cases apply. So in the same way, I am prepared to admit that the right to a sea frontage is subject to the right of the Crown to enter and take steps to exclude the sea, as was decided in *Attorney-General* v. *Tomline*, 12 L.R. Ch. Div. 214, but in the present case the sea was passive nay

so far from being a common enemy it was imperceptibly receding, and it was not even urged on behalf of the Crown that there was any imminent danger; it was merely alleged to be a work of improvement in the interests of the public at large, but I am not aware that the prerogative which exists for the protection of the public goes beyond this, and authorises an interference with private rights merely for the purpose of effecting what may be an improvement, at any rate, no authority has been adduced in support of such a proposition, but on the contrary, it is in evidence that it was deemed expedient by the Government to have an agreement with the adjacent land owners before commencing the so-called reclamation works.

This agreement the Attorney-General remarks must be regarded as being an act *ex abundante cautela* and not further or otherwise. I cannot see that the case of the *Duke of Buccleuch* v. *Metropolitan Board of Works*, 5 L. R. Eng. & Ir. App. 418 in any way strengthens the appellant's position. But it is further urged that even if we find that the rights of riparian proprietors on a tidal navigable river are analogous to those of littoral proprietors, yet the petitioner has not the right of access, &c., &c., to the sea, because the sea was merely given to him as a boundary and not conferring any right thereto: that a grant between subject and subject is to be construed most strongly against the grantor, but that in cases of Crown grants nothing passes, except what is plain and intended. While I admit that Crown grants are so to be construed, yet I approve and adopt what was urged by the Counsel for the appellant in *Parmeter* v. *Attorney-General*, 10 Price p. 432, viz.: that "that principle of law is accompanied with another that when the Court expounds the grant most favourably for the Crown, it, at the same time, always expounds it liberally and for the Crown's honor, in order that it may pass to the subject that which it was the clear intention of the Crown to give, and which the Courts of law would say should be given by the grant itself." I cannot therefore assume that when the Crown grants the sea as a boundary, the grantee is not to have access to it, any more than if in lieu of the sea a highway had been given as a boundary. Bearing in mind the particular portion of the sea here referred to, that is, if I may so express myself, its *locality*—viz., at the back of Beach Street [a name which carries its own meaning] a street occupied by stores, I should say that free access, &c., to the sea was essential to the full enjoyment of a water lot. Chan Ah Hiang swears "they formerly used the sea front, it was used by owners of shops for landing goods for upwards of 20 years." I do not refer to this evidence on any point of prescription; but to show the nature of the user which is the most natural. Moreover, twice has the Crown given the sea as a boundary to the same lot, and it would, in my opinion, be doing violence to common sense to restrict the grantee's enjoyment of the sea which he was obviously intended to have so long as his user thereof was not injurious to, or did not affect the paramount rights of the public. We are told that *Lyon* v. *The Fishmongers' Co.* was the case

FORD, C.J. WOOD & SHERIFF. } J.J. 1885.

ATTORNEY-GENERAL v. WEMYSS.

of the banks of a river, but that we are dealing with the sea frontage and that such a case is not covered by authority. Assuming this to be so, and while I regret not having the landmarks of authoritative decisions for my guidance, I am prepared rather to err with the Court below than to lend my voice in support of what I consider to be the harsh and inequitable theory advanced by the Crown; on the contrary, I hold that it was intended by the Crown to give access, &c., and that it was given and having been given, the Crown cannot by cutting off communication with the sea derogate from its own grant.

A second ground of appeal is that the Court was wrong in deciding that the lease, dated the 15th day of November, 1883, under which the petitioner was in occupation was a renewed lease granted in pursuance of the covenant for renewal contained in the former lease, dated the 3rd day of July, 1877. The Crown wishes to treat the lease of 1883 as a *new* lease so as to charge the petitioner with the equities arising under the Reclamation Agreement of the 9th November, 1882. Cases were cited to show that the Court will not grant a specific performance for the renewal of a lease, where the original terms have been varied even in some minor particular, and that the term of the lease of 1883 are different in several particulars from those of the lease of 1877. Surely, the answer to this is that the parties themselves may modify the terms upon which a renewed lease is to be granted. The petitioner gave due notice of his intention of taking a renewed lease, and the instrument itself sets out that it is made "in pursuance of the proviso for renewal in the former lease." This at any rate goes to show what the intention of the parties was, and in my opinion they effectually carried out their intention. I do not consider it necessary to go into the variances which were pointed out because, assuming that the lease of 1883 had been identical in terms with that of 1877, the petitioner would have had, in my opinion the same right of way, access, &c., as is conferred in fuller terms by the lease of 1883.

The third ground of appeal is practically involved in the second, and it is unnecessary to deal with it separately. The remaining ground is to the effect that if the petitioner was entitled to damages, he should have sued his lessors and not the Crown, but this proposition was not supported by authority, and I should have been surprised if any had been forthcoming.

Having given the case my best attention, I am of opinion that the appellant has failed to shake the decision of the Court below, which I therefore think should be affirmed with costs.

Appeal dismissed. Judgment affirmed with costs.

The defendant appealed to Her Majesty in Her Privy Council.

On the 19th and 20th January, 1888, the appeal came on to be heard before —

Lord WATSON.
Lord FITZGERALD.
Lord HOBHOUSE.
Lord MACNAGHTEN.
Sir BARNES PEACOCK. [*a*]

Rigby, Q.C. [*Joyce* with him] for the appellant, contended that the respondent as lessee under his renewed lease in 1883, took the premises comprised therein subject to and bound by the rights which his lessor had by the agreement of 1882 conferred upon the Government. Having regard to the terms of the covenant for renewal in the former lease, the respondent could not have compelled its specific performance either against the lessor or a purchaser from the lessor, or the Crown claiming under the lessor. FRY on specific performance, 151, 660; *Milnes* v. *Gery*, 14 Ves. 400; *Vickers* v. *Vickers*, L. R. 4 Eq. 529; *Wilks* v. *Davis*, 3 Mer. 507; *Darbey* v. *Whitaker*, 4 Drew. 134. Further, if the lessor has so acted with regard to his property as to have incapacitated himself from renewing the same, it matters not what he purports to do, the renewed lease is *pro tanto* inoperative. This agreement of 1882 was not revocable, it amounted to a license by the owner to do certain works and thereby affect the owner's position and rights of property. Thereafter the owner could not grant any interest in the land derogating from that license; and the lessee took by his renewed lease, subject to the license. As to licenses by an owner to do something on his land detrimental to his neighbour, see *Winter* v. *Brockwell*, 8 East, 308; *Liggins* v. *Inge*, 7 Bing. 682; *Plimmer* v. *Mayor, &c. of Wellington*, 9 App. Cas. 699, 714. As regards the Crown's right of property and prerogative in respect of the foreshore, see *Attorney-General* v. *Tomline*, 12 L. R. Ch. Div. 214; s.c. 14 Ch. Div. 58. This is a claim which, when properly examined, is a tort, and no such action will lie against the Crown. Reference was made to *Farnell* v. *Bowman*, 12 App. Cas. 643, 647, and to the Crown Suits Ordinance 15 of 1876, Sec. 18.

Sir Horace Davey, Q.C. [*Wurtzburg* with him] for the respondent, after their Lordships had observed that they did not require to hear the respondent in reference to the effect of the Ordinance just cited, contended that the respondent was entitled to the damages claimed. As lessee of land adjoining the sea, and with a frontage thereto, he has a private right of access and egress to and from the sea, from and to such land, and of beaching and landing and hauling up boats on the sea shore. He was in the same position as is a riparian proprietor with regard to access to a tidal river. *Lyon* v. *Fishmongers' Co.*, App. Cas. 662.

[*a*] This Report of the case before the Privy Council is taken from 13 L. R. App. Cas. 192.

FORD, C.J. WOOD & SHERIFF. } J.J. 1885

ATTORNEY-GENERAL v. WEMYSS.

[Judgment of the Privy Council.]

The renewed lease was granted in pursuance of a covenant for renewal in the lease of 1877, and consequently the rights to which the respondent is entitled are paramount to any rights which the Crown obtained under the agreement with the lessor in 1882. The Government could only contract with the owner of the reversion, subject to the due performance of the legal obligations which attached to the ownership.

Joyce replied.

Cur. Adv. Vult.

4th February, 1888. The judgment of their Lordships was delivered by—

Lord Hobhouse. This litigation was commenced by a petition of right presented by Mr. Weymss, in which he claimed 40,000 dollars from the Government, on account of damage done to his tenement by the execution of works upon the foreshore in front of it. His case is, that free communication between his plot of land and the sea is of great importance to his business, and that whereas he was previously in enjoyment of such communication, the works of the Government cut it off.

The Chief Justice of the Supreme Court held that the petitioner could recover damages, which were afterwards assessed at 35,000 dollars. The Attorney-General appealed, but the Court of Appeal agreed with the Chief Justice. He now appeals further from their decree.

Wemyss is the lessee of the plot of land in question, which was acquired by grants from the Crown. At the date of the latest grant it was bounded by the sea, and is so described in the deed of grant. But the land gains upon the sea at this point, and in course of time a considerable deposit was formed in front of the plot, pushing back the sea and leaving an extent of open uncovered ground.

There have been several changes of proprietorship in the land as regards both the freehold and the leasehold interests. But they do not affect the present question, and it will be sufficient to speak of the successive owners of the freehold as the lessor, and the successive owners of the leasehold, including Wemyss, as the lessee.

On the 2nd July, 1877, the lessor granted to the lessee a lease of the plot, with some specified exceptions, for the term of six years, at the rent of 130 dollars per month. And it was agreed that if the lessee should be desirous of taking a renewed lease for the further term of six years, and should give six months' notice in writing of his desire, the lessor would execute a renewed lease for the term of six years, at such rent as might be either agreed upon by mutual consent, or fixed by four arbitrators, two to be chosen by the lessee, and two by the lessor.

FORD, C.J. WOOD & SHERIFF. } J.J. 1885.

ATTORNEY-GENERAL v. WEMYSS.

[Judgment of the Privy Council.]

At some subsequent time, it does not appear precisely when, the excepted portions were thrown into the lease at an additional rent of 15 dollars per month.

On the 29th November, 1882, an agreement for reclamation of land from the sea was made between the Government and a number of persons, of whom the lessor was one, described as "owners of lots of land on the East side of Beach Street." The effect of the agreement was that the Government would reclaim and fill up the mud bank lying between the land owned by the owners, and a certain line drawn to the Eastward, which was the seaward side of it, and would construct a quay at the seaward end; that each owner would pay 65 cents a square foot for the reclaimed land lying between his lot and the quay; and should receive a grant of such land in fee simple with a quit-rent reserved.

On the 16th December, 1882, the lessee gave to the lessor, written notice of his desire to take a renewed lease of his plot at the former rent, and on the former conditions.

On the 22nd June, 1883, the lessor and lessee agreed to vary the terms of the lease by leaving in the hands of the lessor some godowns, said to be in disrepair and useless, in consideration of his paying assessments and rates upon them. But the lessee's rent was not to be diminished on that account With this variation, the lease was renewed at the former rent, by deed, dated the 15th November, 1883, according to the covenant for renewal.

The reclamation works came opposite to the lessee's plot in February, 1884, when he presented his petition of right. The Government denied his right to recover damages on several grounds.

First, it was contended that his right to use the foreshore as an access to the sea was no greater than the right of any other of the public, and that it gave him no ground of action. To this it was answered that, with respect to riparian owners on tidal rivers, the contrary rule was laid down in *Lyon* v. *The Fishmongers' Co.*, and that for this purpose no distinction can be taken between a tidal river and the sea. Both the Courts below were of this opinion, and their Lordships concur in it. Indeed, it was not seriously combated at this Bar on the part of the Government.

The next defence of the Government was that the Crown cannot be sued in tort, a point apparently not raised in the Colony, but insisted on here. It is disposed of by the Crown Suits Ordinance of 1876. The object of that Ordinance is to make better provision by law for [among other things] giving redress to persons having claims against the Crown in the Colony. And by Section 18, Sub-section II., it is enacted as follows:—

"Any claim against the Crown founded on the use, or occupation, or right to use or occupation, of Crown lands in the Colony, and any claim arising out of the revenue laws, or out of any contract entered into, or which should have, or might have been, entered into on behalf of the Crown, by or by the authority of the Government of the Colony, which would, if such claim had arisen between subject and subject, be the ground of an action at law or suit in equity, and any claim against the Crown for damages or compensation arising in the Colony, shall be a claim cognizable under this Ordinance."

FORD, C.J. WOOD & SHERIFF. } J.J. 1885.

ATTORNEY-GENERAL v. WEMYSS.

[Judgment of the Privy Council.]

Their Lordships are of opinion that the expression "claim against the Crown for damages or compensation" is an apt expression to include claims arising out of torts, and that as claims arising out of contracts and other classes of claims are expressly mentioned, the words ought to receive their full meaning.

In the case of *Farnell* v. *Bowman*, attention was directed by this Committee to the fact that in many Colonies the Crown was in the habit of undertaking works which, in England, are usually performed by private persons, and to the consequent expediency of providing remedies for injuries committed in the course of these works. The present case is an illustration of that remark. And there is no improbability, but the reverse, that when the Legislature of a Colony in such circumstances allows claims against the Crown in words applicable to claims upon torts, it should mean exactly what it expresses.

Another contention which appears to have been more pressed in the Court below than here, was that the lease of 1883 was not in pursuance of the covenant of 1877, because the subject-matter of it was not identical. If that were so, the lessor could not by his lease pass to the lessee any right which he could not himself have enforced; and the agreement of November, 1882, effectually precluded the lessor from complaining of injury from the reclamation works.

Their Lordships however are clear, agreeing herein with both the Lower Courts, that the circumstance that the later lease did not embrace the whole property comprised in the earlier one is no reason for holding that it was not a fulfilment of the covenant for renewal. The lessee insisted on his covenant, and not the less so, because for mutual convenience an arrangement was made which the parties might have made at any time, and which did not in any way affect the interests of the owners of the foreshore.

An ingenious argument was then presented, and very ably presented, on behalf of the Government, to the effect that its right to execute works which might injuriously affect the land of the owners was prior in time to the interest conferred by the renewed lease. It is said that the covenant for renewal was one that could not be enforced by way of specific performance; that it conferred no interest in the land upon the lessee; that no such interest was acquired by him till the 22nd June, 1883, when the terms of renewal were agreed on; that in November, 1882, the lessor had given to the Government a license to execute the works affecting the land; that he thereby bound himself not to grant any interest in the land which should derogate from that license; that his obligation affected the land; and that what the lessee took under the renewal, he took subject to the license.

Whether the argument would be sound if the agreement of the 29th November, 1882, purported to give such a license to the Government, is a point on which their Lordships do not pronounce any opinion. They think that the agreement is not to be so construed. The owners agree to nothing except to pay for the land. They give no warranty, covenant, or license. They do not purport to represent anybody but themselves. There is nothing

FORD, C.J. WOOD & SHERIFF. } J.J. 1885.

ATTORNEY-GENERAL v. WEMYSS.

[Judgment of the Privy Council.]

to show that the Government was not taking the usual course, by making inquiry of the parties in actual possession, and dealing with them according to their interests. Undoubtedly, the owners preclude themselves, and of course all who claim through them by title subsequently arising, from complaining if the works they have sanctioned injure their property. That is all. The interests of other parties, of all who claim under prior obligations, are left untouched. The view now put forward by the Government comes to this, that without any express word to that effect, the lessor bound himself first to commit the injustice of refusing to perform his covenant with the lessee, and, secondly, to pay the very substantial sum which would be awarded as damages for breach of covenant. Such a construction puts an unjustifiable strain on the expressions in order to reach a very improbable conclusion. Their Lordships hold that the agreement of 29th November, 1882, does not in any way diminish the lessor's power or obligation to perform the covenant for renewal, or the lessee's rights under that covenant.

The result is that, in their Lordships' opinion, the appeal ought to be dismissed, with costs, and they will humbly advise Her Majesty accordingly.

CHEAH POH NHOO *v.* ONG LOON TEK & ORS.

PENANG.

WOOD, J. 1885.

March 16.

A Writ on mesne process, before judgment, was directed to issue under Section 422 B. of the Civil Procedure Ordinance, 1878, for the arrest of a defendant and his imprisonment for six weeks, "unless he give security that he would not leave the jurisdiction without the leave of the Court." The form of such a Writ is No. 53 in the appendix to the amending Ordinance 8 of 1880. The plaintiff thereupon took out a writ in accordance with the repealed form No. 40 in the appendix to the Civil Procedure Ordinance 5 of 1878, directing the arrest of the defendant and his imprisonment for six months, unless he gave security in the sum of $1,200 for his "appearance at any time when called upon, while the suit was pending or until execution or satisfaction of any judgment that might be passed therein against him, and in default of such appearance, for the payment of any sum of money that may be adjudged against him in the said suit with costs, or until he shall otherwise be lawfully delivered from custody." The defendant having been arrested and kept in custody, a few days after was released on bail. The bond which he and his sureties were required by the Sheriff's bailiff to execute, before releasing the defendant, was in $2,000, and after reciting the aforesaid suit and writ, was conditioned to be void, if the defendant would "not go or attempt to go into parts beyond the jurisdiction of the Court without first satisfying the amount of judgment and costs recovered against him in the suit." The defendant and sureties were aware of the terms of the bond and executed the same willingly, they did not then know however, that the writ was void or that the security they were required to give, was beyond what the law required under an arrest on mesne process. The plaintiff having thereafter obtained judgment with costs, the defendant immediately absconded, without paying up any part thereof. The plaintiff then sued the sureties to recover the $2,000 on the aforesaid bond.

Held [1] the writ which had been issued against the defendant was void *ab initio*, as being in contravention of the order of Court, and not authorised by law, [2] that the sureties in the bond were not estopped by their bond and the recital of the writ of arrest therein, from questioning the validity of such writ, and [3] that the bond was void,—as having been obtained by duress, as the security required of the sureties in order to procure the release of the defendant, was more than was required by law, and as the detention of the defendant under the aforesaid writ was illegal and could not be enforced against the sureties, by the plaintiff.

WOOD, J.
1885.

CHEAH POH NHOO
v.
ONG LOON TEK & ORS.

This was an action to recover $2,000 on a bond made by the defendants, as bail or sureties for one Poh Dait, to the plaintiff. The bond had been given under the following circumstances. The plaintiff, as the attorney of one Khoo Nai Suan, had in February, 1884, commenced an action, in this Court, against the said Poh Dait, to recover $1,000, for money had and received by the said Poh Dait from Messrs. Ban Chin Hong & Co. for the plaintiff's use. On the 25th February, the plaintiff applied for and obtained an order under Section 422 B. of the Civil Procedure Ordinance, 1878, for the arrest of the said Poh Dait, and his imprisonment for six weeks "unless he gave security that he would not leave the jurisdiction without the leave of the Court." This was the only form of security that was authorised in an action for debt under the Civil Procedure Ordinance *before* judgment; and the form of the writ is given in No. 53, in the appendix to the amending Ordinance 8 of 1886. The plaintiff, on obtaining this order, through inadvertence or otherwise it did not appear, took out a writ which was addressed to the Sheriff and omitting formal parts, was as follows :—

"Whereas it has been shewn to the satisfaction of the Court, that Poh Dait, the abovenamed defendant, is about to abscond, you are hereby commanded to take and arrest the body of the said Poh Dait, and to deliver him to the keeper of the Civil Prison, there to be kept for a period not exceeding six months, until he shall have given bail, or security, in the sum of $1,200 by deposit or otherwise, to the satisfaction of our said Court, for an appearance at any time when called upon while the above suit is pending, and until execution or satisfaction of any judgment that may be passed therein against him, and in default of such appearance, for the payment of any sum of money that may be adjudged against him in the said suit with costs, or until he shall otherwise be lawfully delivered from custody under the said arrest."

This form was the old form, No. 40, in the appendix to the Civil Procedure Ordinance 5 of 1878, Section 393, as regarded arrests *after* judgment, which section and form had been repealed by Section 14, Ordinance 8 of 1880. The sum of $1,200 was made up of the amount $1,000 sued for, and $200 the probable costs of suit. The said Poh Dait was taken into custody by the Sheriff on this writ, and kept in custody till the 27th February, when the defendants in this action, offered to go surety or bail for him. The Sheriff's bailiff, acting as he considered in pursuance of this suit, and after communicating with the plaintiffs' Solicitor, required that before the said Poh Dait could be discharged from custody, he and they as sureties, should execute a bond in $2,000 [intended to be double the amount sued for in the action] which, —omitting the usual words binding them, their heirs, executors and administrators to pay the said sum, and the attestation clause,—proceeded as follows :—

"Whereas the abovenamed Poh Dait has been arrested by the abovenamed Cheah Poh Nhoo as such attorney as aforesaid, by virtue of a writ of arrest tested the 25th day of February, 1884, issued out of the Supreme Court of the Straits Settlements, in the Settlement of Penang, in a certain suit wherein the said Cheah Poh Nhoo as such attorney as aforesaid is plaintiff, and the said Poh Dait is defendant, and whereas the above bounden

Ong Loon Tek, Lim Gin Tek and Khoo Khay Hock now stand bail or security for the said Poh Dait, and the said Poh Dait has to be delivered up to such bail, now the condition of the above written obligation is such, that if the above bounden Poh Dait, will not go or attempt to go into parts beyond the jurisdiction of the said Court, without first satisfying the amount of judgment and costs recovered against him in the said suit, then the above written obligation to be void and of none effect, but otherwise to be and remain in full force and virtue."

The said Poh Dait, and the defendants herein as sureties, were aware of the terms of the bond, and of their own free will agreed to execute this bond, knowing however that unless they did so, the Sheriff would not release the said Poh Dait, and believing that the writ under which he was detained was according to law, and not knowing that the condition of the bond they were required to sign was beyond the requirements of the law in the case of an arrest under mesne process. The defendants, as sureties, executed this bond, and the said Poh Dait was thereupon discharged from custody by the Sheriff. The action against the said Poh Dait was tried, and on 6th August, the plaintiff recovered judgment for his claim, and costs. The said Poh Dait was then still within the jurisdiction, but a few days after the judgment, absconded, without the knowledge of the plaintiff, or the defendants, the sureties,—and without having paid any part thereof. The plaintiff then commenced this action, on the bond, against the defendants, the sureties, to recover the $2,000.

Van Someren for the defendants contended, that the writ of arrest was illegal, and a nullity, as being in contravention of the order of Court granting the arrest of Poh Dait, and of Section 422 B. of the Civil Procedure Ordinance—that his detention under the writ was unlawful, and the bond which had been given by the sureties for his release from custody under that writ, was obtained by duress. The form used was of a writ *after* judgment—and not under this section, but Section 393, which had been repealed. He referred to these several sections, and to *Buller's N. P.* 172 [*a*]; *Whelpdale's Case*, 3 Co. 241; *Anon. Allen* 92; *Wootton* v. *Collins*, Mich. 9, Geo. 2; *Chitty on Contract* [10th ed.] p. 27, 187, and note; *Anon.* 1 Lev. 68, questioned by Coleridge J. in *Cumming* v. *Ince*, 11 Q. B. 112, 117; *Duke of Cadaval* v. *Collins*, 4 Ad. and El. 858; *Chitty's' Archbold*, 1193; *Sharpe* v. *Johnson*, 4 Dowl. 324; *Dickenson* v. *Eyre*, 7 Q. B. 307 [note]; *Tan Kay* v. *Tan Lat*, Woods' Oriental Cases, Appdx. 3, where a writ of *ne exeat regno*, issued out of this Court, was held void, as issuing out of the then lately abolished "Court of Judicature," and the bail bond was ordered to be given up to be cancelled; and *Atkinson* v. *Sittree*, Willes, 482; and *Smith* v. *Monteith*. 13 M. and W. 427. That the bond, being in excess of the amount commanded by the writ, was void on that ground also—*Cook* v. *Cooper*, 7 Ad. and E. 605.

Capel for the plaintiff contended, that the bond was not void, as the defendants of their free will, executed it, with full knowledge of its contents. They intended to give security for the judgment and costs, and had effectually bound themselves to do so. He referred to *Addison on Contracts*, p. p. 187, 198 and 231.

WOOD, J. 1885.

CHEAH POH NHOO. v. ONG LOON TEK & ORS.

[*Wood*, J., asked, whether the defendants were not estopped by their bond, which recited that writ, from now questioning the validity of the writ.]

Capel submitted they were.

Van Someren in reply contended there was no estoppel, as the recital was only that the said Poh Dait had been arrested on the writ, which was the fact, and not that the writ was duly issued, or otherwise valid.

Wood, J. said, that there was no doubt the writ was not in accordance with the order of Court in *Cheah Poh Nhoo* v. *Poh Dait*, and there was also no authority, *before* judgment, to issue such a writ, and the arrest and detention of Poh Dait in the custody of the Sheriff was therefore contrary to law. Section 422 B was the only mode of proceeding in such a case, and the security there provided for was the only kind the writ could have commanded to be taken—the security required by the writ in question, was not that provided for in this section [*a*.] The writ, in fact was a form once in use, under a section which had been repealed, and was void *ab initio*. That the case of *Tan Kay* v. *Tan Lat*, was an authority, under the circumstances, as to the invalidity of the bond. The defendants here were desirous of procuring the release of Poh Dait, and but for the Sheriff insisting, prior to his releasing the man, that the defendants should give a bond in these terms, they doubtless would never have given it. The demand of the Sheriff, based on the void writ, was illegal, and the pressure he thus brought to bear on the defendant though *bonâ fide*, was *duress* in the legal acceptation of the term. The only doubt he had was, whether the defendants were not estopped by their bond, and the recital in it, of the writ, from calling in question the validity of the writ, but the case of *Kepp* v. *Wiggett*, 10 C. B. 35, s. c. 20 L. J. C. P. [N. S.] 49, cited in the notes to *Doe* v. *Oliver*, 2 Smith's L. C. 634, shewed, that the recital was too general to operate as an estoppel. The result was, the bond could not be enforced against the sureties, and judgment must be for the defendants with costs.

KHOO SEOKE HAING *v.* CHEAH KHAY PIN & ANOR.

PENANG.

SIDGREAVES, C. J. 1885.

A decree for partition although it has never been carried out, operates as a severance of a joint tenancy, even if such joint tenancy be only for life, and notwithstanding the decease of one of the joint tenants for life after the date of the decree, the Court will carry out the decree and effect the partition.

March 16.

This was an action to recover possession of certain premises, No. 81, Penang Street, Penang. A prior suit had been begun in this Court by the plaintiff against Khoo Wee Team and Khoo Lo Heng for the construction of a clause relative to the above premises in the Will of one Khoo Chaing deceased, and for a partition of the premises between the plaintiff and the defendant Khoo Lo

[*a*] See *Kwah Chan Chew* v. *Wee Eng Suk*, Vol. I. of these Reports, p. 519.

Heng. The Court on the hearing of the suit had declared [a.] that under the said will the plaintiff and the said Khoo Lo Heng took only estates for life in the said premises as joint tenants, and decreed that the said premises be partitioned equally between the plaintiff and the said Khoo Lo Heng. Subsequently to the date of this decree, but before it could be carried into effect, the said Khoo Lo Heng died intestate leaving the defendants herein, her children. The defendants were in possession of the whole premises, and the plaintiff now brought this action claiming as the surviving life tenant to be entitled to the whole property for her life, and to recover the same from the defendants. The defendants after the action, but before this trial, took out administration to the estate of the said Khoo Lo Heng and got themselves made defendants in this action in that character also.

Ross for the defendants contended, that the effect of the decree for partition was to sever the joint tenancy, and the fact that it had not been carried out was immaterial. The plaintiff was therefore entitled to recover only one-half of the premises, but which half was to be decided when the actual partition was made. He referred to 1 Smith's Real Property, 231; *Pryor* v. *Pryor*, 10 L. R. Ch. Ap. 469; Cruise's Digest of Real Property, 378.

Van Someren for the plaintiff contended, that although a decree for partition might operate as a severance of a joint tenancy in fee or in trial, yet as here the plaintiff and the said Khoo Lo Heng were joint tenants for life only, the estate and interest of the latter terminated with her death, and there was nothing on which the decree could operate in so far as it regarded what could have been her share. Being only a tenant for life she had no interest in these premises to transmit on her death, and the defendants as her administrators did not represent such interest, and should not, as such, have been made defendants—he referred to *Kirk* v. *Todd*, 21 L. R. Ch. Div. 484, and *Chapman* v. *Day*, 31 W. R. 767. The defendants personally had no right to the premises, and the plaintiff was entitled to recover the whole of it from them.

Ross replied.

Sidgreaves, C.J. decided that the partition decree operated as a severance the moment it was made, in the life time of the joint tenants; that from that moment the plaintiff was entitled to only a moiety and had no further interest in the other's half. The fact that the joint tenants were only such for life, or that the decree had not been carried into effect was immaterial—that could be done now so as to find what was the exact half of the premises the plaintiff was entitled to. Whether the other half passed to the defendants or not the plaintiff had no concern with. The partition decree was therefore ordered to be carried out, and and judgment was to be entered for the plaintiff only for the half of the premises that on such partition being made would be alloted to her. The Court considered that under the circumstances each party should pay his own costs of this action.

Judgment accordingly.

[a] See *Khoo Seok Haing* v. *Khoo Wee Team & anor.*, Volume 1 of these Reports, p. 633.

REGINA *v.* LOW LAU SEW.

PENANG.

WOOD, J.
1885.

March 30

A Forest Ranger has no power to arrest without a warrant, except in the cases specified in Section 11 of the Crown Lands Ordinance 10 of 1883, and if he do so, his act is not an "official act" but a trespass, and any person offering him money to procure the release of the person or thing detained, cannot be convicted of offering a gratification, under Section 165 A. of the Penal Code.

This was an appeal from the decision of J. K. Birch, Esquire, Magistrate, Province Wellesley, in which he had convicted the appellant of causing to be offered a gratification, other than legal remuneration, as a motive for forbearing to do an official act, under Section 165 A. of the Penal Code, and sentenced him to six months' rigorous imprisonment. The evidence given before the Magistrate was to the effect that the respondent, H. Denison, who was a Forest Ranger, seeing two cart-loads of charcoal going pass from the direction of Bukit Martajam, seized the carts and charcoal, and kept them in custody. That the appellant thereupon came to the respondent, and offered him $6 in order to procure the release of the carts and charcoal—the respondent then called a constable, and gave the appellant into custody. One of the witnesses for the appellant said, the charcoal was his, but it did not appear how, or where, the charcoal was made.

Van Someren for the appellant contended, that there was no evidence to shew the charcoal had been made from trees on Crown lands, so as to have called for the interference of the respondent. That there was no evidence to shew his seizure and detention of the cart and charcoal, were "official acts," or what his powers, as a Forest Ranger, were.

D. *Logan*, [*Solicitor-General*] for respondent contended, that there was sufficient evidence to lead to the belief, that the charcoal was made from trees on Crown land, as the carts came from Martajam Hill,—the place notorious for such doings—and the offer of the bribe was only consistent with that theory. The respondent, he submitted, acted officially when he seized the carts under that belief.

Wood, J. considered that the case was deficient in not shewing what the powers of a Forest Ranger were, so as to enable the Court to decide whether he was doing an "official act" in seizing and detaining the carts. He therefore remitted the case to the Magistrate, for evidence on this point, and as to the circumstances attending the seizure of the charcoal in this particular case.

Case remitted.

The Magistrate, in pursuance of this order, took further evidence, and returned the same into Court. Such further evidence, was to the effect, that the respondent was a Forest Ranger appointed under the Crown Lands Ordinance 10 of 1883, and had instructions from the Deputy Commissioner of Lands [among other things] to examine all passes for charcoal which was being removed, and to see if the carriers had passes—and if they had none, to arrest [without warrant] the men, carts, and

charcoal, and charge the men before the Magistrate—to prevent charcoal-burning on Crown lands in the Province, and arrest every one so engaged, or transporting the charcoal, and to stop and arrest [without warrant] all persons cutting wood on Crown lands without passes—and to appear and prosecute before the Magistrate all such persons. The further evidence also shewed that in this particular case the cartmen produced two old passes which evidently were not for these loads of charcoal, and the respondent in obedience to his orders had the carts seized and detained. One of the two cartmen had been prosecuted by him before the Magistrate, and he was cautioned, and the charcoal forfeited. The charcoal had since then been sold by the respondent, and the proceeds had been paid by him into the Land Office. The Crown Lands Ordinance 10 of 1883 provides, in Section 11, a penalty on all persons found depasturing horses or cattle on Crown lands without authority—Section 12, provides a penalty on all persons cutting, digging or taking from Crown lands, any live or dead timber, or other vegetable product, bee's wax, guano, &c., &c., Section 13 provides a penalty on all persons obliterating boundary marks put up by the Government; Section 15 provides for the appointment of Forest Rangers, Punghulus, &c., and gives them, *inter alia*, "the like power and authority to do all such acts, as any Bailiff, lawfully appointed, may by law do in respect of any lands, tenements or hereditaments of his employer"—Section 17, is as follows: "It shall be lawful for all "Forest Rangers, Punghulus and Police officers, within their "respective jurisdiction, and they are hereby required, to arrest, "without warrant, and take before a Magistrate, having juris- "diction, any person whom they shall *find committing* [*a*] any "offence punishable under Sections 11, 12 and 13 of this "Ordinance."

The appeal came on for further hearing, on 17th August:

Van Someren for appellants contended, that the respondent as a Forest Ranger had no power to arrest without warrant these carts of charcoal as they were passing down the public road; the act of the respondent was a trespass, and not an "official act," and the case did not come within Section 165 A.—*Connor* v *Tan Jim Sin*, 3 Kyshe, 114; *Secunder* v. *Kyamboo*, *Ibid.* 116.

D. *Logan*, [*Solicitor-General*] for the respondent contended, that unless Forest Rangers had the power to arrest as in this case, offenders could never be brought to justice, as before a warrant could be obtained, they would have disappeared. The power to prevent trespasses on Crown lands, as in Sections 15 and 17, necessarily included incidental powers of preventing the removal of Crown property, and their recovery.

Wood, J. considered, that a Forest Ranger was an officer unknown to the Common Law, and his powers as a "Bailiff," did not authorise him in seizing and detaining, without a warrant, the charcoal, under the circumstances disclosed in this case. His

[*a*] See *Downing* v. *Capel*, 2 L. R. C. P. 461.

WOOD, J. 1885.

REGINA v. LOW LAU SEW.

power to arrest, without a warrant, was confined to the cases specified in Section 11 of the Crown Lands Ordinance. The seizure and detention here, were not official acts, but unlawful acts, and the case did not fall within Section 165 A.

Conviction quashed.

JENABBOO & ANOR. *v.* VYTILINGUM.

PENANG.

WOOD, J. 1885.

April 27.

A landlord has no power by a mere notice to raise his tenant's rent in failure of his quitting the premises, or in default of payment of such increased rent to distrain therefor. In order to support the claim for such increased rent or to justify the distress therefor, the landlord must shew the tenant agreed to pay such increased rent or facts from which such assent on the part of the tenant might be inferred by the Court.

Van Someren on behalf of the tenants, the said Jenabboo and Ally Tombi, had, on the 17th April, obtained a rule or order under Section 10 of the Appeals Ordinance 12 of 1879, calling on Walter Egerton, Esquire, a Commissioner of the Court of Requests, to bring up the records and proceedings in this case before him and calling on him and the landlord Vytilingum to shew cause why a new trial should not be granted, or such order made as to secure substantial justice between the parties. From the affidavit of the tenants [which was not contradicted] and the Commissioner's notes of evidence before him and proceedings in the Court of Requests it appeared that the tenants had been for some little time prior to 25th October, 1884, in occupation of a house No. 357, Penang Road, from the landlord at $2 per month; that on the 28th October, 1884, the landlord served the tenants with a notice as follows:—"I hereby give you one month's notice to quit and deliver up to me the premises you are now occupying from the service hereof. In default of your doing so, I shall charge rent of Dollars five [5] per month instead of two." In October and November the tenants paid, and the landlord received $2 per month for rent. As regarded the rent for December there was a conflict of testimony; the tenants alleging thay had paid, and the landlord denying he had received $2 rent. On the 16th March, 1885, the landlord applied to the Court of Requests for, and obtained a distress warrant against, the tenants for $15 for arrears of rent from 1st December 1884 to 28th February, 1885, at $5 per month. The tenants did not quit the premises as directed by the notice, but after being served therewith called on the landlord and informed him that they declined to pay $5 a month as demanded. On hearing that the distress was applied for, they called at the Court of Requests, and in the presence of the Clerk of the Court tendered the landlord $4 as rent at $2 per month for January and February, but the landlord declined to accept it insisting on $5 per month which the tenants again refused. The distress having been issued and the tenants' property seized thereon, the tenants made an application under Section 14 of the Distress Ordinance 14 of 1876, to the Commissioner to

discharge the distress on the ground that they had paid December's rent at $2 per month, and submitted the notice of 25th October, was thereby waived. On 18th April, the Commissioner enquired into the matter and disbelieving that December's rent had been paid or the notice aforesaid waived, gave judgment for the landlord with costs and directed the distress to be executed upon which the tenants paid in $18.25 into Court for the rent and costs which the landlord took out. The present rule was then applied for and obtained, and now came on for argument.

The *Commmissioner* did not appear to shew cause.

The *landlord* Vytilingum appeared in person and did so.

Van Someren for the tenants contended, that a landlord had no power by a mere notice to increase his tenant's rent, that there was no agreement by the tenant to pay the increased rent or facts from which his assent thereto could be inferred; he was therefore not liable for the increased rent and the landlord was not entitled to distrain therefor. He referred to *Jenner* v. *Clegg*, 1 M. & Rob 213; *Alford* v. *Vickery*, 1 Car. & M. 283; *Williams* v. *Stevens*, 9 Q. B. 14; *Zouch* v. *Wallinsgate*, 1 H. Bl. 311; *Beavan* v. *Delahay* 1 H. Bl. 8; *Mayor of Thetford* v. *Taylor*, 8 Q. B. 95; *Woodfall on L. & T.* 329, 384, 389, 391 & 527; *Redman on L. & T.* 154, 155, 213; Distress Ordinance 14 of 1876, sec. 22; 8 Anne c. 18, ss. 6, 7; *Addison on Torts*, 518, 523.

Wood, J. considered that there was no power in a landlord to increase his tenant's rent by a notice, and unless there was an agreement by the tenant to pay such increased rent, or there were such facts in the case, as by his conduct or otherwise, from which the Court could infer an assent on his part, he could not be made liable therefor; that if a landlord considered he should get more rent and the tenant declined to pay it, the only remedy open to the landlord was, after giving the tenant a proper notice to quit, to sue him in an action of ejectment; but he had no right to distrain for his increased rent. That to entitle a landlord to distrain there must be an agreement to pay rent, and that for a fixed and definite amount. Here the rent at $5 per month was not agreed to, and the amount of the rent that should be paid per month was a matter in dispute between the landlord and tenant. The distress therefore was irregular and improper, and the rule must be made absolute—reversing the decision of the Commissioner—discharging the distress warrant—and ordering the refund by the landlord to the tenant of the $18.25 taken out by him, together with the costs of this rule.

LIM TUAN HONG *v.* HERMANN JEBSEN & Co.

PENANG.

WOOD, J. 1885. April 27.

It is irregular for a Magistrate, on investigating into a charge against a prisoner for an offence, during the course of the investigation, to place a witness who has given evidence before him, in the dock, and to enter a charge against him for the offence, and to proceed therewith and convict him thereon. Such a conviction will be quashed.

An order to try a prisoner on a charge, *de novo*, does not prevent a fresh and different charge—but of the same class—being entered against him, and enquired into.

An amended charge, must be read or explained to a prisoner, under Section 53 of the Criminal Procedure Ordinance 6 of 1873, whether the prisoner be defended by Counsel or not; an omission to do so renders a conviction on the amended charge, liable to be quashed.

WOOD, J. 1885.

LIM TUAN HONG v. HERMANN JEBSEN & CO.

Though it may not be actually illegal for a Magistrate who has once tried a case and convicted a prisoner, to try the prisoner *de novo*, on an order by the Supreme Court directing a trial *de novo*, still it is highly objectionable that he should do so. He should allow the trial *de novo* to be had before another Magistrate.

One Kurpen, a coolie in the firm of Hermann Jebsen and Company, was, on the 28th day of July, 1884, charged before Henry Arthur Thompson, Esquire, Magistrate, Penang, for that he the said Kurpen did, on the 25th day of July, 1884, at Beach Street, Penang, commit theft in a building used for the custody of property by Hermann Jebsen & Co., to wit, seven bottles of Vermouth, one bottle of Brandy, one bottle of Beer and six boxes mirror lids valued at $2, and had thereby committed an offence punishable under Section 380 of the Penal Code. On the hearing of the charge, the abovenamed appellant, who was a clerk in the employ of Hermann Jebsen & Co., was called as a witness for the prosecution, and after he had given his evidence, and on the prisoner Kurpen thereupon stating that the witness had given the bottles done up in a gunny bag and had told him to take them to the witness' house, the Magistrate ordered the appellant to be placed in the dock and a similar charge to be entered against him. The case then proceeded, and after further evidence had been called, the prisoner Kurpen was discharged, and called as a witness for the prosecution, and at the close of the case the appellant was sentenced to six weeks' rigorous imprisonment. Against this conviction, the appellant appealed; which appeal came on for hearing on the 8th September, 1884, when the Court held that the case had been irregularly heard and determined, and quashed the conviction, remitting the case back for re-hearing on a fresh charge. The appellant was thereupon, on the 26th September, 1884, again charged before the same Magistrate, and as the case stated by the Magistrate shewed, upon the same charge [Section 380], but the conviction was under Section 381, for the offence of theft as a clerk, and the appellant was sentenced to three months' rigorous imprisonment. On this appeal, C. *Logan*, who had appeared for the appellant before the Magistrate, filed an affidavit, wherein he stated that at the second hearing of the case, the Magistrate had called for the notes taken by him on the first hearing, and had among other things therein recorded, read the evidence given on oath by the prisoner himself [the present appellant] at the first hearing, before he was placed in the dock, and that he believed that the second hearing was not a fair one to the prisoner, as it was evident all through, that the Magistrate could not divest his mind from the conclusion he had formed at the first trial of the prisoner's guilt, and had therefore, for some reason or other, sentenced the prisoner to double the term of imprisoment he had at first sentenced him to. To this affidavit the Magistrate filed a counter one, admitting that he had called for his notes of evidence taken on the first trial, but stating that he had only referred to the notes to see if the witnesses had given substantially the same evidence as on the first trial, that he verily believed he had not read the evidence given on oath by the appellant at the first trial, and denied that he had been in any way influenced against the appellant by anything that had taken place on the first trial; that

before beginning the second hearing, he had informed Mr. Charles Logan that his client would be charged under Section 381, and that he had under that charge increased the punishment, as he considered the prisoner's offence more serious than a common theft. It was admitted that the Clerk had omitted to alter the charge to one under Section 381, or to read the new charge to the prisoner.

Van Someren for the appellant. The order was to try the case *de novo*, that is, upon the original charge, and not upon a fresh charge. 2.—The amended charge was not read to the accused as directed by Section 53 of the Criminal Procedure Ordinance 6 of 1873, and although the Counsel for the accused might have been informed of the amended charge, that is not a compliance with the direction in the Ordinance that amendments shall be read and explained to the accused. A prisoner can consent to nothing, much less his Counsel—*Regina* v. *Bertrand*, 1 L. R. P. C. 520. The omission to make the formal amendment, and to read the same to the prisoner, was fatal, being a non-compliance with a statutory enactment. 3.—The Magistrate read or consulted the evidence taken before him in the first trial, this evidence was, in the first place, not evidence taken on the second trial, and secondly, it contained the evidence of the prisoner himself, which was not properly admissible, and even if the Magistrate did not read the evidence of the prisoner, he did read the evidence of all the witnesses. 4.—It was objectionable, though not illegal, that the same Magistrate should have re tried the case, as his mind had been made up.

D. *Logan*, [*Solicitor-General*] for respondent. The only irregularity is the substitution of Section 381, for Section 380, in the conviction, and as this has occasioned no failure of justice, the Court can amend the conviction, or direct the accused to be tried again on a proper charge. Appeals Ordinance 12 of 1879, Section 34.

Wood, J. The first ground of appeal does not appear of any weight, but the omission to read the amended charge to the prisoner, was an irregularity of a grave kind, and although I doubt whether I am called on, imperatively, by Sub-section 2 of Section 34 of the Appeals Ordinance of 1879, to direct the prisoner to be tried on a proper charge, I think that in the interests of justice, the irregularity should not be overlooked. I also consider it is to be regretted that the Magistrate should have referred at all to his previous notes. It stands almost to reason that it is improper for a Magistrate who has tried a prisoner in a summary proceeding, and is thus both judge and jury, to try the prisoner again on a fresh charge, when it is in any way possible to secure the attendance of another Magistrate. Such a trial is identical with the re-trial of a case by a jury, which as already found a verdict of guilty on the same charge. Such a proceeding is always regarded as, if not actually illegal, highly objectionable, and I therefore remit the prisoner to be tried again by another Magistrate on a fresh charge [*a*.]

[*a*.] The case was eventually dropped and the prisoner discharged.—J. W. N. K.

NANA EBRAMSAH *v.* KAT BAWA & ANOR.

PENANG.

WOOD J.
1885.

May 1.

A memorandum of purchase of lands, at public auction, which does not on its face shew what the conditions of sale are,—or at least something connecting it with conditions of sale on a separate paper—is not a sufficient contract within Section 4 of the Statute of Frauds, 29 Car. II. c. 3.

It is the duty of a plaintiff, before he sues upon a contract for the sale of land, to satisfy himself that there is a sufficient contract under the Statute of Frauds—and although the defendant may not plead the Statute as required by Section 175 of the Civil Procedure Ordinance, but at the trial is allowed with the plaintiff's consent to amend his defence, by doing so—he [plaintiff] will be ordered to pay the costs of the action, even if the case goes off solely on account of the Statute.

This was an action to recover $169-55 damages for breach of contract for the purchase of land by one Shayna Ebramsah deceased, of whom the defendants were the executors. The plaintiff's case was that he had put up certain lands situate off Burmah Road, in lots, to sale by public auction, and that two of such lots had been purchased at such auction by the said Shayna Ebramsah deceased, who had signed the memo. of purchase, but had died before completion of the purchase, and the defendants, his executors, had refused to do so. That under the conditions of sale, the two lots had thereupon been put up for re-sale by auction, and had together fetched $103 below the sum for which they were knocked down to the said Shayna Ebramsah, which sum, together with the charges attendant on such re-sale, the plaintiff now claimed of the defendants. The memo. of purchase which was in the auctioneer's book, was to the effect that the lots thereunder mentioned, of all that piece of land situate off Burmah Road in Penang, belonging to the plaintiff, were sold by public auction subject to conditions of sale to the persons signing, and at the prices set opposite each respective lot—then followed three columns, the first, of the number of the lots, the next, the prices for which they were knocked down, and thirdly, the signatures of the purchasers. The memo. showed in the first column the two lots purchased by the said Shayna Ebramsah, with the amount bid for each lot in the second column—which lots and figures were bracketed and signed in the third column by the said Shayna Ebramsah. No conditions of sale appeared on the face of this memo; nor was there any reference therein to any specific conditions of sale. At the trial the auctioneer produced certain conditions of sale on a separate piece of paper which he said were the conditions of sale referred to in the memo. of purchase; but there was nothing on the face of the conditions of sale which connected them with the memo. of purchase. The defendants had, in their statement of defence, denied the contract but did not plead the Statute of Frauds, 29 Car. II c. 3. They however, on the opening of the case, applied for leave to amend, by adding such a defence, which the plaintiff's Counsel consented to, and leave was granted and the amendment made. The case then proceeded, and on the conclusion of the plaintiff's case,

Van Someren, for defendants submitted there was no case to answer as there was no sufficient contract within the fourth section of the Statute of Frauds, as there was nothing on the face

of either the memo. or conditions of sale, to connect them together, and there was therefore nothing to make the defendants liable for the deficiency and expenses on the re-sale. He referred to *Merten* v. *Adcock*, 4 Esp. 251; *Hinde* v. *Whitehouse*, 7 East 558; *Boydell* v. *Drummond*, 11 East 142; and *Peirce* v. *Corf* 9 L. R. Q. B. 210.

Hogan, for plaintiff *contrà*. He further submitted he was taken by surprise and asked for an adjournment.

May 8. *Hogan*, for plaintiff admitted that having looked up the authorities he could not contend the contract was sufficient within the Statute of Frauds, but he contended that under Section 175 of the Civil Procedure Ordinance, 1878, the Statute of Frauds must be specially pleaded—and but for his having consented to the statement of defence being amended, the defendants would have been debarred from relying on the Statute. He referred to *Clarke* v. *Callow*, 46 L. J. Q. B. 53. Had the Statute been pleaded earlier, he submitted he could have had an opportunity of looking up the authorities, and would not have proceeded further with the case. The defendant's omission to do so, had brought about the whole of the cost of the action from the date of the filing of the defence; and he asked therefore that the defendants should not be allowed their costs.

Van Someren for defendants submitted that the fact that the case was on for hearing for a second day, was due to the plaintiff. He should have satisfied himself there was a sufficient contract before he sued; and when he found he could not support his case after the last hearing, he should have notified the fact to the defendants so as to have saved them the expense of that second day.

Wood, J. said it was clear there was no sufficient note or memorandum of purchase within the fourth section of the Statute of Frauds, and had the plaintiff troubled himself to see if the contract here was sufficient he would without any difficulty have found it was not. He should have done this before he commenced his action; so that the costs incurred were entirely due to his own laches—As regarded that second day's hearing also, the fault was his, for he might have intimated his intention of not proceeding further with the action, so as to have saved the defendants the cost of that day. The defendants, no doubt, would have been debarred from relying on the Statute as the statement of defence originally stood—but the plaintiff had consented to allow him to amend by raising the defence. He had only himself to blame again. There was no doubt he was taken by surprise at the first day of hearing, when it was pointed out the contract was insufficient. On the whole, he [the learned Judge] considered that the most the plaintiff could expect was, to be excused from paying the costs of the first day of hearing [1st May]—and the order he would make was, that judgment be entered up for the defendants with costs except the costs of 1st May, the first day of hearing.

REGINA *v.* CHEAH TEE & ANOR.

PENANG.

WOOD, J.
1885.

May 4.

A common brothel is not a "public place" within the meaning of Section 159 of the Penal Code.

A person, not an inmate of the place, who is found armed in a brothel is not found "abroad" within the meaning of Section 32, clause 5 of Ordinance 13 of 1872.

The appellants with others had been convicted by H. A. Thompson, Esquire, Magistrate, for committing an affray under Section 161 of the Penal Code. The appellants were also convicted of being found abroad after sunset and before sunrise armed with two tridents without a pass, under clause 5, Section 32 of Ordinance 13 of 1872, and were severally sentenced to fine and imprisonment. The evidence shewed that at 9.30 p.m., on the 6th October, 1884, cries for Police were heard to proceed from a licensed brothel in Campbell Street, and upon the Police entering the house a large number of Chinese were found assaulting each other. The Police arrested nine of the men of whom the appellants were two; the appellants were found armed each with a trident, the others with sticks. None of the men, belonged to the house. The fight was between a party of Cantonese and a party of Hokiens and several of the men were much hurt. The appellants appealed against their conviction.

Thomas, for the appellant. A brothel is not a "public place," but a private establishment to which access may be denied by the proprietor to whomsoever he pleases. To constitute an "affray" the place must be a public place—Section 159 of the Penal Code, and the disturbance must be to the terror of the public, 1 *Russ. on Crimes*, 390. As to the conviction on second charge the appellants were not "found abroad," but in the brothel, and were not therefore within Section 32, clause 5 of Ordinance 13 of 1872.

D. *Logan*, [*Solicitor-General*] for the respondent. A brothel is open at all times to any one who chooses to enter. At all events such a house may well be regarded as a public place while such a large number of men [as shewn by the evidence] were assembled in it. 1 Bishop's Cr. Law, 315; Mayne on the Penal Code, 246 [note to sec. 294], and *Regina* v. *Harris*, 1 L. R. C. C. R. 282.

Wood, J. Inasmuch as a brothel in the ordinary acceptation of the word [and without evidence that the proprietor has given any general privilege to the public to enter at their will] is not an establishment into which any one is at liberty to enter whether the proprietor likes it or not, I consider an ordinary brothel, such as this one appears to be, is not a "public place" within the meaning of Section 159 of the Penal Code. I also consider the prisoners cannot be said to be "abroad" when in such brothel, within the meaning of Sub-section 5 of Section 32 of Ordinance 13 of 1872. The conviction must therefore be quashed.

Conviction quashed.

ARMOTHA PULLAY *v.* MARIMOOTOO.

PENANG.

WOOD, J.
1885.

May 4.

A Magistrate who dismisses a charge of extortion has no power to order the return of the property or re-payment of the money alleged to be extorted.

The appellant Armotha Pullay on 29th October, 1884, was charged before J. K. Birch, Esquire, Magistrate, under Section 384 of the Penal Code with extorting $3 from the respondent by threatening to expel the respondent from the hindu community. The evidence shewed that the appellant was a headman of the hindu community, and had fined the respondent $3 for some irregularity committed by him, and threatened to expel him from the community unless the fine was paid, upon which the $3 was paid to him, and was to be applied towards some idol feast. On the conclusion of the case for the prosecution, the Magistrate dismissed the case, considering that although the appellant had no authority in law to impose a fine, yet he had acted *bonâ fide* under the belief he was discharging a duty. The Magistrate further stated that he had reason to believe that certain persons taking advantage of the ignorance of those of their nationality about them, constituted themselves headmen in order to practice imposition by fining people with that object. He considered that this should be put a stop to. While therefore dismissing the case he directed that the $3 paid by the respondent should be refunded by him in order that headmen might know that they would not be allowed to retain any fines they imposed, and the people that they need not be imposed on. The appellant paid the $3 under protest and then brought this appeal.

Anthony, for the appellant contended that the Magistrate had no power to direct a refund of the $3, and his order should be set aside.

D. *Logan*, [*Solicitor-General*] for the Crown was heard in support of the order.

Wood, J. Though it is desirable that the poor and ignorant should be protected, yet I know of no law which enables a Magistrate to make an order such as this. Having dismissed the case he was *functus officio*, and could make no order for the re-payment of the $3. The appeal will be allowed, and the $3 must be repaid by the respondent with the appellant's costs out of pocket.

NAIN BOON KEOW *v.* LETCHMAN CHETTY & ANOR.

PENANG.

WOOD, J.
1885.

May 5.

A person who deals with a woman, is bound fully to enquire whether she is a married woman or not, and he is not excused from such enquiry, simply because she represented herself to be a widow, although she may have in so representing herself intended to mislead and defraud him and did in fact do so. [*a.*]

The husband of a married woman, on discovering his wife had purchased some lands, [although the money for such purchase was raised on mortgage of the land by her to a third party, by means of a misrepresentation that she was a widow] -is entitled to

[*a.*] But see *Jones* v. *Smith*, 1 Hare 43; on Appl. 1 Phil. 244; and *Lloyd's Banking Co.* v. *Jones*, 29 L. R. Ch. Div. 221.—J. W. N. K.

WOOD, J. 1885.

NAIN BOON KEOW v. LETCHMAN CHETTY & ANOR.

recover possession of the land, and have the Mortgage Bond to such third party cancelled notwithstanding he neither offers to, nor in fact recoups the Mortgagee the amount he had lent.

This was a suit to have a Deed of Mortgage declared void and ordered to be given up to be cancelled. The facts were as follows: the plaintiff was a Siamese Doctor and had a wife of the name of Nonia Lim Chee by whom he had several children, some of whom had grown up. He entrusted his savings with his wife, but some time before her death she had taken to gambling and without his knowledge had spent all his savings. The wife, without the knowledge of the plaintiff, her husband, agreed with one Nonia Gek, for the purchase of certain lands in Bridge Street, Penang, for $600, and thereupon arranged with the defendant Letchman Chetty for the loan of that sum to her for the purpose on the mortgage by her of the lands. The defendant Letchman Chetty did not know Nonia Lim Chee before, and was introduced to her by the said Nonia Gek as a "widow," Nonia Lim Chee also said the same and reiterated the statement to the Conveyancer who drew up the mortgage bond. The defendant Letchman Chetty was not acquainted with the plaintiff, and made no further enquiries beyond questioning the two women as above stated. On the next day, the 13th September, 1883, the defendant Letchman Chetty in full faith of the representation made to him, and believing he was dealing with a widow lent Nonia Lim Chee the $600, and she then and there paid it to the said Nonia Gek and procured a conveyance of the land from her and immediately thereafter, executed the aforesaid mortgage bond thereof to the defendant Letchman Chetty, for the full sum of $600. In both the conveyance and mortgage bond the said Nonia Lim Chee was described as "widow." The two women afterwards arranged with the Chetty-defendant that he should call for payment of his interest at the house of Nonia Gek as he did not know the residence of Nonia Lim Chee. He thereafter did so and was regularly paid his interest till the death of Nonia Lim Chee in August, 1884. Not being able to obtain his further interest and the bond being overdue, the defendant Letchman Chetty advertised the lands for sale by public auction; through the second defendant, an auctioneer. The plaintiff had a few days previous to the death of Nonia Lim Chee been told by the said Nonia Gek, of the purchase of the lands, but not of the mortgage. This he only discovered on the notice of sale by the auctioneer as aforesaid, being posted on the land. He then commenced this suit, but neither paid up nor offered to pay the amount of the mortgage.

Thomas, for plaintiff. The authorities shew that a wife or infant, guilty of fraud, must pay for the fraud out of some fund over which she, or he, had some power of disposition. Here the land was conveyed by Nonia Gek to the plaintiff's wife, and the property *eo instante* became the property of the plaintiff, the husband; and he is entitled to get it unincumbered. 1, *Roper on Hus. and Wife*, 39. It did not form the "separate estate" of the wife and she had no such estate out of which two recoup the defendant. The defendant also had had recourse to subterfuge,

by collecting his interest at Nonia Gek's. Why did he remain satisfied, without knowing where Nonia Lim Chee lived? In dealing with a woman he should have been cautious; here he made no reasonable enquiry to find the true *status* of Nonia Lim Chee; had he done so he would have found she had grown up children and he would have discovered she had a husband living.

Van Someren, for defendants. The defendant used all reasonable precaution. He and the conveyancer both questioned the woman as to her status and were answered by both the women that Nonia Chee was a widow. The defendant did not know Nonia Lim Chee before, he did not know who were her friends or acquaintances; of whom then was he to enquire further concerning her? The description of the woman in the conveyance and bond further led him to believe all was right. There was in fact, nothing suspicious in the whole transaction and nothing to put him on enquiry. The arrangement as to where the interest was to be paid was not an uncommon thing and was entered into *bonâ fide*, for the woman's convenience. There was nothing to excite the defendant's suspicion about it, and it was only made after the money had been lent and the mortgage bond executed. The property was the husband's only by a legal fiction. As a fact neither he nor the wife, had supplied the money for the purchase of the land, but the defendant; and the property might well be considered his. A married woman or an infant who is guilty of fraud, is liable to make good the loss they occasion out of their property; *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Ex. 422, *Wright* v. *Leonard*, 11 C. B. [N. S.] 257; *Stikeman* v. *Dawson*, 1 De G. and Sm. 90; *Ex-parte* United Joint Stock Association, *Re* King, 3 De G. & J. 63; *Nelson* v. *Stocker*, 28 L. J. Ch. [N. S.] 760; *Savage* v. *Foster*, 8 Mod. 35; *Vaughan* v. *Vandersteyen*, 23. L. J. Ch. [N. S.] 793; *William* v. *Stratton*, 50 L. J. Ch. [N. S.] 495; *Sharpe* v. *Foy*, 4. L. R. Ch. Ap. 35, 42: Even if the property be considered the husband's, and not the wife's own,—as by claiming the property as his, he ratifies her purchase,—he is bound to ratify her acts as a whole, including the mortgage made for the purpose of obtaining the money with which the land was purchased. He would claim the entire benefit, without any expenditure or outlay. If the Court grants him a decree, it will only do so on the ground that he recoup the defendant the amount he had lent for the purchase of the land. *Granby* v. *Allen*; 1. Ld. Raymond, 224.

Thomas, replied.

Cur. Adv. Vult.

June 12. *Wood*, J. In this case the facts are simple. Lim Chee, the wife of the plaintiff and entrusted by him with money purchases land in her own name without his knowledge,—the land she subsequently, also without his knowledge, mortgages to the defendant representing herself to him to be a widow. Shortly before the death of Lim Chee, plaintiff is told of the purchase of the land—but is never aware of the mortgage until after his

WOOD, J. 1885.

NAIN BOON KEOW v. LETCHMAN CHETTY & ANOR.

wife's death, when in default of payment of the principal sum the defendant proposes to sell the mortgaged premises under a power of sale.

The plaintiff in his suit seeks to set aside the mortgage which he asks may be given up to be cancelled.

No authorities exactly in point were cited, and judgment was reserved. In a case like this it is necessary in the absence of direct quotable authority to rely on the main principles which govern the law of husband and wife in dealings with land. There is no doubt of the spoliation of the husband by the wife. The defendant in dealing with any woman should have satisfied himself of her true position and it is not enough that he also is deceived and suffers loss. The general rule is, "that whatever is sufficient to put the party to an inquiry, is good notice in equity." 2 *Fonblanque on Equity*, note [m.]; and applying this principle, I have no doubt that negligence such as this is a form of constructive notice, and the case is the same as if the defendant were cognizant of the misconduct of the wife.

Judgment for the plaintiff, in terms of the prayer, with costs. [*a*.]

NOOR MAHOMED MERICAN & ANOR. *v.* NACODAH MERICAN & ANOR.

PENANG.

WOOD, J. 1885.

June 23.

A legatee, does not lose his right to a legacy, by voluntarily intimating without any valuable consideration that he never intends to take it, and even dies without changing his mind on the point, but without having actually executed a release thereof - and his executor or administrator is entitled after his death to claim payment of the legacy. It makes no difference that such legatee is the executor of the testator and he always refused to credit himself with the legacy.

A testator bequeathed "to my brother Vapoo Merican Noordin whom I appoint the executor and trustee of this my will" a legacy of $4,000 "for his own use absolutely."

Held, the legacy was annexed to the office of executor, and the executor was not entitled to charge the usual executor's commission, in addition to the legacy.

Calvert v. *Sebbon*, 4 Beav. 222 followed.

Compton v. *Bloxham*, 2 Coll. Ch. Rep. 201, distinguished.

This was a special case filed in order to obtain the opinion of the Court as to whether under the circumstances hereinafter set out, a legacy could be considered as released, and whether the legatee [who was also the executor] was entitled to charge the usual executor's commission in addition to the legacy. The following are the only material facts [set out in the case] which need be given in this report. One Nina Merican Noordin died in Penang, having first made a will dated 16th December 1879, by which he appointed his brother Vapoo Merican Noordin, his sole executor. In and by the will, the said testator devised and bequeathed all his real and personal estates to his "brother the said Vapoo Merican Noordin, whom he appointed the executor and trustee of the will," in trust to dispose of the same, as he

[*a*.] The defendant appealed against this judgment, but having left the Settlement before the Court of Appeal sat the appeal was dropped.—J. W. N. K.

thought proper and thereout, *inter alia*, to pay himself "for his own use absolutely" the sum of $4,000. Nothing was mentioned in the will as to whether or not the legacy was given in lieu of the usual executor's commission; and no mention whatever was made in the will, as to commission. Vapoo Merican Noordin proved the will and took out Probate thereof, and administered the estate in accordance with the will [except as to paying himself the legacy of $4,000] until the date of his death, on 24th July, 1884. Vapoo Merican Noordin died leaving a will by which he appointed the plaintiffs herein his executors, and the defendants herein [also his executors] as his successors and executors of the said Nina Merican Noordin. The plaintiffs proved Vapoo Merican Noordin's will, and took out probate thereof. By Vapoo Merican Noordin's will, he bequeathed the sum of $1,000 to each of his executors for their own absolute use and benefit, upon their proving his will and acting as his executors, in lieu of all commissions they might be entitled to, as such executors for administering his own estate and the estate of his brother the said Nina Merican Noordin with a proviso allowing them nevertheless to charge a monthly or yearly commission at the usual rates on the rents and interest they collected for either estate. The said Vapoo Merican Noordin, frequently in conversation with friends said he never intended to take the legacy of $4,000 bequeathed to him by his deceased brother Nina Merican Noordin or any part thereof, and also never intended charging his estate with commission for administering the same; he never mentioned the fact to the plaintiff Noor Mahomed Merican [one of his executors], but to the plaintiff [and defendant] Nacodah Merican [his other executor] he frequently did so. The said Vapoo Merican Noordin always refused to credit himself with the legacy, and so far as was known died without ever having changed his mind on the subject, but he never however reduced his purpose and intention to writing and never actually executed a release therefor. The statements were made by him voluntarily, and without any valuable consideration. In is will, he made no reference whatever to the legacy or commission. The plaintiff Noor Mahomed Merican was a legatee under the will of Vapoo Merican Noordin, and there were several other legatees thereunder who were infants. The defendant Nacodah Merican was not [except as to the legacy of $1,000 in lieu of commission as aforesaid] a legatee thereunder. The commission, if chargeable, would have been about equal to the legacy of $4,000. Doubts having arisen as to the right or liability of the respective executors to credit or not credit the estate of the said Vapoo Merican Noordin with the said legacy or commission or both, this special case was filed for the opinion of this Court on the points as above stated.

Van Someren, for plaintiffs contended, that under the circumstances and without an actual release having been executed or any person having altered his position on faith of the deceased's statements the legacy was not forfeited nor released. No case in point could be found, but cases of an intended release of a debt,

WOOD, J. 1885.

NOOR MAHOMED MERICAN & ANOR. v. NACODAH MERICAN & ANOR.

were, in principle, applicable to this case. *Byron* v. *Godfrey*, 4 Ves. 6; *Eden* v. *Smyth*, 5 Ves. 341; *Reeves* v. *Brymer*, 6 Ves. 516; *Tufnell* v. *Constable*, 8 Simon 69; *Flower* v. *Marten*, 2 Myl. & Cr. 459; *Cross* v. *Sprigg*, 6 Hare 552; *Peace* v. *Hains*, 11 Hare 151; *Edwards* v. *Jones*, 1 Myl. & Cr. 226; *Hornor* v. *Heath*, 27 L. T. [O. S.] 330; *Taylor* v. *Manners*, 1 L. R. Ch. Ap. 53; *Yeomans* v. *Williams*, 1 L. R. Eq. 184; *Strong* v. *Bird*, 18 L. R. Eq. 315; *Bottle* v. *Knocker*, 46 L. J. Ch. [N. S.] 159; *Woodward* v. *Humpage*, 8 Jur. [N. S.] 256; 1 Story Eq. Jur. §§ 433, 706 [note]. He also contended the legacy was not given in lieu of commission and the latter could be charged in addition to the former, and referred to *Cockerell* v. *Barber*, 1 Sur. 23; and *Compton* v. *Bloxham*, 2 Coll. Ch. Rep. 201. The latter he submitted was conclusive, the word "brother" coming in connection with the legacy shewed the testator gave the legacy to his executor, not *qua* executor, but apart therefrom and out of natural affection.

Ross, [E. W. *Presgrave* with him] for defendants contended, that in equity a release need not be by deed, and as Vapoo Merican Noordin was the sole executor, he could not have executed a release to himself. The legacy was, under the circumstances, released in equity—and they relied on *Peace* v. *Hains*, and *Flower* v. *Marten*, supra. They also contended, the commission was about equivalent to the legacy, and could not be charged in addition thereto—that the legacy was annexed to the office of executor, and they referred to *Dix* v. *Reed*, 1 Sim. and Stu. 237; *Chetham* v. *Ld. Audley*, 4 Ves. 75; *Cockerell* v. *Barber* [on appl.] 2 Russ. 585; *Slaney* v. *Watney*, 2 L. R. Eq. 418; *Re* Dendy, 31 L. J. Ch. [N. S.] 184; *Jewis* v. *Lawrence*, 8. L. R. Eq. 345; and *Re* Reeves Trust, 4 L. R. Ch. Div. 841; and relied on *In the goods of* Russell [*a.*] and *Calvert* v. *Sebbon*, 4 Beav. 222, as decisive on this point. *Compton* v. *Bloxham*, they submitted, was distinguishable, as the word "brother" here, was merely descriptive; and in addition thereto, we had the words "whom I appoint the executor and trustee of this my will."

Van Someren replied, contending these last words formed a parenthetical clause merely, and the word "brother" was not descriptive, and was wholly unnecessary except as evincing the testator's regard for Vapoo Merican Noordin. *Calvert* v. *Sebbon*, he submitted, was a short and unsatisfactory report, and was distinguishable from the present, as there the legatee was spoken of "*as* executor."

Wood, J. held, that whatever might have been the intention of Vapoo Merican Noordin, it was clear he never effectually carried it out—and although the Court wished it could have seen its way to support that intention, it was bound to hold that the mere statements made voluntarily and without valuable consideration, amounted to nothing in law or equity, and the legacy was not released. The fact that the legatee here was also the executor of the deceased, made no difference. As regarded the commission, the plaintiffs were not entitled to charge it in addi-

[*a.*] Since reported—see Vol. 2 of these Reports, Eccles. Cases, 6.

tion to the legacy of $4,000. That legacy was given in lieu of commission, and was annexed to the office of executor—and the words relied on by the Counsel for defendants were sufficient reason for holding it so be so, and *Calvert* v. *Sebbon* was a strong authority in support of that view. The case of *Compton* v. *Bloxham* had not words in the will approaching to those words; and the mere fact that the word "brother" was there used and laid hold of by the Court as shewing a different intention was only a coincidence, but did not govern this case where the wording of the will was different. As each party had succeeded in one of the two points submitted, each estate would pay its own costs of this case.

TURNER *v.* MANSFIELD & CO.

In order to justify the dismissal of a servant, it is not necessary that there should be any moral turpitude in any act done by him; it is a sufficient cause to dismiss him if he represent an untrue condition of things to his employer, though he thereby causes his employer no actual loss.

Where therefore the Manager of a Mercantile firm had overdrawn his account, and was requested by the firm to liquidate his debt as soon as possible and at the end of the half-year not having done so, but—in order to induce the firm to believe he had to a certain extent done it—in making up the balance sheet he entered a balance only as due by him, and the difference between his actual debt and the balance he entered into the firm's Suspense account and wrote to the firm enclosing the balance sheet and stating he had made payments to account of his debt, leaving only the balance shewn, -- but a couple of months thereafter he paid off his whole debt to the firm, so that the firm lost nothing by his above conduct, - but the month following the firm discovered what he had done and considering it no longer possible to entrust its affairs in his hands, summarily dismissed him from their service, upon which he sued them for wrongful dismissal,

Held, the firm was justified in dismissing him.

The nature and facts of this case, sufficiently appear from the judgment.

Davidson, for plaintiff.

Donaldson, for defendants.

Cur. Adv. Vult.

On this day judgment was delivered by

Sidgreaves, C.J. This was an action by the plaintiff to recover damages from the defendants for improper dismissal from their service before the completion of his term of 3 years' service to be followed according to plaintiff's contention by his being admitted into the defendants' business as a partner.

At the trial, the defendants rested their justification for such dismissal upon one ground only, and although a number of other incidents were relied upon as explaining to a certain extent and leading up to this final act, none of them were relied upon as being sufficient either by themselves or conjointly to justify such dismissal. The plaintiff, who was engaged for the purpose of managing the defendants' business in Penang, arrived there on the 1st August, 1882, and in the following month, Mr. Bogaardt, then in partnership with Mr. Mansfield and now alone representing the defendants' firm, went for the benefit of his health to

SIDGREAVES, C. J. 1885.

TURNER v. MANSFIELD & Co.

Europe. In May, 1883, Mr. Bogaardt returned, and on the 30th June of that year it appeared that the plaintiff had overdrawn his account $2,157, and there was a conversation between them regarding it, nothing unpleasant however being said by Mr. Bogaardt who was not at all unwilling apparently to assist the plaintiff at that time. On the 20th January, 1884, Mr. Bogaardt wrote to the plaintiff from Singapore as follows:—

Singapore, 20th January, 1884.

My dear Turner,

.....I see further that you yourself have not paid off anything towards your debt to the firm. As I will soon have to settle with Mansfield, I should like to know how you intend repaying this money. Since you have had $400 per month, you should certainly have been able to make a move in this matter. Remember that the money is enjoyed by you also without a single cent of interest, which I think is rather rough on me. I hope now you will do your best to clear this debt before the end of the year.

[Signed] BOGAARDT.

On the 23rd January in a letter from plaintiff to Mr. Bogaardt, the following occurs:—

Penang, 23rd January, 1884.

My dear Mr. Bogaardt,

.....*As to mine.*—May I remind you that I have twice proposed to pay interest, and I understood you to decline it: but of course now you hint at it I shall at once debit myself with the amount at the rate you will name from any date, and you may be sure, I shall make every effort to work off this debt as soon as possible. I must confess, I have not hitherto made it *a first consideration*, but henceforth will regard it as Gladstone does a *tree*—a thing that must be cut down at any cost.

[Signed] GEORGE E. TURNER.

To this, Mr. Bogaardt replied on the 26th January:—

As to your debt, don't think I will charge you any interest, but I certainly at the time expected you would at once have begun to pay off, and shewn at least some difference at the end of the year. You have now a pay ample to pay off, and I now hope you will do your best to get it wiped off at your earliest convenience.

In consequence of this the plaintiff determined that he would now begin to clear off the debt by paying $100 a month for that purpose, and during the first 3 months of that year he did with the exception of $20 in one month for a reason which he subsequently explained, reduce the debt by $100 a month. At the end of the second quarter however, on the 30th June, the plaintiff found that he had not paid off anything. The over-draft then stood at $2,244.55 and would have to be sent in to Mr. Bogaardt at once. That would have been an admission that for the last three months he had paid nothing towards discharging his debt. If he had sent in a true balance sheet, and explained to Mr. Bogaardt his reasons for not up to that period, having been able to continue his payments, nothing detrimental to his position could have happened, and Mr. Bogaardt says he would not have been very

angry with him if he had found out then that he had not continued such payments. Unfortunately, instead of adopting a plain straightforward course, the plaintiff adopted a tortuous one which has brought him into his present difficulties. The account of the transaction for which the defendants justify their dismissal of the plaintiff is thus given by the defendants' book-keeper, Mr. Romenij, who says he began as book-keeper to defendants in February, 1883, having come straight from school and without any previous experience:—

I made out the June balance sheet. The over-draft was $2,244.55, as it stood in the draft. I took the draft balance sheet to the plaintiff. He said "I cannot have so large a debt balance on my account; I must reduce the amount to $1,900." He told me to credit the amount over $1,900 with the difference, and to debit the Suspense account. I said that the cash-book was closed, and that he could not pay in for that month. I said cash won't do for the account is closed.—He made no offer to pay in cash. He said—"The balance I want reduced to $1,900 and the difference I want to keep hanging till I have money in hand to pay it in." I said "I understand what you mean—like a suspense item that you want to keep separate from your account and square it up when you have money in hand." He gave me to understand that he had made arrangements with defendants to reduce his debit balance, if the balance went down with that larger amount it would not shew. When he told me to put it down to suspense account, I asked him if he could do that he said:—Yes, I should think so, that is the only way to do it" upon that I made the entries as they appear. I showed plaintiff the book; he looked at it in the Journal and approved it. One or two days before Mr. Alfred Turner went to Penang I was at my books; when plaintiff came at my desk and said:—I am going now away, as Mr. Alfred Turner will be here in a few days—he is rather inquisitive and is sure to look over our books, so don't forget to write that item back in the suspense account. I did so and entry appears on the 18th August. Before I signed the first balance sheet plaintiff said: "There will probably be questions about this with defendants, but never mind I can explain that."

The account which the plaintiff himself in cross-examination by Mr. Donaldson gave of this transaction was as follows:—

The payment for the first quarter was $280; for the second quarter I said that if I sent my remittance home I could not pay the $100, as I put in the hands of the cashier and other clerks of the office, as well as in the hands of two auctioneers and others in Penang, the carriage and horse I had from Mr. Bogaardt and a pony and harness which I considered ample even for $300. On the 7th April I made up my mind to do this. Up to the end of June these things had not been sold. Mr. Romenij asked me what I was going to d about my balance. There were two parties in treaty at that time, and I thought at any time the sale would come in. I said to Mr. Romenij "Make my balance $1,900, even money, and pass the difference, about $340, to suspense account to wait the return of the sale of this property." I did not explain all this to Mr. Bogaardt. I did not send him a copy of my account, —that would have been quite unusual—nor of the suspense account. I wrote that I had been paying that account—that was partly true. About 2nd July I bought a pair of horses for $630 from Mr. Brown for use. I paid for them by a cheque of the firm. I gave an I.O.U. to the cashier for them. I got them for a month on trial. I did not put it to the debit of my account. I paid for the horses on the 2nd July. I had made arrangements if the horses suited me to get the money elsewhere. I had not arranged with Mr. Jebsen, but if they had suited me I should have gone to him and have asked for an even $1,000. I had spoken to Mr. Jebsen about lending money—we were very intimate friends.

SIDGREAVES, C. J. 1885.

TURNER v. MANSFIELD & Co.

On the 10th July the balance sheet for the previous quarter was sent off by plaintiff to Mr. Bogaardt with a letter commencing,—

Dear Sirs,—Enclosed please find copy of our lines of yesterday and Balance Sheet and Profit and Loss Account to 30th June, 1884, which we hope will be found in order.

In this balance sheet the amount of plaintiff's debt was put down as $1,900, the real amount being $2,244.55. Now, undoubtedly, if Mr. Bogaardt as employer, was entitled to have from the plaintiff as employed, a balance sheet at all, he was entitled to have a correct one—if it was the duty of the plaintiff to let the defendant know the state of his account, he was bound to give him a correct statement of his account. If the plaintiff really thought that this device of putting down to suspense account a sale which had not come off, and then taking credit for it in the balance sheet forwarded to his employer was a matter with which his employer would not find fault, he should have explained it to his employer. This unfortunately he did not do, but was at great pain to conceal the true state of the case from Mr. Bogaardt. On the 22nd of the same month he wrote to him as follows:—

My debt. I think you will remember writing to me at the end of last year about it, and since then I have been paying back 25% of my salary every month towards its reduction [except $20 short when the baby was born].

Now this, instead of being in the nature of an explanation of the previous incorrect balance sheet, could only have been written with the object of making Mr. Bogaardt believe that that balance sheet was a correct one. As a matter of fact, Mr. Bogaardt never did know the true state of the case with regard to this balance sheet till his arrival in Penang on the 9th September following. On the 4th of that month, in anticipation of Mr. Bogaardt's visit to Penang, the plaintiff wrote the following letter to Mr. Romenij:—

No. 19, Hotel de L'Europe,
Singapore, 4-9-84.

My dear Romenij,

I just am told that Mr. Bogaardt will leave here for Penang in the *Achilles* to investigate his business in Penang. I think everything is pretty straight and that he will be satisfied. If there is a balance to my debit at end of August you can get the amount at once by asking Mr. Thomas for it, who has cash of mine in hand, or I will square it up here. It can't be much either way, and Cohen has yet to sell the big house, instructions as to which have been given him.

Please hand friend Paiwan the enclosed draft for $180, which I promised to send him, and oblige me by asking him *strongly* not to say a word to Mr. Bogaardt about our private business, as were he to do so under present unpleasant situation, it would only plunge me into more hot water. The cashier too has promised to keep his mouth shut on the subject. Give both best "chin chins." I hope I am not asking too much from you in this matter, and I beg that you will exercise your good judgment in answering any questions that may be put to you by Mr. Bogaardt as to my private affairs.

[Signed] GEORGE E. TURNER.

As regards this entry in the Suspense account, the Honorable James Graham who was called as a witness, explained what a Suspense account was. He stated that:—

A suspense account is used by Merchants to keep their credit balance to meet expected losses on other accounts; for instance, if I had some venture, and foresaw a loss at the end of the year, I would write off £200 or £300 to meet that anticipated loss; the expected loss would be on the debit side, the expected profit from some other transaction would be on the other side to meet it. If I make a bad debt of £1,000 and hoped to get some of it back some day, I put it down to suspense account till a dividend is declared or the amount paid. If the manager of a firm being about to sell some furniture credited himself with a sum on account in his own account, and then debited himself in the suspense account, that would be a very improper use of the suspense account. I should call it concealing the true state of his account.

It was characterized also in the same manner by Mr. Gunn, Public Accountant and Auditor of most of the Companies in Singapore.

The question is whether this is such conduct on the part of the plaintiff as would justify the defendant Mr. Bogaardt in refusing to retain him any longer in his service. It is quite clear that no misappropriation of money was at any time intended by the plaintiff; his one object was to make Mr. Bogaardt believe that he had been making a monthly payment of $100 during the 3 months ending June 30th, in reduction of his debt, whereas he had not been making such payments. It was a small matter perhaps, but it seemed of sufficient importance in his eyes to lead him to make an improper use of his employer's books, to send in to his employer a false balance sheet, and 12 days afterwards to write to his employer untruthfully about the matter for the purpose of carrying out the deception.

As regards the law, there are very few legal decisions upon the subject because these matters are invariably left to the decision of a jury at home, but in the case of *Horton* v. *McMurtry*, 29 L. J. Exch, 260, the present Lord BRAMWELL, then Baron Bramwell, thus lays down the law upon the subject:—

Cases may be cited in which the Court has laid down certain criteria or rules, under which a master would be justified in discharging his servant. It is quite clear, when these decisions are examined, that they do not give an exhaustive set of cases, but only a certain number; and I think it is very correctly stated in Mr. Manley Smith's book on *Master and Servant*, 2nd edition, page 76, that, "it is difficult to lay down any general rule as to what will justify the discharge of a servant, which shall comprise and be applicable to all cases, since whether or not a servant in any particular case was rightfully discharged must, of course, depend upon the nature of the services he was engaged to perform, and the terms of his engagement." I think it is a very good observation to bear in mind, and it seems to me, that in this case, there was a ground on which the defendant, the master, might properly discharge the plaintiff; at all events, to say the least of it, there was that which my Lord might properly, and ought to have left to the jury, for them to say that the defendant was justified in discharging the plaintiff. That misconduct, including moral turpitude, is not necessary, manifestly appears from the case of *Smith* v. *Thompson* where all the man did, as I understand it, was, that he had appropriated £80, out of some money he had got, in payment of his own salary. It is quite plain that there was no moral turpitude in that. Now, as to the particular case before us, the plaintiff it may be assumed, supposed that he had acted rightly; at least there is no evidence

SIDGREAVES, C. J. 1885. — TURNER v. MANSFIELD & CO.

that he committed any fraud; but the plaintiff in truth did one thing and said another, and it may be put compendiously in this way; bladders were bought by him from a person, and he represented to his master that another person was the seller to his master. Now I am inclined to think that it is immaterial what the motive of the act was; he could have no right to represent an untrue condition of things to his employer; and that being so, to say the least of it, it was a proper question for the jury to say whether he was justified in discharging the plaintiff, and I think the question, therefore, was properly left to the jury.

In the case of *Ridgway* v. *The Hungerford Market Co.*, 3 Ad. & Ell., 171, the Clerk to the Company at a salary of £200 a year, whom the Company had decided upon discharging, was directed to call a Meeting of Directors to elect his successor. This he did, and having entered a resolution to that effect as clerk in the Minute-book, he subjoined a protest in his own handwriting against the proceeding. For this it was held that he was properly dismissed. *Coleridge*, J. in his judgment said:—

> Although a party be hired for a given time, the master is justified in discharging him for misconduct, and in that case he cannot recover *pro rata* —as to the existence of a sufficient cause the jury have found it and they were right in so doing. The act of entering the protest on the minute-book was inconsistent with his service; a servant of this kind if allowed to do such acts would be useless.

On the whole, I find myself compelled to the conclusion that this unfortunate act of the plaintiff was quite inconsistent with the service which the defendant had a right to expect from him, and that although no harm was done, and the whole debit balance was cleared off in August, he yet, by that act of misconduct, in the proper and non-invidious sense of the word, put it in the power of the defendant to retain him or discharge him as he pleased. Mr. Bogaardt gives his reasons for adopting the latter alternative in a letter dated 18th September:—

> I have received your letter of to-day's date, and having considered your explanation respecting the "suspense a/c," I cannot say that I think it satisfactory, and you have omitted to explain how it was that you did not, as you told Mr. Romenij you would do,—explain the matter to me.
>
> Taking everything you say into consideration, it is apparent to me, that from some reason or other you have not dealt with me with that candour and straightforwardness which I have a right to expect from one in a position like yours. I am bound to tell you also that there are other matters in which I am by no means satisfied with you.
>
> It is quite out of the question that you should occupy a subordinate position in my office and my frequent and necessary absences from Singapore render it impossible that you should always act under direct instructions as you suggest. I am therefore compelled to repeat what I said in my former letter that it is necessary that our connection should end, but I shall be ready to deal liberally with you. A passage will be provided for you and your family in the *Stentor* or our next succeeding steamer if you wish to avail yourself of it, and I shall hand you a draft on London for £500, which I trust will be ample for your needs until you obtain another situation.

That was an offer certainly conceived in a generous spirit and one which I very much regret that the plaintiff did not see his way to accept. With so little to guide either judges or lawyers upon the subject however, it is not to be wondered at

that conscious of having committed no act of fraud or dishonesty, as he certainly has not, the plaintiff thought the punishment too heavy for what probably seemed to him so trivial an offence. But the higher the position the greater the danger of any deviation from the "candour and straightforwardness" which in every position is as much the best policy as honesty is proverbially declared to be. I find a verdict for the defendants.

RAMAN CHETTY *v.* GOLAM MYDIN.
In re CHEW HOCK SENG.

Any question as to the right of property or possession to any goods taken under a Distress Warrant under Ordinance 14 of 1876, and claimed by a third party may be raised and decided as an Interpleader under Section 379 of the Civil Procedure Ordinance, 1878.

Chinese theatrical costumes which are let to hire by their owner to another for purposes of enabling each other person to carry on a *wayang* or theatre are not exempt from distress for rent put in by a landlord against such other person.

This was an Interpleader summons under Section 379 of the Civil Procedure Ordinance, 1878, taken out by the Distraining Bailiff [through the landlord Raman Chetty] in order to obtain the decision of the Court as to who was entitled to certain *wayang* or Chinese theatrical costumes which had been taken on a distress for rent under the following circumstances. The landlord Raman Chetty had on 5th May, 1885, leased a theatrical stage, premises Nos. 104, 106 and 108, King Street, Penang, to the tenant Golam Mydin for a term of thirty-two days commencing from the 10th instant, at a daily rent of $9.16\frac{2}{3}$ and 35 cents for assessment and water rate per day. The tenant entered into possession of the stage and premises on the day his tenancy began, and continued so in possession up to the time the distress hereinafter mentioned was put in; and during that time carried on therein Parsee theatricals for his own benefit. During the term the tenant hired at a daily hire, of Chew Hock Seng the claimant herein, large quantities of Chinese theatrical costumes for the use of his [the tenant's] performers at their theatricals. These costumes were kept in four large boxes specially used for keeping *wayang* or Chinese theatrical costumes, and were placed by the tenant on the demised premises. The tenant having got into arrears with his rent to the landlord, the latter on the 10th June put in a distress for same, and among other things, distrained on the boxes and theatrical costumes. Chew Hock Seng their owner thereupon claimed them and refused to allow them to be sold on the distress; but did not avail himself of the provisions of Section 14 of the Distress Ordinance 14 of 1876. The present summons was then taken out by the Distraining Bailiff.

Thomas, for claimant contended 1, that the case did not fall within Section 379 of the Civil Procedure Ordinance, 1878, and the summons should be dismissed; 2, that the costumes were exempted from distress under clause [g.] Sub-section II of Section 10 of the Distress Ordinance 14 of 1876 as having been handed to the tenant in order to be "managed in the way of his trade or employ."

WOOD, J. 1885.

RAMAN CHETTY v. GOLAM MYDIN.

In re Chew Hock Seng.

Van Someren, for the landlord contended 1, that the seizure on the distress warrant was a seizure "in execution under an ..... order in a ..... proceeding" within the meaning of Section 379, and that as neither the claimant nor the tenant had availed themselves of Section 14 of the Distress Ordinance, 1876, the only remaining mode of proceeding was by way of Interpleader; 2, that the theatrical costumes had not been delivered to the tenant as "a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ," but had been hired to him for his own use and benefit. *Woodfall L. & T*, 401; *Joule* v. *Jackson*, 7 M. & W. 450.

Wood, J. held 1, that the case fell within Section 379 of the Civil Procedure Ordinance, 1878, as an Interpleader; but even if it did not as the parties interested were before the Court and justice could be done between them, the form of the summons was immaterial—the Court now looked only to the rights of the parties in the litigation and the justice of the case, and not to technical formality; 2, that the costumes were not delivered to the tenant "to be managed in the way of his trade or employ" within the meaning of clause [g.], but to be used by him for his performances, for his own convenience and profit, and were not exempted from distress under the Distress Ordinance nor by the Common Law.

Judgment for the landlord with costs.

In the goods of SHERIFFA ESSAH.

PENANG.

WOOD, J. 1885.

September 7.

Section 27 of the Mahomedan Marriage Ordinance 5 of 1880 is not retrospective so as to affect an Estate which has been commenced to be administered *before* the coming into operation of the Ordinance. When one of the parties to a suit refuses to consent to the section being applied, the Court cannot grant leave that it should, if the suit is one that was commenced *after* the coming into operation of the Ordinance.

The right of a husband to administer to the Estate of his wife under the aforesaid circumstances is therefore untouched.

This was an application by one Che Essah for Letters of Administration to the Estate of the abovenamed deceased, as her daughter-in-law. The deceased had died on the 10th of March, 1835, intestate, leaving her husband one Tunku Syed Abdulrahman bin Mahomed Bilfakki and one child, a son, named Syed Hamid, her only next-of-kin her surviving. Her estate then consisted of only a piece of land in Acheen Street. On 15th October, 1838, Letters of Administration to her Estate "for the special purpose of disposing and conveying the lands thereof" were granted to the said Tunku Syed Abdulrahman bin Mahomed Bilfakki as the husband of the said deceased on his own petition [No. 276 of 1838] and the usual Administration Bond was given by him, and the land aforesaid sold and conveyed away. Syed Hamid, the son, had married Che Essah the petitioner in the present instance, and by her had one child, a daughter, named Sheriffa Noor. He also had another wife one Inche Sittee, who was at this date at Banjar Masane in Borneo. Sheriffa Noor died about six years prior to this date, leaving two daughters surviving

her. Syed Hamid had died some four years before, leaving the petitioner and the said Inche Sittee, his widow, and the said Sheriffa Noor his daughter surviving him. It was now alleged that the petitioner had been divorced by Syed Hamid before his death, but this question was not gone into. Owing to the case of *Kyshe* v. *Inche Nap Pendek & ors.* [*a.*] being decided in favour of the plaintiff and a large strip of land now proving to be the estate of one Tunku Syed Hussein Idid deceased, the father of Sheriffa Essah the present deceased, who survived him—she [the present deceased] came in for a share of this property which now formed a further portion of her estate. With the object of obtaining such share on her behalf as her estate, the present petitioner as the only person in the Settlement representing Syed Hamid the son, filed this petition [No. 100 of 1885] and now applied for Letters of Administration to her Estate. Syed Abdulrahman bin Mahomed Bilfakki had died about 1865 at Singapore, intestate, leaving one Syed Mahomed, his son, [but not by the deceased herein] to whom Letters of Administration had been granted in about 1866 at Singapore. Syed Mahomed, as such administrator, had transmitted a Power of Attorney to one Hajee Omar, of Penang, appointing him his attorney, to oppose the present petition and apply for letters to be granted to him as the attorney of the administrator of the husband of the deceased herein. A Caveat was accordingly filed to this petition by Hajee Omar. The parties were all Mahomedans. By the Mahomedan Marriage Ordinance 5 of 1880, Section 27, clause 9, the sons [of full age] of a deceased Mahomedan married woman are entitled to a grant of Letters of Administration to her estate in preference to her husband; and by clause 18 of the same section, the aforesaid clause 9 [*inter alia*] is declared to be applicable "to all cases in which the death or marriage happened before as well as after" the coming into operation of that part of the Ordinance, provided that nothing in that Section [27] contained should "without the consent of the parties interested or in case of suits, the leave of the Court be held to affect any suit commenced, or any contract entered into, or the administration of any estate commenced before the coming into operation of that part" This petition now came on for hearing.

Petitioner in person.

Van Someren, for Caveator submitted that clause 9 aforesaid did not apply as the administration of the estate of the deceased had been commenced in 1838, before the passing of the Mahomedan Marriage Ordinance, and his client refused to consent to the Ordinance applying. Leave could not be given by the Court to apply the Ordinance as this suit was *not* commenced *before* the passing of the Ordinance. He submitted therefore, clause 9 was not retrospective so as to affect the rights of the husband vested in him in 1838 by the Common Law and the Statutes of Distribution, and the Caveator as representing his administrator, was entitled to administration in preference to the petitioner, who represented the son.

[*a.*] Vol. 1 of these Reports, 624.

WOOD, J. 1885.

In the goods of SHERIFFA ESSAH.

Wood, J. was of this opinion and refused the prayer of the petition; and under Section 492 of the Civil Procedure Ordinance, 1878, granted Letters of Administration to the Caveator as the attorney of the administrator of the husband of the deceased. The power of attorney was directed to be filed with the record of the case.

Order accordingly.

QUAH LOO MOYE *v.* LAW SEOW HUCK.

PENANG.

WOOD, J. 1885.

September 8.

Where the plaintiff was merely the sole survivor of numerous trustees of a Chinese burial ground charity, but had never acted except to bring this action in order to get possession of the Deeds from the defendant who had no right to them, but who alleged that they had been entrusted to him by certain persons of the Chinese community for safe custody, and who alleged that the plaintiff intended to make improper use of the Deeds,

Held, the Court would not order the Deeds to be given up to the plaintiff or even enter up judgment for him; but directed the Title Deeds to be deposited with the Registrar of the Court for safe keeping until further order.

This was an action to recover possession of the title deeds of a piece of land at Mount Erskine, in Penang, which had been purchased in 1856 by general subscriptions raised among the Chinese community of Penang, for the purpose of a Chinese public cemetery, and had been so used from that time. The land was however conveyed to the plaintiff and numerous other persons as joint tenants, but did not disclose any trust. The plaintiff was the survivor of the joint tenants, but had taken no part in the management of the land on the trust, except to bring this action. The title deeds had at a public meeting of the Chinese community been by vote entrusted to the defendant for safe custody *pro tem.* This meeting was however attended by very few persons, and it was alleged by the plaintiff consisted only of relatives and friends of the defendant. At this meeting also, the defendant and others were nominated "Trustees" of the burial ground. A portion of the Chinese community repudiated this appointment and vote, and having ascertained the plaintiff's name was in the deed and he was the last survivor, procured him to bring this action for the recovery of the title deeds. This was not denied by the plaintiff, nor was it attempted to be made out that the land was not intended to be held in trust for the Chinese public as a burial place. On the part of the defendant it was alleged that a desire on the part of certain of the plaintiff's supporters to acquire a portion of the land for private purposes was the cause of the whole dispute.

Ross, for plaintiff claimed judgment to be entered up for him, and to have possession of the title deeds. He cited *Doe* v. *Passingham*, 6 B. & C. 305, *Barclay* v. *Collett*, 4 Bing. N. C. 658.

Van Someren, [*Presgrave* with him] *contrà* cited *Duncombe* v. *Mayer*, 8 Ves. 320; *Denton* v. *Denton*, 8 Jur. 388, and *Hill on Trustees*, 259.

WOOD, J. 1885.

QUAH LOO MOYE v. LAW SEOW HUCK.

Wood, J. considered that the Court had to deal with substantial rights and not mere empty claims; that the *cestuis que trust* [the Chinese community] were the persons the Court ought to protect; that the land was a public charity, but there was no properly appointed trustee thereof; and as there were differences between members of the community as to the lands, and it was possible improper advantage might be taken if the deeds which disclosed no trust were handed to plaintiff, he should not be justified in entering up judgment for him. Under the circumstances, he considered the justice of the case required that the title deeds be deposited with the Registrar of the Court for safe custody until further order.

Order accordingly. [*a.*]

MAHOMED GHOUSE *v.* HAJEE MAHOMED SAIBOO & ANOR.

PENANG.

WOOD, J. 1885.

October 15.

A testator, being possessed of a large piece of land which as a fact were five lots comprised in *five* grants, but believing the whole piece was comprised in *four* grants, by his Will declared, that "of the *four* grants of land situate in Toh Kramat, I have converted *one* grant into a Wakoff to bury my children and grand children and relations, and the *three* grants are the portions of my ten children [whom he designated] —they will take the produce thereof, and divide and take in equal shares, but they shall not sell nor mortgage the land."

Held, the gift of the lands to the children, was not void on the ground of uncertainty—that the testator did not die intestate as to the lot comprised in the *fifth* grant, but such lot passed with the "portion" for the children. That the whole clause was not void as tending to a perpetuity, but the restraint on alienation alone was void—and the ten children [to the exclusion of all his other children] took as estate in fee, as tenants in common, in the lands referred to as their "portion" *inclusive* of the lot in the *fifth* grant.

This was a suit for the construction of a clause in the Will of one Madinasah deceased, of whom the first defendant was the executor, and to have a conveyance made by the defendant, as such executor, to certain of the testator's children, in pursuance of the clause, declared void and ordered to be cancelled. The clause in question was as follows, "Of the *four grants* of land in Toh Kramat, I have converted *one grant* into a Wakoff to bury my children, grand children and relations, and the *three grants* are the portions of my ten children aforesaid, they will take the produce thereof and divide and take in equal shares, but they shall not sell nor mortgage the land." The ten children referred to were mentioned in the preceding part of the Will, and were all children of the testator by his first wife; the plaintiff was one of the ten. The testator had also another child, a daughter, named Showtomah, by his second wife; but she was *not* one of the ten referred to. The testator's land at Datoh Kramat, was a large piece, and from the evidence of a Surveyor, while the one piece spoken of as having been converted into a Wakoff was separated from the rest by a distinct boundary, there was nothing to show

[*a.*] The plaintiff filed an appeal against this order, but before the hearing the parties had come to terms and the appeal was dropped.—J. W. N. K.

WOOD, J. 1885.

MAHOMED GHOUSE v. HAJEE MAHOMED SAIBOO & ANOR.

how many lots or grants were comprised in the remaining portion. The testator always spoke of the remaining portion as being in *three* grants, believing the whole land including the Wakoff piece was comprised in four grants. As a fact, on the survey, it was found to be comprised in *five*—the Wakoff piece in *one*, and the remaining portion in *four*. The defendant, as such executor, conveyed the remaining portion as contained in four grants, to the ten children, limited to the strict wording of the latter part of the clause in question. The plaintiff thereafter brought this suit praying that the whole clause might be declared void for uncertainty and as infringing the law of perpetuities, and that the conveyance might be declared also void, and be ordered to be cancelled. The said Showtomah was made a defendant by order of the Court, made on 27th August last.

E. W. *Presgrave*, for the plaintiff contended, the whole clause was void as tending to a perpetuity, and being in restraint of alienation—that it was also void for uncertainty, as it was not clear whether the testator meant to give the children lands comprised in only *three* grants or four. If it was not void, then the ten children took the fee, as tenants in common, in the land comprised in all the *four grants*, excluding the Wakoff piece. He referred to *Sampson* v. *Sampson*, 8 L. R. Eq. 479; and 1 Jarman on Wills, p. 361.

Van Someren, for the executor submitted the interests of the estate to the Court, but suggested, that there was no uncertainty as three grants were clearly devised to the children—nor was the clause void, as a whole, as tending to a perpetuity, and the restraint on alienation alone was void. He referred to *Kader Bee & anor.* v. *Kader Mustan & ors.* [*a.*] and *Khoo Seok Haing* v. *Khoo Wee Team & anor.* [*b*]. He further suggested that the children took in fee, as tenants in common, in the lands in the three grants only, and as regarded the land in the fourth, [exclusive of the Wakoff land] the testator must be held to have died intestate.

Hogan, for Showtomah contended the whole clause was void, and the testator must be held to have died intestate as to all the four grants, [exclusive of the Wakoff] and the same were divisible among his next-of-kin, of whom the said Showtomah was one.

Wood, J. held, that the description of the land as "*three grants*" was an erroneous description. It was clear the intention of the testator was to give the whole of the remaining land after setting apart the land for the Wakoff to his ten children for their portion—that the evidence showed the testator was always under a wrong belief that the whole of the remaining land was in *three grants* and the features and landmarks were such as to confirm him in that belief. It was clear that under that belief he devised the remaining whole. The lot in the fifth grant therefore passed with the portion for the ten children, and they were entitled to the whole remaining land, in fee, as tenants in common. There was no uncertainty in the clause, except that which at first sight

[*a.*] Vol. 1 of these Reports, 432. [*b.*] Vol. 1 of these Reports, 633.

might appear from the erroneous description of the land; that being cleared all uncertainty was removed. The testator for the same reason could not be declared to have died intestate as to the lot in such fifth grant. Neither was the whole clause void as infringing the rule against perpetuities—the restraint on alienation alone was void, but it could be well severed from the rest of the clause without affecting its meaning. The conveyance would be set aside or rectified according to this decision.

WOOD, J. 1885.

MAHOMED GHOUSE v. HAJEE MAHOMED SAIBOO & ANOR.

Order accordingly. Costs of all parties out of the Estate.

TANJONG PAGAR DOCK Co. *v.* MUNICIPAL COMMISSIONERS.

SINGAPORE.

SIDGREAVES, C. J. 1885.

November 9.

In assessing the rent which a tenant might reasonably be supposed to give for any premises, it is not necessary to suppose such tenant will occupy the whole of the premises: any portion which is capable of separate beneficial occupation might be rated separately.

Where Wharves and Warehouses adjoin each other, and the one is an adjunct to the other and must be worked together, it might reasonably be expected that no tenant would rent the one without the other, and the two might therefore well be rated together, and that as "buildings" within the meaning of Acts 25 and 27 of 1856.

Coal sheds connected with the business of a Wharf and Warehouse Company, but not inseparably so, and being capable of separate beneficial occupation, ought to be valued and assessed separately from the Wharves and Warehouses.

Profits of trade, such as on labour supplied, on insurance, on cartage and such like should not be rated; but as under the aforesaid Acts the question is what would a tenant reasonably be expected to give for his occupation of any given premises, and the capacity to carry on a profitable trade would very largely enter into his consideration when deciding what rent he could afford to pay, such profits may properly be taken into consideration in estimating the rent which such a hypothetical tenant might reasonably be expected to pay for the occupation.

Interest on capital employed in a business ought to be deducted in rating premises in which such business is carried on. Nine per cent. on such capital is a fair rate of interest to allow.

General charges for management of a business, expenses of office, Directors' remuneration, and payments to shareholders for bringing in business ought to be deducted from the general receipts of the business.

"Land" in the above Acts is not necessarily confined to land used for purposes of agriculture only, but may include land upon which there has been anything artificially done, and money invested for commercial purposes. The fact however that a detached dry Dock is used for commercial purposes is not alone sufficient to prevent it being "land" within the aforesaid Acts. A Dock would be liable however to be rated under the higher scale provided by the aforesaid Acts if it is so mixed up with warehouses, jetties and other things surrounding it; and in that case the whole must be considered one entire property and rated as "buildings."

The enhanced value given to land by the presence of machinery thereon, cannot be taken into consideration under Ordinance 3 of 1879, Section 2, except in cases where the "machinery is employed for manufacturing the produce of such land."

The word "buildings" in Section 4 of the aforesaid Act of 1856 and Section 21 of Act 27 of 1856, is *ejusdem generis* with "houses" in the same sections, and a detached dry "Dock" is neither a "house" nor a "building" within the meaning of those Acts. The provisions of these sections are not so general as those of Section 33 of 3 & 4 Wm. IV. c. 90, and the English authorities on the latter section giving a narrower interpretation to it are *a fortiori* authorities on the former sections.

The above held by the Court of first instance, and on appeal as to the sixth, seventh, eighth and ninth points, the same was affirmed by the Court of Appeal.

SIDGREAVES, C. J. 1885.

TANJONG PAGAR DOCK CO. v. MUNICIPAL COMMISSIONERS.

This was a special case stated by the plaintiffs and defendants in order to obtain a decision of the Court as to the principles on which the plaintiffs' Wharf and Dock Company's property should be assessed. The facts and arguments sufficiently appear from the judgment.

Davidson, for plaintiffs.

Bonser [*Attorney-General*] and *Joaquim*, for the defendants.

Cur. Adv. Vult.

On this day judgment was delivered by

Sidgreaves, C.J. It will be convenient to consider the special case stated and agreed on by the abovementioned parties as being already set out, and to refer to it in general by the numbered paragraphs.

The Indian Acts referred to in para. 4 are first, Act 25 of 1856, Section 4, which is as follows:—

"The estimated gross annual rent at which the houses, buildings and lands liable to the rate might reasonably be expected to let from year to year shall for the purposes of the rate be held and deemed to be the annual value of such houses, buildings and lands. The value of a house or building so estimated shall not include the value of any machinery contained therein."

And Act 27 of 1856, Section 21, which is as follows:—

"An annual rate not exceeding ten per centum of the actual value shall be imposed upon all houses and buildings and not exceeding 5 per centum upon all lands within each Station."

By Ordinance No. 3 of 1879, Section 2, at the end of Section 4 of the Indian Act No. 25 of 1856, the following words shall be added, that is to say:—

".....but in estimating the annual value of any land on which machinery is employed for manufacturing the produce of such land it shall be lawful to take into consideration the enhanced value given to such land by the presence of such machinery."

These provisions are somewhat different from those contained in the English Acts, upon which, of course, the decisions referred to in the authorities are based. The 3 & 4 Will. IV. c. 90 Section 33 enacts that—

"The overseers aforesaid shall, for the purpose of collecting, raising and levying the rate necessary for the purposes of this Act, proceed in the same manner and have the same powers, remedies and privileges as for levying money for the relief of the poor in the same parish: Provided always that owners and occupiers of houses, buildings and property [other than land] rateable to the relief of the poor in any such parish shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act."

The 6 & 7 Will. IV. c. 96 Section 1 enacts that—

"No rate for the relief of the poor in England and Wales shall be allowed by any justices or be of any force which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let

from year to year free of all usual tenants' rates and taxes and tithe commutation rent charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent."

In endeavouring to fix the rent which a tenant might reasonably be supposed to give for the occupation of the premises occupied by the plaintiffs, it is not necessary to suppose that such tenant would occupy the whole of the premises. Any portion which is capable of separate beneficial occupation can be rated separately—*Mersey Docks and Harbour Board* v. *Overseers of Birkenhead*, 8 L. R. Q. B. 445. As set out in para. 8, the defendants have valued the wharves, godowns and coal sheds together, and charged the assessment thereon at ten per cent. As regards the wharves and warehouses, no tenant could reasonably be expected to rent the one without the other. Paras. 5 and 6 shew that they must be worked together or they would be practically useless. Whether, as Mr. Davidson contended, the warehouses were adjuncts to the wharves, or, as the Attorney-General contends, the wharves were adjuncts to the warehouses, the result seems to be that they are so closely united that separation for commercial purposes would be practically impossible, and the defendants were right in assessing them together. This contention, however, was for the purpose of settling the question which would arise when the Court had decided whether the wharves were to be considered as rateable as "land" or as "houses or buildings." In the one case it was contended that the warehouses would follow the wharves, in the other, that the wharves would follow the warehouses, which it was admitted, if separately assessed, must be assessed upon the higher scale.

The plaintiffs contend that the wharves and warehouses ought to have been assessed as "land." It has been decided in the *Neath Case*, 6 L. R. Q. B. 707, that a canal is "land," and in *The Queen* v. *Midland Railway Co.*, 10 L. R. Q. B. 389, that a line of Railway is "land" and therefore only rateable at the lower rate. The reasonings, however, upon which these decisions are based would hardly support the conclusion that wharves and warehouses also are to be considered and rated as "land." In *Peto* v. *West Ham*, 28 L. J. M. C. 241, the reasons given by Lord CAMPBELL, C.J., for holding that warehouses, jetties and other things surrounding the dock and being in the middle of the dock were to be considered as part of one entire property and that so the dock and basin are property *ejusdem generis* as the "houses and buildings" seem to apply with even greater force to these wharves and warehouses. It is true that he prefaces his judgment by describing the dock and basin as being "property other than land" within the meaning of Section 33 of 3 & 4 Will. IV. c. 90, and that in our Act we have only the words "houses, buildings and lands," but he also states that the docks and the basin, are property *ejusdem generis* as the houses and buildings. As regards the wharves and warehouses now under consideration, I find that they must be taken together and that they are properly assessed under the head "buildings" within the meaning of Acts 25 and 27 of 1856.

SIDGREAVES, C. J. 1885.

TANJONG PAGAR DOCK CO. v. MUNICIPAL COMMISSIONERS.

The coal sheds being capable of separate beneficial occupation and not being inseparably connected with the business carried on at the wharves and warehouses, should have been separately valued and assessed. The assessment should have been based upon a consideration of what a tenant taking the coal sheds from year to year might reasonably be expected to give for the use of them, taking into consideration all the surrounding circumstances inclusive of the advantages and facilities which might be afforded by the neighbourhood of the Tanjong Pagar Dock. In the result, the assessment would probably not be widely different from that already made by the defendants. The plaintiffs contend that in any valuation of the wharves, warehouses and coal sheds, whether made jointly or separately, the profit on the labour supplied, profit on insurance, profit on cartage, and profit on sundries ought not to be taken into consideration. Para. 15 shows how these matters have been dealt with by the defendants. Now, although it is against the principle of the law to bring the profits of trade into the rate, yet, as the question is what a tenant would reasonably be expected to give for the occupation of the premises, it is obvious that the capacity to carry on a profitable trade or trades would enter largely into his consideration when he was deciding what he could afford to pay for the occupation of those premises. Lord DENMAN, C.J., puts this very clearly in the case of *The Queen* v. *The Grand Junction Railway Co.*, 13 L. J. M. C. 94:—

> "To this then existing state of facts we applied the established principle of rating, that the rate is to be upon the occupier in respect of the beneficial nature of his occupation; in estimating which, as to the amount, or, to put it in other words, in ascertaining how much annual rent such an occupation may be expected to command, Parish Officers are to consider, not drily and only what would legally pass by the demise of it, but all the existing circumstances, whether permanent or temporary, wherever situated, however arising, or secured, which would reasonably influence the parties to the negotiation for the tenancy as to the amount of the rent. In both cases the inquiry must be the same—what is the value of the occupation, from whatever source derived? In neither, can the profits of trade, as such, be brought into the rate, but if the ability to carry on a gainful trade on land adds to the value of the land, that value cannot be excluded, on the ground that it is referable to the trade. Suppose a house occupied by a private family to-day, which, having greater advantages of situation for the purposes of trade should be turned into a shop to-morrow, and, in consequence, let for double or treble the former rent, would not the rate be properly increased in proportion? Could it be objected, that to do so is to rate the profits of trade? The lessee would undoubtedly consider the facilities and advantages which the occupation as tenant would afford him for carrying on a lucrative trade as a carrier; and in whatever proportion that consideration would increase his rent, in the same, after due allowance, would his rate be raised also. The two propositions are equally true, that the rate is not to be imposed in respect of the profits of trade, and that it is to be imposed in respect of the value of the occupation; and two propositions that are true, and applicable to the same subject-matter, cannot be inconsistent."

I consider, therefore, that these four items may properly be taken into consideration in estimating the rent which a hypothetical tenant might reasonably be expected to pay for the occupation from year to year of the wharves, warehouses and coal sheds.

In regard to the plaintiffs' contention that interest on the capital employed in working this branch of the plaintiffs' business

ought to be deducted, the Attorney-General agreed that such a deduction ought to be made. As it was agreed that the Court should lay down the principle and that the parties themselves should work out the details, I confine myself to doing so and to deciding that interest at the rate of nine per cent., which seems to me as near an approximation to the average banking and commercial rate of interest as can be arrived at, shall be allowed upon such capital.

The plaintiffs contend that a proportional reduction ought to made for the general charges of management, the expenses of the town office, the Directors' remuneration, and the payments to shareholders for influencing business to the Company. The question is what view would an incoming tenant take of these various items of expenditure and how would they affect the rent which he might be reasonably expected to pay for the occupation of the property, assuming that he would carry on the same business under the like circumstances. It is not unreasonable to suppose that, looking at the success which has hitherto attended the operations of the Company and the position it has now attained, the supposed tenant would wish to carry on the business as far as possible in a precisely similar manner to that in which it is now carried on. He would assume that the object of the Company had been to make the business as remunerative as possible and to do that they would naturally have endeavoured to bring down the working expenses to as low a point as was compatible with efficiency. Para. 29 describes how the business of the Company is managed at an average cost of $24,786.22 a year. It may be taken that this is a necessary cost, without which the receipts upon which the assessment is now made would have been much lower. The incoming tenant would be compelled to employ a staff of persons to assist in the management of so large a business, and to keep offices for the transaction of such business and he would probably act in these respects as far as possible on the lines of his predecessors—they are clearly expenses in regard to which a proportional deduction should be made from the general wharfage receipts.

On the same principle it would be for such a tenant to consider whether he would continue the practice set out in para. 30 of payments to shareholders for procuring or influencing business. He might assume that such a practice would not have been adopted and continued unless it had been considered and proved to be beneficial. If he discontinued it, he might secure an immediate gain, but incur a future heavy loss. It may be assumed that, at all events, this expenditure of $11,000 odd brings in a return of at least equal amount to the general receipts. Stop this expenditure therefore of $11,000 as we may call it, and the general receipts sink at once from $98,000 to $87,000, which would then be the rateable amount. The probability, however, is that this expenditure brings in a very much larger amount, and that the diminution of the rateable receipts would be very much greater. It is only fair therefore to allow a proportional deduction for this necessary expense, without the incurring of which the rate would

SIDGREAVES, C.J. 1885.

TANJONG PAGAR DOCK CO. v. MUNICIPAL COMMISSIONERS.

be diminished in proportion to the earnings at present accruing from it. As regards para. 36 [6], I have had some difficulty in determining the mode in which the profits of a hypothetical tenant should be ascertained. Two courses seem to be open—one to allow a percentage on the gross earnings, and the other to ascertain the amount of capital employed on the plant or moveable stock and allow a percentage on that. In *The Queen* v. *the Grand Junction Railway*, 13 L. J. M. C. 96, the case states that—

> "The Parish Officers adopted, and the Court of Quarter Sessions sanctioned, by their judgment, a different mode of arriving at the nett annual rateable value of the property of the appellants in the parish. They ascertained the gross yearly receipts of the Company throughout the Railway as above stated, viz., the sum of £440,366 and then made therefrom the following deductions, viz., 6 per cent. for interest on £255,000 being the capital necessary for and actually invested by the appellants in the purchase of engines, carriages, and all the other moveable stock necessary for the business of the carriers as conducted by them in manner aforesaid; secondly, £20 per cent. on the same sum for the tenant's profits and the fair profits of such a trade carried on by means of so large a capital and with such large risks."

This principle seems to have been adopted by Lord DENMAN, C.J. in delivering the judgment of the Court of Queen's Bench. In the case of *Queen* v. *The Great Western Railway Co.*, 15 L. J. M. C. 88, Lord DENMAN, C.J. delivering the judgment of the same Court, says—

> "Two more questions are stated; the first as to the mode of ascertaining the tenant's profit in order to their deduction from the rateable value. The respondents have taken the original value of the plant, or moveable stock, and allowed £10 per cent. upon it for their profits as the profits of trade. The appellants say that the more correct mode would be to ascertain them by a percentage on the gross receipts, and claim to have 15 per cent. deducted from these on that account. We are very unwilling to withhold our aid in settling questions for the Sessions of such novelty and difficulty as the Railway rating must often bring before them, but we ought not to go beyond our province and so perhaps mislead them. This question involves no principle of law, and we decline to answer it."

Not having a Court of Quarter Sessions here to fall back upon, I cannot avoid the attempt to solve the difficulty, and it seems to me that under all the circumstances and bearing in mind the somewhat risky nature of the business as described in para. 27, that 20 per cent. on the gross earnings exclusive of the last four items in para. 15, would be a fair percentage to allow for the profits of a hypothetical tenant.

The next question relates to the valuation and assessment of the plaintiff-Company's Docks, and that depends upon whether the docks are to be assessed as "land" or "buildings." In deciding that they are to be assessed as land, it might seem as if this were inconsistent with the case of *Peto* v. *West Ham* already referred to. An examination of that case, however, will show that the decision does not go to the extent of laying down that all docks and basins are to be rated as "buildings," but only docks similarly circumstanced and located to those therein referred to. In *The Queen* v. *Midland Railway Co.*, 10 L. R. Q. B. 394 Blackburn, J.

thus comments on that case.

"Then came *Peto* v. *West Ham* upon which the Parish Officers in the present case very properly mainly rely as being very material. In this case the majority of the Court, for Erle, J. dissented, came to the conclusion that a dock covered with water [which was surrounded with warehouses and other things which certainly would be in the nature of buildings] was rateable at the higher rate; and Lord CAMPBELL, C.J. who delivered the judgment, gives, as it seems to me, two reasons for it. In the first place he says he thinks that the spirit of the decision on the Midland Railway Company's Acts should prevail and that the legislature meant to tax at the higher rate all land in which there had been money invested for commercial purposes on the one side, and on the other side land that still remained for the purpose of agriculture or cultivation or "vegetation" the word used in the other case. Now, if that were the principle upon which the judgment went, it would certainly be inconsistent with the *Vauxhall Case*, 6 E. & B. 1008, for in no sense of the words that I can see, can it be denied that the occupying the land by putting down the water-pipes and thus investing money for commercial purposes was not using the land for the purposes of vegetation. But then Lord CAMPBELL gives another reason for the judgment, which is that the warehouses, jetties and other things surrounding the dock and being in the middle of the dock were to be considered as part of one entire property; they were to be treated as the legislature had in Section 34 directed that the courtyards or gardens attached to a house should be treated as being a part of the principal building to which they are auxiliary, and on that ground, also, judgment was given for the parish."

He then proceeds to comment upon the case of *Regina* v. *Neath* and says:—

"It is to my mind perfectly impossible to deny that though this canal was occupied as a water-way, it was artificially made, and money had been invested for a commercial purpose—to use Lord CAMPBELL'S phrase—as completely as you could say in the case of the dock.....Then comes the question—Is that to be considered houses, buildings and property other than land or land within the meaning of the Act? Now, as to that the Court of which COCKBURN, C.J., my brothers MELLOR, LUSH and myself were members, on considering the case came to the conclusion that the canal was to be considered as land, and I think that the reasoning, when looked at, clearly shews that we did, rightly or wrongly, dissent from the idea that "land" in this Statute was to be considered as land used for the purpose of agriculture only, and was not to include land upon which there had been, anything artificially done and money invested for commercial purposes.....I certainly intimated then that I thought if it were attempted to be said that "land" meant only agricultural land, that would not do. My brother MELLOR says very nearly the same thing, and my brother LUSH pointedly says, referring to *Regina* v. *Midland Railway Co.*, "there is nothing in Section 33 of this Act to warrant us in holding that land is confined to agricultural land."

From these cases, then, I deduce the principle that the fact that a dock is used for commercial purposes is not sufficient to raise it from the lower scale of rating as "land" to the higher scale of rating as a "building," but that if it be so mixed up with werehouses, jetties, and other things surrounding it and in the middle of it, or in some such fashion, then it is to be considered as part of one entire property, and must be rated on the higher scale. The plaintiff-Company's Dock is quite detached from all such surroundings, for there the carpenter sheds and brick-built house containing steam engines and pumping machinery are mere necessary accessories to the dock itself, and I am brought to the conclusion, therefore, that it must be assessed on the lower scale as "land."

FORD, C. J. SHERIFF & PELLEREAU. } J.J.

TANJONG PAGAR DOCK CO. v. MUNICIPAL COMMISSIONERS.

It remains to be considered whether the enhanced value of such land by the presence of machinery thereon should be taken into consideration, and it appears to me that such enhanced value cannot be taken into consideration. Section 2 of Ordinance 3 of 1879 would be unintelligible on any other construction. If the legislature had intended to bring within its scope all land the value of which had been increased by the presence of the machinary thereon, it would have been a very easy thing to have so enacted, but the legislature in passing this Ordinance expressly limits its operation to "land on which machinery is employed for manufacturing the produce of such land."

On the principle *expressio unius exclusio alterius*, it is equivalent to enacting that the enhanced value of land by the presence of machinery which machinery is employed for purposes other than for manufacturing the produce of such land, shall not be taken into consideration, and as the dock falls within this latter class, it can be assessed as land, and land only. Under these circumstances the questions involved in clauses [3] [4] of para. 37 do not arise.

The defendants appealed against this decision, in respect of the following :—

1. That the Court was wrong in deciding that the docks in the special case mentioned are to be assessed as "land."
2. That the Court was wrong in deciding that if the docks were to be assessed as "land" the enhanced value given thereto by the presence of machinery ought not to be taken into consideration.
3. That the Court was wrong in allowing a deduction for payments made out of the net profits to shareholders for influencing business to the plaintiff-Company.

The appeal was heard on the 9th and 10th August, 1886, by the Court of Appeal consisting of *Ford*, C.J., *Sheriff* and *Pellereau*, J.J.

Bonser [*Attorney-General*] and *Joaquim*, for appellants.
Davidson, for respondents.

Cur. Adv. Vult.

18th August. *Ford*, C.J. I see no reason in this case to differ from the conclusions of the late Chief Justice in the Court below, and had I to write all my reasons for concurring in that judgment, I could not, in respect of some of them, particularly those which rest on a consideration of the English authorities, do better, I think, than repeat, if not *ipsissimis verbis*, still in terms substantially the same, the language of that decision. I am desirous, however, of looking at the first point raised by this Appeal rather more from the standpoint of our local Ordinances than of the English authorities, because those authorities rest upon an English Statute with very much wider words than are found in our Ordinances. The words in the English Statute touching the questions under discussion being "houses, buildings and property [other than land]," whereas the words in our Ordinance are "houses and buildings" only. The Court here has, therefore, not to consider whether a dry dock

is property other than land *ejusdem generis* as houses and buildings, but whether it is a house or a building. In the view which I take of our own Act [No. 25 of 1856], I do not even think the *ejusdem generis* rule of construction has any room for play, as I am unable to treat the words buildings as a *general* word restricting its signification to buildings in the nature of a house. Were I to do so, the case would seem to me beyond argument, as by no process, at least of which any mind or imagination is capable, could I range a dry dock as something of the nature of a house, nor am I aware of any authority which should bring about so great a dislocation of thought. Then the question remains—can dry docks be fairly ranged within structures which are known as buildings, taking that word in its general signification [for it has no definition in the Act] and not straining it to meet every case of stones or bricks laid one on the top of another for some purpose? I think the inference from authority is strongly against so ranging it. Within the larger words of the English Act to which I have alluded, the Courts in *The Queen* v. *Neath Canal Co.* refused to range a stone-walled canal and dry dock used with it; *a fortiori* the Court would have refused to range them under the terms houses or buildings; and although that case is distinguishable from this in the circumstance that the dock was held to be an adjunct to the canal, the bearing of the decision seems to me to favour the view that a stone-walled and bottomed excavation or dry dock alone could not have been rated, even as "property other than land" much less as a building. In the much-questioned and partially over-ruled *West Ham Case* also, no attempt seems to have been made to range a walled wet dock, built in the usual manner—the case describes it—under the term house or building, but as property other than land, and even the application of this description to it, seems only to have been arrived at by associating it with warehouses. And it is also to be observed that whilst dry docks abound in England, no case has been cited in which they have been rated other than as land, a point which almost certainly would have been fought out in the Courts had an attempt to so rate them been made. I think, therefore, the leaning of authority is against calling dry docks "building." But regarding the construction of the word building, apart from authority, it would seem to me that a very liberal sense would be given to the term even if it was defined as an erection of some kind for the use of men or animals or storage of goods or things. Tried by such a test, one could hardly say a repairing yard should be rated as a building—the respondents' store-house, in which are kept the materials for repairing vessels as separately rated and the yard not therefore a mere adjunct to it—and because this yard is, from the necessity of the case, dug at a lower level than the sea and faced with stone and cement to keep its side from falling in and to afford support to vessels and facilities for the repair, can it be said to be other than a repairing yard? I think not. If every walled excavation or wall-faced earth bank were to be considered a building, evidently our reclamation walls would be buildings. Would any one in ordinary

FORD, C. J. SHERIFF & PELLEREAU. } J.J.

TANJONG PAGAR DOCK CO. v. MUNICIPAL COMMISSIONERS.

language so designate them? Again, I think not. On these additional considerations, I am of opinion the judgment on this point of the Court below should be affirmed, and these dry docks be rated as land. The Court below has found, and I agree with the decision, that the mere carpenter-shed and pumping-house are adjuncts to the docks.

The second question is to me one of more difficulty, viz., whether in rating this dock as land, its enhanced annual value from machinery should be taken into consideration; construing the words of Section 4 of 25 of 1856—"the value of a house or building so estimated shall not include the value of any machinery thereon" as not disallowing the consideration of such enhanced value as the presence of machinery may give a house or building—a construction conceded, but I am of opinion a very liberal construction, in the face of there being no such restrictive clause in English Acts—undoubtedly an inference might be drawn that lands with machinery on them might be rated at their enhanced value from such machinery, but this inference seems negatived by a yet stronger one to be drawn from the declaratory language of Section 2 of Ordinance 3 of 1879, which, enacting that the words "but in estimating the annual value of any land on which machinery is employed for manufacturing the produce of such land it shall be lawful to take into consideration the enhanced value given to such land by the presence of such machinery" shall be added to Section 4 of Act 25 of 1856, defines the class of machinery that shall give the land an enhanced value. I am of opinion that the inference from this declaratory clause of what machinery shall be taken into consideration, is far stronger than the inference to be drawn from the earlier part of the clause to which it is appended under which it is contended that the enhanced value from non-manufacturing-produce machinery can be rated. Indeed, had the question been *subjudice*, I should have been inclined to hold that the clause throws a very vivid light upon the construction of the previous part of the section, in the direction of holding that in no sense was the value of machinery to be taken into consideration in rating houses or buildings either by the direct method of rating the interest on its cost, deducting certain rates for profits as is frequently, I see from the cases, done in England, or by the more indirect method pointed out by the Attorney-General as existing, of estimating the supposed enhanced value of the house or building which the presence of such machinery may give. In my judgment under either method and not with very dissimilar results [unless the buildings of an unprofitable concern are not rated at all], the value of the machinery is taken into consideration in estimating the gross annual rental. But certainly the case made in favour of the over-riding operation of Section 2 of Ordinance 3 of 1879, seems to me too strong to justify this Court in reversing the judgment of the late Chief Justice upon it.

The last point to be dealt with is whether the deductions from certain earnings of the Company in favour of business-bringing shareholders in the proportion of the Company's profits can be set down as working expenses. I was at first a good deal impressed

by the case cited by the Attorney-General in which a case somewhat analogous, the Courts in England held somewhat similar privileges to certain shareholders, were primarily liable to income tax. But the question here is not one of liability to income tax, but simply whether or not the hypothetical tenant or tenants would continue the practice of these payments. This is, I think, a practical question and its answer dependent upon an intimate knowledge of the character of the business which this Company carries on and the persons they deal with. I can very well believe that the hypothetical tenants would do so in the future as their predecessors have found it desirable to do in the past. The practical men of business who conduct this Company's affairs are of opinion that this money is well laid out in earning business for the Company, and I do not see my way to dispute this conclusion. I am, therefore, of opinion, that although described as paid out of the profits, these payments are really paid out of the gross earnings, but dependent upon some profits being made, and thus may fairly be considered as out-goings of the Company.

With reference to the statement so much pressed that the result of the decision of the Court below would be manifestly inequitable in comparatively freeing this profitable portion of the Company's business from Municipal rates, it must not be forgotten that throughout the English authorities the principle that properties are rated for benefits received is recognised, and I am by no means sure that in the result the Municipality, when rating this part of the Company's premises as land, will not get a fair *quid pro quo* for the benefits conferred on it. The greater part of the business of these docks, facing as they do water communication, is, from its nature, dependent very little upon the roads of the Company and the adjacent advantages of lighting, &c., which the Municipality provide. Nearly all the materials used in the repair of vessels, the wood, iron, machinery, paint, and so on, are landed at the Company's wharves already rated at the higher rate. They leave these docks in a different form by the same water communication, by which they are brought. The docks are lighted by the Company, and not by the Municipality, and except in some of the lighter materials used, and in the traffic of the servants and labourers to and from the town it is questionable if the Company in respect of these particular docks gets any further share of those Municipal benefits which the mere general public enjoy. That a rating on the lower scale, and on land may be a very fair equivalent for benefits received under these circumstances, I am much disposed to believe. The difference between the character of the Company's transport traffic from the warehouses, and these dry repairing docks is obvious. Again, it may well be that in consideration of the benefits, which such properties confer upon navigation generally, the concession of a lesser rate of rating can be sustained on well founded grounds of public policy, rendering such concession by no means inequitable.

Sheriff, J.—This case comes before the Court on appeal from certain portions of the judgment of Sir THOMAS SIDGREAVES, late

FORD, C. J. SHERIFF & PELLEREAU. } J.J.

TANJONG PAGAR DOCK CO. v. MUNICIPAL COMMISSIONERS.

Chief Justice of the Colony. There are three grounds of appeal, and I will deal with them *seriatim*.

1. It is urged that the Court was wrong in deciding that the docks were to be assessed as *land*.

I think the Court was right, and I arrive at this conclusion upon what I believe to be a true construction of the Indian Act 25 of 1856, Section 4. The words used in that section are "houses, buildings and lands." A dock is certainly not a "house." Is it a building, within the meaning of the section? In the present case we have a dry dock standing by itself with mere necessary accessories thereto. Is such a dock, I repeat the question, a building? The question may be answered according to the light of the English cases which have been cited, and which were, or at any rate most of them, discussed by the learned Chief Justice in his judgment, or it may be answered by simply putting a construction on the words of the Act. I shall adopt the latter course, because the English Cases based upon the construction of the Imperial Act 3 & 4, Will. IV. cap. 90, sec. 33, and the language there employed is: "houses buildings and property other than land," and the last four words are not to be found in the Indian Act. Now, the word "buildings" in the section we are considering, is preceded by the word "houses." They must, I think, be read together and the *ejusdem generis* rule of construction be applied, and if so, then the dock is certainly not a building, and it follows that I hold that it was rightly assessed as "land." I would merely add that it must not be supposed that I dissent from the conclusions arrived at in the Court below upon a consideration of the *Neath Case*, *Peto* v. *West Ham*, *Queen* v. *Midland Railway Co.*, *The Vauxhall Case*, &c., &c. I have merely decided without reference to these authorities, except when reference is made to the *ejusdem generis* doctrine.

The second objection reads thus:—

"That the Court was wrong in deciding that if the docks were to be assessed as land the enhanced value given thereto by the presence of machinery ought not to be taken into consideration."

I must confess that, while I did my best to follow the Attorney-General in the distinction he endeavoured to draw between machinery, the value of which he admitted was not to be taken into consideration, and the enhanced value given to land by the presence of the same machinery, I am unable to see my way to recognize any such distinction; on the contrary, I concur with the Court below in its reading of Act 25 of 1856, Section 4, coupled with Ordinance 3 of 1879, and I think these laws, read together, are incapable of any other construction.

The remaining point is:—

"That the Court was wrong in allowing a deduction for payments made out of the net profits to shareholders for influencing business to the plaintiff-Company."

It is alleged that this is merely a division of profits in different shares, the more active shareholders receiving a larger share

of the profits, and that the assessment should be on the net profits without any such deduction, but this proposition is not tenable. I read net profits to mean after the payment of all expenses, and if there shall be a surplus, then there shall be a further deduction in payment of those shareholders who, by their active exertions, have procured or influenced business. If the hypothetical tenant is viewed as a Company, they would doubtless continue the practice, but if he is to be regarded as a solitary person, I think it only reasonable to suppose that although there would be no shareholders upon whose exertions he could rely, yet the advantages to be derived from getting persons to procure or influence business would be so obvious to the tenant that he would employ agents on the same terms. I think money paid for procuring or influencing business is a legitimate charge, and to be regarded in the same light as money paid for advertising, and for the reasons I have given, I do not consider it material whether the payment is to be made to shareholders or not.

The judgment of the Court below on all these points will, therefore, stand affirmed with costs.

Pellereau, J. This is an appeal brought by the Municipal Commissioners of Singapore, from a judgment of the late Chief Justice Sir THOMAS SIDGREAVES. They contend that the Court below was wrong.

1st.—In deciding that the docks of the Tanjong Pagar Dock Company, Limited, are to be assessed as land.

2nd.—In deciding that if the docks are to be assessed as land, the enhanced value given thereto by the presence of machinery ought not to be taken into consideration.

3rd.—In allowing a deduction for payments made out of the net profits to shareholders for influencing business to the Company.

In examining the first ground of appeal, it must be noticed that the judgment appealed from has proceeded on certain decisions given in England under Act 3 & 4 Will. IV. c. 90, s. 33, which, for purposes of assessment, creates two categories of property, first, houses, buildings and property other than land; and second, land. It was ruled in England that property other than land must be *ejusdem generis* with houses and buildings, and it was decided in the case of *Peto* v. *West Ham* that a dock worked in connection with warehouses and forming with these one establishment should be considered as falling within the class of property other than land; whilst in the cases of *The Queen* v. *The Overseers of Neath* and *Regina* v. *Midland Railway Company*, it was considered that a canal with its towing paths, and a dock lined with masonry, or a plot of land with part of a line of Railway laid on it, were not comprised within that expression. On the strength of the authorities under the English Act, the late Chief Justice came to the conclusion that the Company's dock which he found to be detached from warehouses and were worked separately from such warehouses should, with their accessories, be considered as land.

FORD, C.J. SHERIFF & PELLERAU. } J.J.

TANJONG PAGAR DOCK CO. v. MUNICIPAL COMMISSIONERS.

It was contended with great force for the appellants that by the light of the authorities, the docks could not be viewed as mere water-way, as in the Canal Case, nor as mere land as in the Railway Case, that they were dry docks, were excavated at great cost, were lined with masonry, had a cradle laid in, that a carpenters' shed and brick-built house containing steam engines and pumping-machinery were attached to them, and that the docks, considered as a whole, could not be mere land.

Whatever may be said of this contention under the English Act, there is no doubt that there is a difference between the wording of that Act and the local law, which we have to apply. Section 4 of the Indian Act 25 of 1856 creates two categories for the purpose of assessment—one consisting of houses and buildings, and the other of lands. The words in the English Act "and property other than land" are not to be found in the description of the first category, which, in Singapore, should be assessed at the higher rate, for that it may be considered that that category is not so comprehensive in the Indian as in the English Act, and subjects of taxation may be conceived which would be rateable in England on the higher scale as not being mere land, whilst it would only be rateable on the lower scale in Singapore as not being clearly buildings.

When the word 'building' is used by a law after one or more words of a more definite or pointed sense like the word 'house,' the proper rule of construction is that it should comprise only subject *ejusdem generis* with houses, and this restricted meaning which primarily attaches to it cannot be rejected unless there are adequate grounds to show that it was not used in the limited order of ideas to which its predecessors belong. It is so stated in *Maxwell's Interpretation of Statutes*, 2nd edition, pages 410 and 412, and so laid down by Justice ERLE in *Powell* v. *Farmer*, 34 L. J. [N. S.] C. P. 72, and Mr. Justice BLACKBURN in *The Queen* v. *The Overseers of Neath*, 6 L. R. Q. B. 711.

Applying this rule of construction to Section 4 of the Indian Act, I think that buildings include only those subjects which are *ejusdem generis* with houses, and it is impossible for me to hold that the docks, whatever their importance or the cost of their construction may be, are *ejusdem generis* with houses.

Nor do I see that there are adequate grounds to show that the word building should be taken in a wider sense. The case of *Peto* v. *West Ham* must have great weight in the case of docks worked in common with buildings, and may lead to the inference that what is not *per se* a building may acquire that character if worked in common with buildings as one establishment. But in this case the docks are separate from the warehouses, the carpenters' shed and brick-built house containing certain machinery to work the docks are mere adjuncts and accessories thereto, the whole, taken together, is separate from the warehouses, and cannot therefore, on the authority of *Peto* v. *West Ham*, be taken to be buildings.

Besides, the authorities quoted in Maxwell's work at page 349 are to the effect that the subject is not to be taxed unless the language of the Statute clearly imposes the obligation, and that in

a case of doubt the construction most beneficial to the subject should be adopted. It is, to say the least, far from clear that docks considered *per se* should be taken to be buildings *ejusdem generis* with houses, and they were, I think, rightly assessed on the lower rates.

For these reasons, the first ground of appeal should be repelled. On the second, I also agree with the judgment appealed from.

Under Section 2 of Ordinance 3 of 1879, it is clear that in estimating the value of any land on which machinery is employed for manufacturing the produce of that land, it is lawful to take the enhanced value given to such land by the presence of such machinery. As no property should be taxed unless expressly mentioned in the law, this leads to the inference that if the machinery is not used for manufacturing the produce of such land, the enhanced value which it may give to land should not be taken into consideration for purposes of assessment. A distinction has been made by the Counsel for the appellants between the value of machinery and the enhanced value which it gives to the land on which it exists, but this distinction is more imaginary than real, so far as this case goes. Under Section 4 of the Indian Act, the estimated gross annual rent to be considered is that which an hypothetical tenant might be reasonably expected to give; a tenant having to rent lands with machinery thereon would ascertain the cost of purchasing the machinery and of setting it up on the land, would take the interest on the amount and add it to the rent he is prepared to give for the lands; so that it is difficult in a case of this nature, and under this law, to conceive any enhanced value caused by machinery into which the value of the machinery would not enter for a part. I hold, therefore, that when Section 4 excludes the value of machinery, it excludes also the enhanced value given by the presence of machinery.

This construction derives greater force from the addition made by the Ordinance of 1879. If the enhanced value were not excluded from consideration by Section 4 as it originally stood, it would have been needless to pass the Ordinance to declare when the enhanced value should be considered for purposes of assessment.

As regards the third ground of appeal, I fully concur in the reasoning of the Court below. It may be that in England, under a different Act for the purposes of the income tax, the profits referred to in the present case should be considered as profits, but our local law requires that the position of a hypothetical tenant should be assumed, and I have no doubt that such tenant would consider the payment to influence business as an outlay to be deducted from profits, and not to be looked at in the light of the profits, and if he stood alone he would consider that in order to obtain the same amount of profits that a Company would get, he must employ and pay certain agents, therefore sums so disbursed, although they may come out of the profits and by whatever name parties may call them, are to the hypothetical tenant expenses and not profits. The appeal should be dismissed with costs.

ABDULRAHMAN & ORS. *v.* MANNAR ASARY.

PENANG.
WOOD, J.
1885.
November 11.

A prisoner who is charged with the commission of an offence as a principal, cannot be convicted of an abetment of the offence without the charge being first amended by charging him with the abetment.

Section 64 of the Criminal Procedure Ordinance 6 of 1873 does not include such a case.

There were three appellants in this case; the first two of whom Abdulrahman and Mootoosamy had been convicted by Henry Arthur Thompson, Esquire, Magistrate, under Section 342 of the Penal Code, of wrongfully confining the respondent—the third appellant Singaravello, had been convicted under Sections 109 and 342 of abetting the first two appellants in such wrongful act. The appellants were all charged before the Magistrate as principals under Section 342 only; on the conclusion of the case, the Magistrate convicted the first two appellants as principals, and the third of abetment as aforesaid. There had been no amendment of the charge into one of abetment against the third appellant. All the appellants appealed. The case was before this Court on 17th August, when it was remitted back to the Magistrate for amendment. It having been amended and returned into Court, the appeal came on for final hearing this day.

Van Someren, for appellants contended, the conviction was against the weight of evidence as regarded the first two appellants. As regards the third, he contended there could be no conviction of a prisoner as an abettor, when he was charged only as a principal, and submitted Section 64 of the Criminal Procedure Ordinance 6 of 1873 did not apply to such a case. He referred to *Mayne on the Penal Code*, 423, 24 [9th Ed.], and *per* WEST, J. 11 Bom. H. Ct. Rep. 241. It was different in the case of a conviction for an attempt under Section 67.

D. *Logan* [*Solicitor-General*] for the respondent contended, that Section 64 applied to the case, and the authority cited was merely the opinion of a single judge, and not binding on this Court.

Wood, J. held, there were no grounds for the appeal as regarded the first two appellants. As regarded the third, that a prisoner who was charged with the commission of an offence as a principal could not be convicted of abetting that offence without the charge being first amended by charging him as abettor. The authorities cited were in point and shewed that Section 64 did not include such a case, and he was of opinion that that was the right construction of the section. Convictions of Nos. 1 and 2 affirmed.

Conviction of No. 3 quashed.

In the goods of MUCKDOOM NINA MERICAN.

PENANG.

WOOD J.

1885.

November 16.

Where an interest or estate vests in a person, as the "heir" of a deceased, prior to Act 20 of 1837, the fact,—that such "heir" did not insist on his rights, and was dead, [at the time the question arose between his descendants and others] so that he could not personally be deprived of such estate—does not prevent the case falling within the second proviso of the Act, and the property [lands and shops, which were still in the same condition as they were at the time the deceased died] cannot, even at this date, be treated as chattels real.

Query. Is Act 20 of 1837, retrospective?

This was an application under Section 491 of the Civil Procedure Ordinance 5 of 1878, by one Hamid, as the son and attorney of one Mahomed Mah, a daughter of the abovenamed deceased, that Letters of Administration to the Estate of the deceased, granted to one Mowna Merican, a grandson of the deceased, might be revoked, and the said Mowna Merican in the meanwhile restrained by injunction from selling and disposing, as such Administrator, the estate of the deceased. The grounds of the application were firstly, that the deceased had left a Will at the French Settlement of Karrikal, in India; and secondly, that as the daughter of the deceased, the applicant had a right to administration, prior to the said Mowna Merican, his grandson, but she had not been cited to appear, nor service on her dispensed with by the Court under Sections 480, 481. A Rule *Nisi* was granted, and an *interim* injunction issued. The deceased had died at Karrikal aforesaid in 1827 leaving, among others, his eldest son one Mam Meera Lebby Merican, his heir, who had obtained administration to his estate here, in 1831, and distributed the rents of the lands and shops, the estate of the deceased, among all the children of the deceased including the said Mahomed Mah. The said Mowna Merican was the eldest son of the said Mam Meera Lebby Merican; he was born in 1843, shortly before the death of his father. The said Muckdoom Nina Merican, the deceased herein, was possessed of the aforesaid lands and houses in this Settlement, which he purported to devise by his aforesaid Will, but the Will was attested by only one witness. The said Mam Meera Lebby Merican had never insisted on his exclusive right to the lands and shops as the heir of the deceased, but during his lifetime, he treated them as his father's estate, to which all the children [including the said Mahomed Mah] were entitled—and the property was so treated, by all the parties, till shortly before the issue of the Rule *Nisi* herein. The case now came on the Rule *Nisi*, and was further heard on 11th January, 1886.

Ross, for Mowna Merican the administrator, shewed cause. He contended, that the Will was invalid as it was not attested according to either the Wills Act 25 of 1838, or the law prior to that Act; that as it affected lands in this Settlement, it was inoperative. As regarded the second point, he contended, the question of priority of right to administration, did not arise, as the deceased died prior to the passing of the Act 20 of 1837, and the lands descended to Mam Meera Lebby Merican, as the deceased's heir, and was therefore, *his* property, [and not the deceased's herein], and was now distributable among *his* next-of-kin, of whom the applicant Mahomed Mah was *not* one.

WOOD, J. 1885.

In the goods of MUCKDOOM NINA MERICAN.

Van Someren, for the applicant in support of the rule, conceded the first point. As regarded the second, he contended Act 20 of 1837 was retrospective, and the lands which were now in the same condition as they were at the time of the deceased's death, must be treated as "chattels real" and did not pass to Mam Meera Lebby Merican as the deceased's heir. *Moraiss & ors.* v. *De Souza*, 1 Kyshe, 27, 29. That Mam Meera Lebby Merican never claimed the property as his, but always treated it as the estate of the deceased to which all his children alike were entitled. That the second proviso to the Act did not apply to the case, as the heir never had entered into possession of the property, as such—*Moraiss* v. *De Souza*, 1 Kyshe, 30, and he would not now be deprived of any interest, having long since died,—and the property must, at this date, and between the present parties, be treated as the estate of his father's, the deceased Muckdoom Nina Merican, and distributable now among his next-of-kin. He also contended this matter was a question as regarded administration to the estate of Muckdoom Nina Merican deceased, and not, whose property the lands and shops were; and the Court would not in these proceedings enquire whether the deceased herein had, or had not, any property; or of what such property consisted. The matter being for administration to the estate of the original deceased, the question of priority did arise.

Ross, in reply, relied on the proviso aforesaid.

Wood, J. declined to decide whether Act 20 of 1837 was retrospective, but considered the case fell within the second proviso of the Act, and the fact that the heir, Mam Meera Lebby Merican, did not insist on his rights, or that it was his only by doctrine of the Common Law, and not also by actual possession and enjoyment, and that he would not in fact now be deprived of such his interest, as he had been long since dead—did not prevent the case falling within such proviso. The property must be looked on as the estate of the heir, Mam Meera Lebby Merican, and not as the estate of his father, the deceased herein, and the question of priority of right to administration to the father's estate, did not arise. The Rule would therefore be discharged with costs and the injunction dissolved.

Order accordingly [*a.*]

DUVAL *v.* SCULLY.

In re HO KIM HOCK.

PENANG.

WOOD, J. 1886.

January 8.

An affidavit of the execution of a Bill of Sale which describes the occupation of an attesting witness as a "Clerk" merely, is insufficient under the Bills of Sale Ordinance 22 of 1870, Section 18, and the Bill of Sale is void against an Execution-creditor [*b.*]

Interpleader summons. The plaintiff had obtained judgment against the defendant, and the Sheriff on the 23rd December, 1885, seized under a *fi. fa.* issued at the suit of the plaintiff on such

[*a.*] An appeal was filed against this judgment, but was dropped on the parties coming to a settlement.

[*b.*] Ordinance 22 of 1870 has since been repealed, but this case is retained as possibly applicable to the recent Ordinance 12 of 1886. See *Doral* v. *Lesslar*, September, 1886, *infrà*.—J. W. N. K.

judgment, certain goods belonging to the defendant being his stock-in-trade in the "Colonial Warehouse," which were then in his possession. The claimant claimed such goods under a Bill of Sale, dated 20th October, 1885, made by the defendant to him to secure the re-payment of a loan of $1,200 and interest. The Bill of Sale was attested by two witnesses, and the affidavit filed with it, under Ordinance 22 of 1870, Section 18, described the abode and occupation of one of such witnesses as follows: "the abode of the said T. C., is Muntri Street, in Penang, and he is a clerk." There was no further description of his occupation in either the Bill of Sale or Affidavit. The plaintiff, the execution-creditor, refused to release the goods alleging the Bill of Sale to be void against him, and hence this Interpleader.

Hogan, for claimant contended, the affidavit was a sufficient compliance with the requirements of Section 18 of the aforesaid Ordinance.

Van Someren, for plaintiff, the execution-creditor contended, the description of an attesting witness' occupation as "a clerk" merely was insufficient, and the Bill of Sale was void against his client—*Meyappa Chetty* v. *Khoo Bean Teen & ors.*, 1 Kyshe, 510, and cases there cited; *re* Hams, 10 Ir. L. R. Ch. 100, where the description of an attesting witness as "Law Clerk" was held insufficient; 1 Prideaux on Conveyancing, 741, and *Goh Chin Tek* v. *Ramsawmy Chetty*, unreported. [*a.*]

Ross, as *amicus curiæ* mentioned an unreported case the name of which he had no recollection, in which *Ford*, J. had held some years before that the description of an attesting witness as "clerk to Mr. Capel" without stating who, what, and where Mr. Capel was, was insufficient.

Wood, J. I regret that in conformity with English decisions and previous decisions of this Court, I am obliged to decide in favour of the execution-creditor. In so small a place as Penang, I think no European or Eurasian is in point of fact, unknown. The Ordinance however requires the abode and occupation of the grantor and every attesting witness to the Bill of Sale to be given, and the decisions referred to shew the description of a witness as a "clerk" merely is insufficient, and the Bill of Sale void.

Judgment for Execution-Creditor with costs.

[*a.*] *17th August, 1885.—Ramsawmy Chetty* v. *Tan Huat—Goh Chin Tek*, claimant. Interpleader for goods seized under a *fi. fa.* at suit of plaintiff. The affidavit filed with the Bill of Sale, described two of three attesting witnesses as follows: "they are clerks."

Capel, for claimant referred to *Briggs* v. *Boss*, 3 L. R. Q. B. 268.

Van Someren, for execution-creditor, referred to *Larchin* v. *N. W. Deposit Bank*, 8 L. R. Ex. 80, on app. 10 L. R. Ex. 64; *Murray* v. *Mckenzie*, 10 L. R. C. P. 625; *Brodrick* v. *Scale*, 6 L. R. C. P. 103; *Pickord* v. *Sears*, 6 L. R. Ex. Div. 364, and *re* Hams, suprà.

Wood, J. said the object of the Bill of Sale Ordinance was to enable persons to ascertain without difficulty who they might apply to for information regarding any Bill of Sale. The description 'clerk' he was disposed to consider was too vague and uncertain to afford evidence of the identity of any of such persons who might be applied to, but at the request of *Capel* for the claimant, he would allow an adjournment to enable him to produce any further authorities he might find against that view.

28th August, 1885. The case was mentioned as having been settled between the parties, and no judgment was given.

REGINA *v.* OJIR & ANOR.

PENANG.

WOOD, J.
1886.

February 7.

Although by the Mahomedan Marriage Ordinance 5 of 1880, a Mahomedan married woman's property is her "separate" property, yet she cannot notwithstanding Section 27 Clause 12 of that Ordinance, prosecute her husband for theft of such property or cheating.

The Common Law Rule that a wife or husband cannot, except in certain cases, give evidence *against* each other is not touched by any Ordinance, Act, or Statute in force in this Colony as regards *criminal* matters; and their evidence is, subject to those exceptions, still inadmissible in criminal cases *against* each other.

The fact that the husband and wife are both Mahomedans, and the wife's property is her "separate" estate by the aforesaid Ordinance 5 of 1880, does not affect the rule of evidence, inasmuch as that Ordinance has not rendered their evidence admissible in criminal matters *against* each other.

Regina v. *Brittleton*, 12 L. R. Q. B. Div. 266, s. c. 50 L. T. [N. S.] 276, followed.

If a stranger be charged jointly with the husband of a *criminal* offence in respect of such "separate" property, the evidence of the wife being inadmissible *against* the husband is also inadmissible *against* the stranger.

Regina v. *Thompson*, 1 L. R. C. C. R. 377, followed.

The prisoners were indicted for cheating and theft, and were jointly given in charge of a common jury. The first prisoner Ojir was the husband of the prosecutrix Noh; the second prisoner Choh was a stranger, but had been known to the prosecutrix for some time past. About the latter end of November the prisoners came to the prosecutrix [on whose evidence alone the case rested] and representing to her that they were desirous of renting a plantation at Sungei Kedah of one Mat Arshat, requested her to let them have her jewelry in order to raise $70 thereon, and they would hand her the pawn-ticket and lease as security. The prosecutrix thereupon handed them a gold chain, four gold bracelets, five gold hair-pins, a gold necklace and two gold brooches, but did not see the prisoners again for some days. Eventually she met them, but they denied having received the jewelry and all knowledge of them. They never rented nor attempted to rent the plantation, and never handed the prosecutrix the pawn-ticket or the lease. The prosecutrix and prisoners were all Mahomedans, and the jewelry had been given to the prosecutrix by a former husband named Imam who had divorced her. By the Mahomedan Marriage Ordinance 5 of 1880, the property was the prosecutrix's "separate" property or estate. The jewelry was afterwards discovered by the Police scattered in various pawn-shops in the Province, as well as in Penang, and were in each case pledged by one or other of the prisoners under a feigned name. After obtaining the jewelry, the prisoner Ojir never returned to his wife the prosecutrix, but on one occasion thereafter when she was out, he and the second prisoner Choh went to her house and carried away some sarongs and other articles of apparel belonging to her. The prosecutrix thereupon applied for a warrant against both prisoners, and they were in due course arrested. It was in reference to the carrying away of these sarongs and articles that the prisoners were charged with theft, and in reference to the fraudulent obtaining of the jewelry they were charged with cheating.

D. *Logan* [*Solicitor-General*] for the Crown, having opened these facts,

Van Someren for prisoner No. 2 Choh submitted there was no case to go to the jury—that although the Mahomedan Marriage Ordinance 5 of 1880 made the property the wife's "separate"

estate, and Section 27 Clause 12 gave the wife a right to take *criminal* proceedings in respect of them, yet the Ordinance did not enable the wife to give evidence *against* the husband in *such* proceedings as did the Married Woman's Property Act 45 & 46, Vic. c. 75, ss. 12 & 19, at home [*a*]; that though in *civil* cases husband or wife might give evidence *for or against* each other [Act 2 of 1855, Section 20], and in *criminal* proceedings the one might give evidence *for* the other [Ordinance 20 of 1870, Section 28], yet there was no Act, Ordinance, or Statute in force in this Colony, which rendered their evidence—except in cases of offences on the person of each other and perhaps treason [*Taylor on Evidence*, ss. 1371, 1372]—exceptions which did not apply to this case—admissible *against* each other in *criminal* cases, and the Common Law Rule of Evidence was therefore still in force in this particular, and the wife could not give her evidence *against* prisoner No. 1, her husband. *Regina* v. *Kenny*, 2 L. R. Q. B. Div. 307; *Regina* v. *Brittleton*, 12 L. R. Q. B. Div. 266, s. c. 50 L. T. [N. S.] 276; *Lush on Husband and Wife*, pp. 423, 25. Her evidence being inadmissible against No. 1, who was jointly indicted and given in charge to the jury with prisoner No. 2 Choh, it was inadmissible *against* the latter also. *Regina* v. *Thompson*, 1 L. R. C. C. R. 377. That cases decided in India on the point would have no bearing here, as the Indian Charters specially preserved the rights of different classes of natives for themselves—*Fatimah* v. *Logan*, 1 Kyshe, 262.

D. *Logan* [*Solicitor-General*] submitted that in India such cases as this had often occurred, and the conviction in them have been upheld—*Regina* v. *Khatabai*, 6 Bom. H. C. Rep. Cr. C. 9; *Mayne on the Penal Code*, 306, Section 27, clause 12 of the Ordinance 5 of 1880, expressly gave the wife the right to prosecute "criminal proceedings" against "all persons" which included the husband as well.

Wood, J. said such a proceeding as this was entirely new to him; that the Mahomedan Marriage Ordinance 5 of 1880 did not render the evidence of the wife admissible *against* the husband in *criminal* proceedings—and no other Act, Ordinance, or Statute in force in this Colony enabled her to do so. The Common Law Rule of Evidence was still in force, and her evidence could not be received *against* her husband No. 1 in this case, notwithstanding, Section 27 Clause 12 of the Mahomedan Marriage Ordinance, and *Regina* v. *Brittleton* was an authority on the point. The evidence of the wife being inadmissible *against* No. 1, it was, on the authority of *Regina* v. *Thompson*, inadmissible *against* No. 2, who was jointly charged with him. The case for the prosecution being entirely dependant on her testimony and that being inadmissible, there was no case for the jury.

No evidence was then tendered.

Verdict: *Not Guilty.*

[*a*.] See now also 47 & 48 Vic. c. 14, Sec. 1.

TIJAH *v.* MAT ALLI.

PENANG.

WOOD, J. 1886.

February 15.

A Mahomedan married woman cannot maintain an action against her husband whether divorced or not, for a share of their *joint* earnings. *Such* earnings are not the wife's "separate" estate under the Mahomedan Marriage Ordinance 5 of 1880, Section 27, but belong to the husband by English law.

This was a rule calling on J. K. Birch, Esquire, Commissioner of the Court of Requests, Province Wellesley, and the plaintiff, to bring up the proceedings under Section 10 of the Appeals Ordinance 12 of 1879 with a view to a new trial being granted. The proceedings were this day brought up and shewed that the plaintiff's claim in the Court below was for $50 being the "value of the half-share of the husband's property after divorce," that the Commissioner had taken no notes of evidence, but had given judgment for the plaintiff for the full amount with costs. From the affidavit of the defendant in moving for the rule, it appeared that the Commissioner had not taken any evidence in the case, but simply asked the plaintiff, the defendant, and a Kali, a few questions relative to an alleged divorce by the defendant of the plaintiff, and the Mahomedan law in respect of joint-earnings of husband and wife, and then gave judgment as aforesaid. This affidavit was not contradicted.

Van Someren, for defendant submitted there was no evidence in support of the plaintiff's claim, and the claim was one unknown to law.

Plaintiff, in person.

Wood, J. considered the case must be properly heard by the Commissioner, and directed a new trial to be had, but intimated the claim was one that could not be supported in law.

A new trial was had before the said Commissioner, when after taking evidence fully on both sides, he again gave judgment for the plaintiff for the full amount and costs. The defendant having again obtained a rule calling on the said Commissioner and the plaintiff to bring up the proceedings on such re-hearing, this was now done. From the evidence it appeared that the plaintiff and defendant were Mahomedan husband and wife, and had jointly rented lands and planted paddy, and also made nepah sugar—this paddy and sugar they from time to time had sold and the defendant had received the money, and except what they used for their daily expenses, had retained the balance for himself and subsequently divorced the plaintiff. The claim was for the value of half-share of this balance as being the joint-earnings of husband and wife. A Kali was also called who proved that according to Mahomedan law a wife after divorce was entitled to a half-share of all property acquired by joint-earnings of husband and wife during coverture.

April 2. *Van Someren*, for defendant contended, the judgment

should be reversed as the claim of a wife whether divorced or not for a share of joint-earnings of herself and husband could not be supported in law. Whatever the Mahomedan law on the subject was, the Mahomedan Marriage Ordinance 5 of 1880, Section 27 Clause 2, authorised the Court to administer that law, only in so far as it was enacted in that section; that Clause 11 of that section made a Mahomedan's wife's own earnings, her seperate property; but it did not touch the *joint*-earnings of husband and wife, and the English law that *such* earnings were the husband's therefore applied. *Lush on Husband and Wife*, 38, 149—55; *Whittaker* v. *Whittaker*, 21 L. R. Ch. Div. 657, and *Bongah* v. *Mat Din*, unreported [*a.*]

Plaintiff, in person.

The Commissioner did not appear.

Wood, J. said the joint-earnings of husband and wife during coverture were according to English law clearly the property of the husband, and such it must be even among Mahomedans here, unless the Mahomedan Marriage Ordinance had enacted otherwise. By Clause 11 of Section 27 of that Ordinance, the wife's own earnings were declared to be her separate estate, and by Clause 12 she was entitled to maintain an action therefor. The Court however could find nothing in that Ordinance which dealt with joint-earnings of husband and wife and it followed from the express power of Section 27 Clause 2, the Mahomedan law on the subject was immaterial. The case therefore was governed by English law. Under Section 10 of the Appeals Ordinance, 1879, the Court might direct a new trial or make such other order so as to secure "substantial justice." That meant, justice as understood by law. It was useless to order a new trial when all the materials were already before the Court for the sole reason that judgment might be given by the Court below for the defendant. The Court would therefore now make an order so as to secure to the defendant that which the law gave him. The order would be that the judgment of the Court below be reversed with costs. If any amount has been paid into the Court below, it would have to be refunded to the defendant.

Judgment reversed with costs.

[*a.*] *2nd April, 1884.* Action by Mahomedan wife to recover *inter alia* a sum of money for her share of joint-earnings of herself and the defendant, her husband. The parties had separated, but had not been divorced.

Van Someren, for the plaintiff.

Ross, for defendant.

Wood, J. by consent gave judgment for the plaintiff for $77 without costs, as to the claims other than in respect of joint-earnings—but refused to give the plaintiff anything under that head, as he considered joint-earnings of a Mahomedan husband and wife—like other husbands and wives—were the property of the husband under English law.

Judgment for $77 without costs.

D'ALMEIDA *v.* D'MENZIES.

SINGAPORE.

FORD, C. J. 1886.

February 25.

A sale of Manila *Lottery* tickets does not constitute the "keeping, using, permitting to be used, caring, managing or assisting in the business of a lottery" within the Gambling Ordinance 13 of 1879 [*a*.]

A contract made in this Colony between residents here, for the sale of tickets in a lottery in a Foreign State where the lottery is lawful, is *not* an illegal contract as contravening public policy, and will be enforced by the Courts of this Colony—*Aliter* where the lottery is illegal in the Foreign State.

There is no difference in principle between such a contract and the case of *money lent* for the purpose of gambling in the Foreign State where gambling is legal.

Quarrier v. *Colston*, 1 Phil. 147, and *King* v. *Kemp*, 8 L. T 255, applied.

This was an action to recover $154.25 for "goods sold and delivered." The goods in question being Manila *Lottery* tickets. The facts were practically admitted, and sufficiently appear in the judgment.

J. D. *Vaughan*, for plaintiff.

T. de M. *Braddell*, for defendant.

Cur. Adv. Vult.

26th March. *Ford*, C.J. A question of very considerable importance arose in the trial of this case, viz., whether the plaintiff could substantiate a claim for the value of certain tickets known as Manila lottery tickets, sold by him to the defendant. It appears that the Government of Manila holds a periodical lottery for the benefit of the Revenue of that Colony: the lottery differing in little or no respect from the form of transaction more generally known by that name, the process being for the State to issue tickets for amounts some 50 per cent above the prizes which are given; the tickets being purchased by whosoever will pay for them, and certain numbered tickets carrying prizes of a greater or lesser value, whilst the remainder are blanks. A not inconsiderable trade is apparently done in these tickets outside the limits of Manila itself, and in this case the plaintiff, a resident in Singapore, having purchased some of the tickets apparently from agents in Manila, sold a portion to the defendant, also a resident here.

The defendant now declines to pay for them upon the ground [1st] that such a contract being a violation of the provisions of the Gambling Ordinance 13 of 1879 is illegal and void; and [2nd] that if not illegal and void by force of those provisions it is still so by reason of its being a contract against the public policy of these Settlements.

To the first of these objections, I expressed my dissent at the hearing, being clearly of opinion that such a sale of tickets as this could not constitute the "keeping, using, permission to use, care, management or assistance to be given to the business of a lottery" for which some place of keeping or user within the jurisdiction is necessary, both upon the language of the Act, and general principles of constructions. I reserved, however, my judgment upon the

[*a*.] This Ordinance has been repealed by Ordinance 5 of 1888, and by Section 8 of that Ordinance the purchase of a [Manila] lottery ticket is an offence, and by Section 10 a contract for the sale of such ticket is void.—J.W.N.K.

second objection, the question whether the public policy of these Settlements being [as I concede it to be] against the existence of lotteries within their borders, this Court be justified in refusing to give effect to a contract for the purchase of lottery tickets made within its jurisdiction in respect to a lottery held outside that jurisdiction and in a country where such lottery is legal.

There could, I think, be no doubt of the illegality and invalidity of such a contract were it made in respect of a lottery illegal where the contract is made, but the question becomes a more difficult one under the circumstances of this case—a case indeed I believe of first impression—and not covered, although, as will be seen hereafter, I am of opinion, strongly vouched by authority. Had it not been for that authority, having regard to the great evils which might arise from a neighbouring State flooding these Settlements with enticements to gambling of this class, or to people of these Settlements taking advantage of the contiguity of a State where lotteries were legal to carry on the business of a lottery there, their actual clients being citizens of these Settlements, I should have been strongly disposed to have ranged this class of foreign contracts between the State and the ticket-holder together with the assignees and transferees of them here, under that class of which *Santos* v. *Illidge*, 6 C. B. [N. S.] 841, *Grell* v. *Levy* 16 C. B. [N. S.] 73, and *Hope* v. *Hope*, 26 L. J. Ch. 417 are examples; in which the Courts declared they would not enforce contracts legal in the country in which they were made, but illegal in England as contravening objects of public policy. In the above cases the public policy alleged to be contravened, was the declared law of England as against slavery, against restraint of trade, and in favour of certain rights arising out of marriage, but the extension of the principle to contracts in connection with gambling in States where gambling is lawful, and were actual consideration has passed between the parties, seems to have been succesfully resisted in the cases of *Quarrier* v. *Colston*, 1 Ph. 147, and *King* v. *Kemp*, 8 L. T. 255, quoted by Mr. Vaughan. The facts in both these cases were alike. In each case A. had lent money to B. in a foreign State to gamble with. The plaintiff in the one case sought unsuccessfully to restrain an action at law for the amount lent, and the defendant in the other case set up the plea of the illegal purpose for which the money was lent. In both cases the lender was held entitled to recover. Nothing turned upon the question of where the money had been lent, nor do I see, how the place of lending could affect the question, I am unable,—and I say it with some regret, for the application of the principle I have referred to in one class of cases and not in the other seems an arbitrary one—to distinguish these cases in principle from the one now before me. The contract in these cases will be simply put in this form. In consideration of A. lending B. a sum of money to gamble with, where gambling is lawful, B. promises to re-pay it; A. lending the money is entitled to recover.

The contract here will, I think, be simply and accurately put in this form. In consideration of A. giving to B. a ticket which shall enable B. to gamble by taking his place in a lottery where

FORD, C.J. 1886.

D'ALMEIDA v. D'MENZIES.

lotteries are lawful, B. agrees to pay A. a certain sum for the ticket, the transactions *mutatis mutandis* are in substance the same; if A. had lent the money to B. to buy the lottery ticket, the facts would be in form identical with the two cases to which I have referred, and he must have recovered. But in what does the transaction differ? In substance in no way; in form only in this way that A. has shortened the process by selling a ticket to B. upon credit instead of obliging B. to procure it with money lent by A. Upon authority therefore, I think the plaintiff in this action is entitled to recover. I need hardly add that the laws of England against lottery and gambling are generally as stringent as the laws of these Settlements, and that the stringency rests upon similar considerations of public policy to those which govern legislation here.

Judgment for plaintiff with costs.

QUAIK KEE HOCK *v.* WEE GEOK NEO.

SINGAPORE.

FORD, C.J. 1886.

March 12.

The word "children" in a Will, means children born in wedlock; but if from the context or in the surrounding circumstances, the word is shewn to have been used by the testator in a broader sense, such wider meaning will be given to it so as, if necessary to include illegitimate or even *adopted* children.

A subsequent ambiguous clause in a Will, which is somewhat inconsistent with a previous unambiguous clause, does not necessarily revoke or modify the previous clause, but the Court will, if possible, place such a construction on the ambiguous clause so that the two may stand together.

A testator, a Chinese domiciled in Singapore, made a Will by which, after directing all his just debts, funeral and testamentary expenses to be paid by his Executrix as soon as conveniently may be after his decease, gave, devised, and bequeathed all his household furniture, wearing apparel, chattels and other effects, and also all and every sum or sums of money which might be found in his house or be about his person, or due to him at the time of his death, and also all his stock, fund, rent and securities for money due on bonds, bills or notes or other securities, and all and every other his estate and effects whatsoever and wheresoever, whether in possession or reversion, remainder or expectancy, unto his "*wives or widows and children both in Singapore and in China.*" The testator then nominated, constituted and appointed his widow [in Singapore] to be the Executrix of his Will "and to make also a remittance of money to his wife or widow and *son* in China, one-fourth [¼] part of the residue of his estate." The testator at the date of his Will and time of his death had two wives [one in Singapore and one in China]—a daughter of his own in Singapore [who had since died leaving a husband but no issue], an *adopted* son in Singapore [since deceased]—and *two adopted sons* in China. He had no sons of his own, either in Singapore or China. From the evidence it appeared that the position of *adopted* children was the same in all Chinese families and in ordinary language they would be included in the word "children," and it was not usual to make a distinction between those born in wedlock and those adopted.

Held [by *Ford*, Acting C.J. and affirmed by the Court of Appeal], that the word "children" in the Will included the adopted sons both in Singapore and in China; and that the clear language of the first part of the Will, giving the "children" all like shares was not cut down by the latter ambiguous words as to "one-fourth part of the residue" - which latter clause indicated the class to be benefited, but applied—only to a "remittance" to be made [in part execution of the general bequest] to support the China wife and adopted sons, pending the winding up of the Estate.

This was a suit for the administration of the estate of Tan Swee, deceased, of whom the defendant was the executrix. It was found, in proceedings before the Registrar, that the testator left surviving him two widows [one in Singapore and one in China], a daughter of his own in Singapore, who had since died

leaving a husband and no issue; one adopted son in Singapore [since deceased], and two adopted sons in China. The testator had not been in China for over forty years, and had adopted the two sons there when they were only a few months old, more than forty years ago; one was a child of the testator's elder brother, and the other a son of a relative. The deceased had no sons of his own in either Singapore or China. The words of the will, so far as they are material, were as follows:—

"I direct that all my just debts, funeral and testamentary expenses be duly paid and satisfied by my Executrix hereinafter named as soon as conveniently may be after my decease. I give, devise, and bequeath all my household furniture, wearing apparel, chattels and other effects, and also all and every sum or sums of money which may be found in my house, or be about my person, or due to me at the time of my decease, and also all my stock, fund, rent and securities for money due on bonds, bills, notes, or other securities, and all and every other my estate and effects whatsoever and wheresoever whether in possession or reversion, remainder or expectancy unto my wives or widows and children both in Singapore and in China. And I nominate, constitute and appoint my wife or widow Wee Geok Neo to be Executrix of this my Will, and also to make a remittance of money to my wife or widow and son in China one-fourth [¼] part of the residue of my estate."

Donaldson, for the plaintiff, the husband of the deceased daughter, contended that the status of adopted children could not be placed higher, if as high, as that of illegitimate children under English law, and referred to the following cases:—*Dorin* v. *Dorin*, L. R. 7 H. L. 568; *Gill* v. *Shelley*, 9 L. J. Ch. 68; *Paul* v. *Children*, 12 L. R. Eq. 16; *Re Ayle's Trusts*, 1 Ch. Div. 282; *Occleston* v. *Fullalove*, L. R. 9 Ch. Ap. 147; *Cartwright* v. *Vawdry*, 5 Ves. 530; *Wilkinson* v. *Adam*, 1 V. & B. 422; *Ellis* v. *Houston* 10 Ch. Div. 236. The will was not intelligible, having been drawn by a Kling man; and the second clause as to a remittance showed an intention to benefit one son only in China, and if the Court held that the adopted sons could take at all, it was impossible to say which of the two sons was meant. In any case the share of the claimants from China was only for one-fourth, being cut down to that by the second clause. The persons to benefit were the wives and one lawful child, and amid such a mass of absurdity as to the words of the will, it might be in equal shares.

Drew, for the Singapore widow and executrix of the deceased argued, that under the word "children" none could take except legitimate children, if the words of the will could possibly apply to legitimate children, unless children other than legitimate children, were clearly designated by name or description in the will, which was not the case in this will. Adopted children did not take any share in the estate of a Chinese intestate [*a*]. The last clause of the will clearly expressed what share of the estate should go to those spoken of as "in China."

Buckley, for the China widow and adopted sons.—As to the latter clause of the will, it only speaks of a "remittance," meaning that the one-fourth should be sent at once to China to keep up the establishment where the China widow and the two

[*a*]. See *Khoo Tiang Bee* v. *Tan Beng Gwat*, Vol. 1 of these Reports, 413.

FORD, C. J. 1886.

QUAIK KEE HOCK v. WEE GEOK NEO.

adopted sons had lived for forty years. That the words of the second clause were not so distinct as to cut down the unqualified and absolute bequest in the first clause. *Kerr* v. *Clinton*, 8 L. R. Eq. 462. Adopted children were spoken of by Chinamen in the same way as they spoke of their lawful children; all were treated alike. In this case the adopted children were near relations, one being the son of an elder brother, the highest form of adoption. The status as adopted children was much higher than that of illegitimate children in England, and the reasons of the rule in England, which were the difficulty of identification and the refusal of the Courts to enquire into a question of reputation and not of fact, and to allow evidence to be given as to the actual paternity [*Wilkinson* v. *Adam*, 1 V. & B. 435; *Occleston* v. *Fullalove*, L. R. 9 Ch. Ap. 170] do not apply to adopted children, because, among other reasons, no evidence of immorality can come into question. Unless the adopted children were intended, the will had no meaning, as the testator had not been in China for forty years, and his China wife had never left China. If the word "child" meant, by legal construction, only the testator's own lawful children the adopted sons had no case, but this was not so. [Lord CAIRNS, in *Hill* v. *Crook*, L. R. 6 H. L. 265, 283, 285; Lord ROMILLY in *Lepine* v. *Bean*, L. R. 10 Eq. 162; Lord HATHERLEY in *Dorin* v. *Dorin*, L. R. 7 H. L. 575.] The Court here will not follow blindly the English technical rule as to illegitimate children. *Barlow* v. *Orde*, L. R. 3 P. C. 164. If a question arose as to the law in China, the adopted sons might possibly take under that law in Singapore. *Goodman's Trusts*, 17 Ch. Div. 266. Children in existence were spoken of, and the circumstances and the state of the family no doubt of the testator's intention, and that must, when sufficiently clear, govern the construction of the will. From the evidence adduced it clearly appears that the position of adopted children was the same in all Chinese families. That a *learned* man writing a will would make a distinction in language between his lawful children and adopted children, but in ordinary language they would all be included in the word children, and it was not usual to make a distinction.

Donaldson, in reply.—The word child has a definite meaning —the issue of the body of a man or woman. An illegitimate child does answer to this description in a will, an adopted child does not. It would be dangerous and inconvenient, in Singapore, to extend the meaning of the word. The Chinese here know now the meaning of the word, and no exception should be made in their favour, because they use insufficient words of designation.

Cur. Adv. Vult.

On this day, judgment was delivered by

Ford, Actg. C.J.—By this will the testator gives all his property "unto his wives or widows and children both in Singapore and in China," and after appointing one of the wives executrix directs "a remittance of money to his wife or widow and son in China, one-fourth [¼] part of the residue of his estate." A ques-

tion has arisen upon the construction of these paragraphs, the testator having at the date of the will, and at his decease, a wife and two adopted sons in China, and a wife and one adopted son and one daughter by marriage in Singapore. The testator was at the time of making his will, and necessarily therefore at his death, over 60 years of age and he had married his wife in China 44 years ago, and with the exception of a few months had not seen her or at least lived with her since his marriage. It was urged that the adopted children could not take, although their designation as his children was to an ordinary mind tolerably clear, because the case must be governed by the rules of English law regarding illegitimate children. It was argued that adopted children among the Chinese must be put on the same status as illegitimate children in England, and that as illegitimate children would not take in England, the adopted children here must labour under the same disadvantage. But I am of opinion, taking all the facts of the case into consideration, together with the terms of the bequest, that even under the English authorities, and if adopted children ranked in all respects like illegitimate children [a position I am not disposed to concur in] still they would be entitled to take under this will.

In English cases the word children in a will means legitimate children, unless by necessary implication the reference is to, or comprises, legitimate children. To arrive at a decision whether such an implication is a necessary one, the Courts have certainly looked at the facts and circumstances of the testator's family at the time the will was made, although you are forbidden, it is said, to do so with a view to any speculation upon his intention. The facts in the case, I think, forbid speculation, and taken with the language of the will, even if the devising clause stood alone, supply the necessary implication, unless we are indeed to speculate upon the possibility of a testator over sixty years of age rejoining a wife married to him in China forty-four years ago, and with whom he lived but a few months, and, at the common age of at least sixty, having children by her. I do not conceive that you are to exclude an implication which, having reference to natural laws and our experience of their operation, is a necessary one, for a hypothetical possibility which is contrary to that experience. The case of *Dorin* v. *Dorin*, 7 L. R. H. L. 568, is not in contradiction to this view; for there, that the husband might have children after marriage with his mistress, was a natural and probable event, contradicting no experience of the operation of natural laws. [The learned judge then referred to the facts of this case.]

But this view of the testator's intention is confirmed by the reference in the subsequent paragraph of the will to a remittance to his widow and son in China. You could not, as you could in the case of *Dorin* v. *Dorin*, read the will as applicable only to non-adopted children, for there was no son in China, but an adopted child, and the sending a remittance to him must be treating him as existing. The coupling of the widow and children in Singapore with those in China leads, I think, to the irresistible

FORD, C. J. 1886.

QUAIK KEE HOCK v. WEE GEOK NEO.

inference that in each case he spoke of a similar class, and with a similar intent, and therefore the adopted child in Singapore will take as well as the adopted children in China.

For the construction of the will it is not necessary to determine the question, and I would rather not merely express an opinion upon it. Whether in a Chinaman's will a gift to children simply would include adopted children, or whether the Court here would be bound to apply the rule of the English Courts which excludes illegitimate children, to adopted children amongst Chinese residents here—questions which were argued before me at length and with ability. I think it will be better to determine those questions when they actually arise for decision, and when, so important do I consider them, the opinion of a Court of Appeal can, if desired, be taken upon them.

The Court can give but an uncertain meaning to the second clause in the will, beyond pointing out that, by directing a remittance to be sent to the widow and son in China, the testator indicated the class he intended to benefit by the previous actual gift. This direction to send a remittance of one-fourth I think clearly too ambiguous to operate as cutting down the previous gift, and I think the fair reading of it must be that the testator was thinking only of a remittance to support his absent wife and children in another country pending the winding up of the estate here. Possibly an error of the drawer of the will led to the word 'son' being inserted for 'sons.' Its practical operation is not important as no remittance has been made and the estate is now, I understand, divisible.

The result is that the two widows and the children [including the adopted children] take equal shares in the estate, and that the clause directing a remittance is to be treated only as of that character. The costs of all the parties may be borne by the estate.

The defendant appealed from this decision, and the appeal was argued before the Court of Appeal on the 10th, 11th, 12th, 13th, 16th and 17th August, 1886.

Bonser, [Attorney-General] *Burkinshaw*, and *Joaquim*, for the appellants, in addition to the cases cited below, referred to *Stringer* v. *Gardiner*, 27 Beav. 35; *Goodinge* v. *Goodinge*, 1 Ves. Sen. 231; *Veale's Trusts*, 5 L. R. Ch. Div. 622; *Megson* v. *Hindle*, 15 L. R. Ch. Div. 198; *Re Parker*, 15 L. R. Ch. Div. 528, s. c. 17 Ch. Div. 264; *Wells* v. *Wells*, 18 L. R. Eq. 504; *Merrill* v. *Morton*, 17 L. R. Ch. Div. 382; *Crook* v. *Whitley*, 7 De G. M. & G. 496; *Evans* v. *Davies*, 7 Hare 498; *Re Well's Estate*, 6 L. R. Eq. 599; *Re Campbell's Trusts*, 34 W. R. 629; *Armstrong* v. *Armstrong*, 7 L. R. Eq. 518; *Eagles* v. *Le Breton*, 15 L. R. Eq. 148; *MacGibbon* v. *Abbott* 10 L. R. App. Cases 653, *Martin* v. *Lee*, 11 Moore P. C. 142; *Levy* v. *Soloman*, 25 W. R. 842; *Reg.* v. *Willans*, 3 Kyshe, 16; *Khoo Tian Bee* v. *Tan Beng Gwat*, 1 Kyshe, 413; *Yeap Cheah Neoh* v. *Ong Cheng Neo*, 6 L. R. P. C. 318, s. c. 1 Kyshe, 326.

Buckley, for the respondent, in addition to the cases cited below, referred to *Laker* v. *Hordern*, 1 L. R. Ch. Div. 644; *Leigh*

v. *Byron*, 1 Sm. & Giff. 486; *Adney* v. *Greatrex*, 38 L. J Ch. 414; *Sherratt* v. *Mountford*, 15 L. R. Eq. 305; *Brown* v. *Bolton*, 31 L. R. Ch. Div. 542; *Charter* v. *Charter*, 7 L. R. H. L. C. 364; *Overhill's Trusts*, 1 Sm. & Gif. 362; *Holt* v. *Sindrey*, 7 L. R. Eq. 170; *Andros* v. *Andros*, 24 Ch. Div. 638.

Ford, C.J. I in no way depart from the view taken by the Court below in this case, although it is due, I think, to the industry and ability which have been shewn in the elaborate arguments of the appellants against that view to refer to them a little at length. I think that judgment correct, if the will be construed by the light of the application of the English Rule of Construction regarding legitimate and illegitimate children; although, I think, had the extraordinary hypothesis which have been started in this Court been raised in the Court below [those of a testator of 60 odd years contemplating a third wife and children in China or another son in Singapore whom he should send to China] the judgment might perhaps have been mended when dealing with the general devise by itself by expanding its language to include irrational and extraordinary hypothesis, as well as those contradicting our experience of natural laws. The judgment, however, resting on the construction to be given to the whole Will of the testator and not to this devise read singly renders this a point of no importance and I allude to it only in reference to some criticisms which were made to that part of the judgment.

As to the new class of cases brought before the Court laying down that if a primary meaning can be given to the words of description you are not to look for a secondary and more probable one, the rule is obviously and on authority a sound one; but the only way apparently that the rule has been applied in the argument has been by torturing the language of this general devise to refer to the widow only in China, and the widow and children in Singapore, and then by dealing separately with this mangled version of a gift to "my wives or widows and children both in Singapore and in China" and with the subsequent direction to make "a remittance of one-fourth of the residue to the wife or widow and son in China," is in some way, not quite clear to my understanding, to make the primary meaning of the language to be a devise to the blood-child in Singapore only. Unfortunately for the argument, the will must be read as a whole, and when this is done, the contention that children in China and son in China mean primarily daughter or children in Singapore has only to be stated to supply its own reputation.

Then it is sought by dividing the wives and children into classes—one in China the other in Singapore—to limit the gift to children in Singapore to the blood-child; but the testator has collocated the two classes in one, and I see no reason why the Court should separate them for the benefit of a construction which no one could, as a matter of common sense, help seeing would utterly defeat the intention of the testator. It was further said that no case has decided that two different kinds of children can take together. But no case has been cited to shew they

FORD, C. J. SHERIFF & PELLEREAU. } J.J. 1886.

QUAIK KEE HOCK v. WEE GEOK NEO.

cannot, and on the contrary, Mr. Jarman's construction of Lord CAIRNS and Lord CRANSWORTH'S observations in the cases he refers to in Volume II, page 230 of his well-known work upon Wills is that they can—and obviously, if sufficiently designated on every principle or rule, they ought. I have dealt with these arguments, I am bound to say, not from any intrinsic value which I think attaches to them, but in deference to the ability with which they have been urged.

With regard to the construction of the direction to make a remittance of one-fourth part of the residue to the wife or widow and son in China, I have heard nothing to shake the opinion that it cannot operate to cut down the original gift, or to make me differ from the probable meaning which I put on it in the Court below. In my judgment it is not practicable quite to give the actual effect of each word to the direction, but I think the view taken by the Court then, gives the more probable meaning of it. The question to what extent English Rules of Construction apply to wills made under the circumstances which surround us in these Settlements, it is not necessary to decide. The testator has here by his reference to his children both in China and Singapore and son in China, shewn the sense in which he has used the word—in fact, to use a phrase from one of the cases cited—has been his own dictionary, and when this is the case the *designatio personarum* is sufficient under all English Rules of Construction. The question therefore to what extent such rules may be modified owing to the different circumstances under which wills are made here or in deference to the customs and habits of native testators is not strictly *sub judice*, and on this point, I think, this Court will be wise in following the Court below and refrain from giving a judgment. The judgment is confined to the construction of this will and does not go beyond it. The words 'equal shares' in the judgment were not intended to imply that the *beneficiaries* took as tenants in common. The character of their shares will be determined in the Court below, as events may have happened since the will which may affect that question.

Pellereau, J. This is the case of a will made in English by a Chinaman whom I hold from all the facts to have been domiciled in Singapore when he died.

The first ground of appeal is that the Court below was wrong in holding that the word "children" in the will include adopted children. It is admitted by all parties that the law of England is the law of the Colony on this subject, and it is needless to enquire how far it may have been modified in favor of adopted children by any local enactment, as I am able to arrive at a conclusion favourable to them by the sole light of English law.

By virtue of that law the word "children" should apply to children born in wedlock, unless there be in the will, and, in what is called surrounding circumstances, anything shewing that the word is capable of a broader sense, and therefore includes a larger class of children.

The will in this case contains two phrases which enable us to ascertain the meaning of the testator, and they should be read together. The first is a general bequest to his wives or widows and children both in Singapore and China. The second mentions the appointment of one of his widows to be his executrix and to remit to his wife or widow and son in China, the quarter of the residue. By his wife or widow in China he evidently means a person existing in China at the date of his will. When he mentions his son there he cannot contemplate a future child, as he could not have known whether such child would be a son or a daughter, and I think both from this fact and from the collocation of the son with the wife, that the more reasonable interpretation is that he referred to a son existing in China at the date of the will. He therefore considered that son to be one of his children mentioned in the general bequest.

From the surrounding circumstances which, according to the law of England, may be taken into consideration to ascertain the sense of the words used by the testator, it appears that he had a wife and two adopted sons in China at his decease, and it does not appear that he ever had any legitimate or illegitimate children there. It has also been shown that the Chinese, the class to whom the testator belonged, are, in Singapore, as in China, in the habit of adopting children, that these adopted persons have the status of children and are treated as such. This usage is part of the surroundiug facts in the case; I need not decide that it is recognised by the local law as having the force of law, it is sufficient for me to treat it as part of the surrounding circumstances, and from the whole of those circumstances, I infer that the word "children" in this will has a much broader sense that it would have in a will drawn up by an Englishman in England, or in any country where neither polygamy, legitimation nor adoption are recognised or practised, and I think the word includes adopted children.

Coupling this conclusion with that mentioned in the previous paragraph, viz., that this testator in his will treated a son whom be had in China as one of his children, I hold that the testator meant to treat his adopted children in China as children just as well as his legitimate child in Singapore, and any adopted child he had in Singapore would therefore be included in the same meaning.

This disposes of the first ground of appeal. The second is, that the Court was wrong in holding that the widows and children took in equal shares, and it was argued in support of it that the phrase in the will touching the remittance of one-fourth of the residue to China limited the rights of the widow and children in China to that fourth. Certainly, the use of the word residue creates some ambiguity, but it requires more than this ambiguity to upset the clear bequest in the phrase which immediately precedes that in which the word residue occurs. The testator makes this bequest and by a distinct phrase appoints one of his wives to be executrix and to make the remittance of one-fourth to China; both phrases should be so construed as to give effect to both, if

FORD, C.J. SHERIFF & PELLEREAU } J.J. 1886.

QUAIK KEE HOCK v. WEE GEOK NEO.

possible, and it appears to me plain that the remittance is meant to be the execution in part of the general bequest; this view is not merely borne out by the general context of the will, but also by the words of bequest in the first phrase and the word of remittance in the last. I therefore think the second ground of appeal should also be dismissed.

The question whether the legatees take as joint tenants or tenants in common remains undecided, as it was not raised in the Court below or in the grounds of appeal, and the words used in the judgment appealed from are not intended to decide it.

Sheriff, J. concurred in the judgment of *Pellereau*, J.

Appeal dismissed with costs.

KOH SEANG THYE *v.* CHUNG AH QUEE.

PENANG. WOOD, J. 1886. March 15.

Disturbances existing in the Native State of Larut between two opposing factions or Kongsis of Chinese relative to the possession of certain tin mines there, a number of mines belonging to the faction or Kongsi of which the defendant was a headman, were taken from them by their opponents. The Muntri as the chief authority of the country sided with the defendant's faction or Kongsi and with his knowledge and consent, the defendant and others, headmen of that faction or Kongsi applied to the plaintiff's firm for help in money and provisions, in arms, ammunition and food for their "armed men" to an "unlimited credit." In consideration of the plaintiff's firm agreeing to render this help, the defendant by an agreement made in Penang, agreed that after the conclusion of peace between the two factions or Kongsis, ever to pay to the plaintiff's firm seven-tenths of the percentage which their faction or Kongsi received from the miners on all tin obtained by them at their mines, but should the defendant change his mind and not pay such seven-tenths he was to pay to the plaintiff's firm $10,000 per month in lieu thereof. The agreement then provided in a separate clause that should the mines *fall in other hands* than those of the defendant's faction or Kongsi, or should the mines be *wrenched* from the hands of the defendant's faction or Kongsi, so that they became unable to draw their aforesaid percentage, then the plaintiff's firm could not claim payment of the seven-tenths. The plaintiff's firm provided the necessary moneys and goods up to the extent of $60,000; with the help so rendered the defendant's faction or Kongsi were able to recover most of the mines they had lost, and on the British Government shortly thereafter interfering and bringing about peace and establishing a Residency in Larut, the defendant and his co-headmen and the miners of their mines met, and with the knowledge and consent of the British Resident made a further agreement which—after reciting the previous agreement and the fact that the supplies had been rendered and thereby most of the mines had been recovered, and that peace had been restored—provided and declared that the defendant and his co-headmen and their miners were to follow and abide by such previous agreement. The defendant's faction or Kongsi thereafter drew and received their aforesaid percentage from their miners and thereout paid seven-tenths thereof to the plaintiff's firm for about two years whereby the debt to the plaintiff's firm was reduced by $16,500. While the plaintiff's firm were thus collecting their seven-tenths, the British Government with the consent of the Perak authorities took possession of and re-allotted the mines among the Chinese mine-owners, and thereafter issued a proclamation prohibiting the further levying of the aforesaid percentage and proceeded to levy a duty on tin for themselves for the upkeep of the Government of the country, whereby the plaintiff's firm were deprived and hindered from obtaining their seven-tenths. The plaintiff's firm then sued the defendant for the balance of their advances,

Held [by *Wood*, J. and affirmed by the Court of Appeal] that the plaintiff could not recover—[1] as the expression "other hands" in the first agreement was not limited to the faction or Kongsi opposing or fighting the defendant's faction or Kongsi, but included the British Government; and the construction apparently put on these words by the parties themselves by the second agreement was immaterial, and the acts and proclamation aforesaid, were acts within the provisions of the aforesaid clause, and the agreements were rendered impossible of performance as the subject-matter of them, the percentage, had been put an end to; [2] that the alternative provision to pay $10,000

a month did not arise as it applied to a free and voluntary change of mind on the part of the defendant and not by constraint, and the defendant under the aforesaid circumstances could not be said to have "changed" his mind.

If a plaintiff be resident or his firm be established in this Colony, and the payment of a debt has to be made to the plaintiff or his firm, the cause of action is one that "arises in this Colony" within Section 29, Ordinance 5 of 1868, and Sections 18 & 19 of Ordinance 3 of 1878, so that this Court has jurisdiction to entertain the suit if the defendant be absent from the Colony—per *Wood*, J.

Semble. If a contract is made in the Colony, though confirmed by a subsequent contract made out of the Colony, and the breach be committed abroad—the case is one which "on general principles of international law and comity, is to be determined by the law of the Colony" within the aforesaid sections—per *Wood*, J.

The English rule that once the Statute of Limitation begins to run nothing can prevent its operation, although the defendant be in hiding or out of the jurisdiction is merely a rule of construction on the language of the English Limitation Acts 21 James I, c. 16, and 4 Anne, c. 16, Section 19, and is not a hard and fast rule of law, and is inapplicable to the Indian Limitation Act XIV. of 1859, in face of Section 13 thereof.

Gregory v. *Hurrill*, 5 B. & C. 341, and *Gan Kim Swee* v. *Lee Ah Kee* [infra, note [*a.*] p. 138,] not followed—per *Wood*, J.

Semble.—The word "present" in Section 29 of Ordinance 5 of 1868, and Section 19 of Ordinance 3 of 1878 means *bonâ fide* and actual presence in an open and undisguised manner and not in hiding and concealment—per *Wood*, J.

Semble. It does not mean presence at the time of action brought, but at the time of breach or thereafter—per *Wood*, J.

The earlier English Statutes of Limitation of James and of Anne as above, are law here, except as modified by subsequent Acts and Ordinances of the Indian and Straits' Settlements Legislature, but Lord TENTERDEN'S Act 9 Geo. IV. c. 14, is not in force here—per *Wood*, J. [*a.*]

Section 4 of the Limitation Act XIV. of 1859, only deals with acknowledgments in cases of a "legacy or debt" and does *not* like Lord TENTERDEN'S Act extend to "actions on the case grounded on any simple contract," so that a letter written by directions of a defendant, though *not signed* by him, but from which a promise to pay may reasonably be inferred is a sufficient acknowledgment under the old law, prior to Lord TENTERDEN'S Act, to revive his liability—per *Wood*, J.

A promise to pay "when of ability" will revive the debt if it can be shewn by evidence that between the date of the promise and the commencement of the action for recovery of the debt, the defendant has had the ability—per *Wood*, J.

In an action for breach of an agreement, the plaintiff in answer to a defence of the Statute of Limitations put in evidence the three following letters written within six years of the commencement of the action by the defendant's directions and with his name, but *not* signed by him. 1. "It is true that the kindness bestowed by you..... "is to no small extent. Although others may be ungrateful, I cannot be so bad as "that.....it is really on account of my being hard up that I cannot further my "wish.....although I wish to put the matter to right, it is not within my powers "to do it.....should in future I receive the sum from the Government I will not "be ungrateful to you." 2. "With regard to the matters mentioned in your letter, "you say you wish me to manage to pay one-half of the amount, but should I have "any means in my power, I have nothing to complain of even if I had to pay the "whole." 3. "Day or night I cannot forget your kindness, should I have little "better prospects in the future, I would never forget you. I must then first of all "repay you your kindness."

Held, that the letters were conditional promises to pay on being of ability to do so, and there being proof of such ability, they were acknowledgments which took the case out of the Statute of Limitations—*per Wood, J.*

Tanner v. *Smart*, 6 B. & C. 603, and *Hammond* v. *Smith*, 33 Beav. 452, followed.

This was an action to recover $240,000 as damages for breach of an agreement. The facts and arguments are fully set out in the judgment.

Van Someren, [*Clutton* with him] for plaintiff, in addition to the authorities mentioned in the judgment, cited *Barker* v. *Hodgson*, 3 M. & S. 267; *Brown* v. *Royal Insurance Co.*, 28 L. J. Q. B. [N.

[*a.*] But see Act 14 of 1840 since impliedly repealed by Act 14 of 1859, *Rabiah* v. *Mahomed Ghouse*, Vol. 1 of these Reports, 214; *Neoh Chin Tek* v. *Tan Beow*, *Ibid* 392; *Penang Foundry Co.* v. *Cheah Tek Soon*, *Ibid* 559; and Ordinance 4 of 1878, Section 6.—J. W. N. K.

WOOD, J. 1886.

KOH SEANG THYE v. CHUNG AH QUEE.

S.] 275; *Pollock on Contracts*, 349, 358; *Lim Guan Teet* v. *Shaik Ahamad Bashaib*, 1 Kyshe 536; *Din Dyal Chatterjee* v. *Maharajah Ingutruder Burururee*, 1 W. R 310; *Prunath Chowdry* v. *Rukeah Begum*, 7 Moore Ind. Appeals, 323, 357; Thompson on Limitation, pp. 242, 284–5; *Lee* v. *Wilmot*, 1 L. R. Ex. 366; *Green* v. *Humphreys*, 23 L. R. Ch. Div. 207; *Bourdin* v. *Greenwood*, 13 L. R. Eq. 281; *Chasemore* v. *Turner*, 10 L. R. Q. B. 500; *Quincey* v. *Sharpe*, 1 L. R. Ex. Div. 72; *Skeet* v. *Lindsay*, 2 Ibid. 314; *Meyerhoff* v. *Froehlich*, 3 L. R. Ch. Div. 333, Appd. 4 L. R. C. P. Div. 63.

Ross, for defendant, in addition to the authorities mentioned in the judgment, cited *Khoo Poh* v. *Wan Mat*, Straits L. R. 247; *Mahomed Mushurddeen Khan* v. *Clara Jane Mushurddeen*, 2 N. W. P. H. Ct. Rep. 173; *Gregory* v. *Hurrill*, 5 B. & C. 341; *Gan Kim Swee* v. *Lee Ah Kee* [*a*.]

Cur. Adv. Vult.

17th May. *Wood*, J. In this case, I may state at once, that I find for the defendant upon what may fairly be called the merits of the case, by which I mean the construction of the agreement upon which the plaintiff relies.

As to this point of the construction of the agreement is the main point in issue, so it appears to me to be the one most capable of clear demonstration, but in view of the strong probability of the case being brought before the Court of Appeal, I have for obvious motives of economy and convenience expressed my opinion on other points raised at the trial distinguishing between matter of law and matters of fact as to which last I have generally expressed my finding during the course of the trial which lasted for many days. The facts of the case, so far as I consider them necessary to explain my judgment, are as follows:—

In the years 1872 and 1873, disturbances occurred at Larut as to the possession of certain tin mines claimed by two distinct bodies of men the "Ship Yips" [or 10 tribes] and the "Si Yips"

[*a*.] *Unreported*:—18th September, 1872. Action to recover $2,253.34½ for goods sold and delivered, money lent and on accounts stated. Pleas, 1.—Never indebted. 2.—That the plaintiff's cause of action did not accrue within three years of the commencement of this action. Replication 1—Joinder in issue. 2.—When cause of action accrued, defendant was in Larut, beyond the jurisdiction of this Court, and plaintiff commenced this action within three years next after the defendant first came within the jurisdiction after the accruing of the cause of action. The plaintiff by evidence attempted to shew that the defendant had not been in Penang until within 3 years of his action. The defendant by evidence shewed he had on one occasion, since the accrual of the plaintiff's cause of action, [31st August, 1868] but beyond 3 years of the date of this action [1st March, 1872] been in Penang, but had done so in hiding. The Court on this question of fact found that the defendant had so been in Penang more than 3 years before action, but in hiding and unknown to the plaintiff.

Ross, for plaintiff, contended the claim was not barred—Section 13, Act XIV. of 1859; and such a coming within the jurisdiction, in hiding and unknown to the plaintiff, could not prejudice the plaintiff.

Bond, for defendant, contended such a coming within the jurisdiction was sufficient to let the Statute of Limitation begin to run, and once it ran, nothing could stop it. He relied on *Gregory* v. *Hurrill*, 5 B. & C. 441.

Hackett, J. said he considered he was bound by *Gregory* v. *Hurrill*, and however reluctant he was to hold such a coming within the jurisdiction caused the Statute to run, he thought that case decisive of the point and the claim here was barred.

Judgment for defendant with costs.

[or 4 tribes] respectively. Of these, the *Si Yips* were for some time in possession of the tin mines, but the authorities of Larut represented at that time by the Muntri of Larut, sided with the *Ship Yips* and after the expenditure of large sums of money on the part of both the Muntri of Larut and the *Ship Yips*, the latter were put in possession of the mines.

The following evidence given by Mr. Karl, formerly Assistant Protector of Chinese Immigrants in the Settlement of Penang, and admitted as evidence by both parties to the suit will explain the matter further—

"Kongsis are established by Chinese for certain districts. Associations for the purpose of helping each other and for prayer and for everything in which individuals require assistance or advice.

There is an entrance fee and annual subscription from members. Property is bought and houses erected. Certain persons are chosen headmen of Kongsis by election and the management left in their hands according to the rules of the Kongsi.

Of the 10 tribes and 4 tribes in Larut I know from personal knowledge that each had its own Kongsi and each party in Larut applied to their own Kongsi here in Penang for assistance, and each of the two contending parties, the 10 tribes on the one hand and 4 tribes on the other, agreed to give a *chabût* [or tax] of 10 slabs in every hundred to their respective Kongsis which advanced money as their mode of payment as between the miners and their Kongsi."

During the period of these disturbances the *Ship Yip* miners were in need of funds and having exhausted their own resources and that of their Kongsi, the Kongsi of the *Ship Yips* through their headmen applied to the Chinese firm "Hock Seng," a firm carrying on business at Penang for assistance in money, ammunition and goods. Of this firm of "Hock Seng," the plaintiff Koh Seang Thye is the representative partner, and in like manner the defendant Chung Ah Quee is the representative man of the Kongsi of the *Ship Yips*; and I have found, as a fact, that the plaintiff through his firm "Hock Seng" has supplied to the *Ship Yip* miners in all the sum of $60,000 in goods, money, and ammunition, over and above payments made on account, and which sum has not been received by the plaintiff although the Kongsi of the plaintiff has received $16,500 by way of *chabût*.

In October, 1873, and April, 1874, the following agreements were made between the plaintiff and his firm on the one side, and the defendant and the *Ship Yips* on the other, of which the following are translations:—

"Agreement entered into between Tan Yit Hoon ..... and Teh Keng "Quee [who is the defendant under that name and many others whose names "follow] all representatives of the Canton 10 district on one part, and Koh "Seang Thye [the plaintiff] of the "Hock Seng" firm, and Khoo Tian Tek of "the "Chin Yang Mow" firm on the other part.

"Whereas the tin business have [*sic*] become very bad in Larut for great "want of capital, Tan Yit Hoon ..... Teh Keng Quee [the defendant] "[here follow the other names] representative of the Canton 10 districts have "applied to Koh Seang Thye of the Hock Seng firm and Khoo Tian Tek of "the Chin Yang Mow firm for the necessary capital on an unlimited credit, "promising that they [repeating the names] will after the conclusion of "peace, ever pay to Koh Seang Thye of the Hock Seng firm and Khoo Tian

WOOD, J. 1886.

KOH SEANG THYE v. CHUNG AH QUEE.

"Tek of the Chin Yang Mow firm, 7-tenths of the percentage due to [*sic.*] "the miners of the said 10 districts, on the tin produced by them, and keep "only for themselves the remaining 3-tenths of the said percentage—so was "it agreed to between both parties, with the clause, that should Tan Yit "Hoon .... Teh Keng Quee [the defendant] [here follow the other "names] change their mind they must pay monthly to Koh Seang Thye of "the Hock Seng firm and to Khoo Tian Tek of the Chin Yang Mow firm, a "sum of $10,000, instead of the aforesaid seven-tenths—but should the Larut "tin mines fall into other hands than in those of the aforesaid 10 districts, "or should the said mines be wrenched from the hands of the aforesaid 10 "districts people, so that they become unable to draw the aforesaid per- "centage, neither Koh Seang Thye of the Hock Seng firm, nor Khoo Tian "Tek of the Chin Yang Mow firm, can press Tan Yit Hoon ..... Teh "Keng Qee [the defendant] [here follow the other names] for the re-payment "of the capital, and the payment of the aforesaid 7-tenths—so it has been "agreed between both parties, but as mere verbal dispositions are of no avail, "copies of this agreement have been handed over to the Hock Seng and the "Chin Yang Mow firms as a proof thereof." This agreement was signed by Teh Keng Quee [the defendant], and the other parties of the first part, sealed with the *chop* of the "Ship Yip" or 10 districts Kongsi, and dated 25th October, 1873.

As to this agreement, it may be here said that Khoo Tian Tek made practically no advances, and this agreement became the agreement of the *Ship Yips* on the one side, and the Hock Seng firm on the other.

The second agreement made in April, 1874, and which is, as I think, merely a confirmation of the former, and admitted to be signed by the defendant and others managers in Larut of the *Ship Yip* Kongsi, and others who were headmen in Larut of the *Ship Yip* miners, is as follows:—

"This agreement was made and executed between the "Ng Tak Tong" "Kongsi, the "Ship Yip," known to be the people of the 10 districts, and "Koh Seang Thye the manager of the "Hock Seng" Kongsi and others, on "the 14th day of the 3rd Moon, in the year Kah Soot, and in the reign of the "Emperor Tong Tee, corresponding to the English 28th day of April, 1874," "as follows:—

"Whereas owing to a disturbance in Larut in the year Jim Sin [1872], "the "Ng Tak Tong" Kongsi, together with the "Ship Yip," or the people "of the 10 districts, were at war with the "Si Yip" or the people of the "4 districts, the provisions as well as money having been consumed, and "having no other means whatever of obtaining relief, we the said "Ship Yip" "were obliged to apply to the "Ng Tong" Kongsi who were in Penang, as "well as the managers of the 10 districts, viz.: Chin King Kin, Shak Hin "Ton, Chin Yew Chi, and others, after several suggestions and discussions "we latterly agreed to beg of Koh Seang Thye the manager of the "Hock "Seng" Kongsi and others, to render us assistance in supplying provisions "and money for the upkeep of our men. We fortunately obtained the boon "we requested, and assistance being immediately rendered to us, we were "then enabled to recover a few mines in different places, after which peace "having been restored, and every one resumed their former occupation, we "were deeply thankfull to Koh Seang Thye of the "Hock Seng" Kongsi and "others, for their exertions, and were also greatly indebted to them for their "kindness.

"When first application and suggestions were made for assistance, it "was agreed, that should peace be restored, and tin mines recovered by us "the "Ship Yip" people of the 10 districts, and should there be any tin "produced by us, 10 slabs on every hundred slabs of the produce were to be "taken from the mines, out of which, 7 slabs were to be given to Koh Seang "Thye the manager of the "Hock Seng" Kongsi and others, and 3 slabs to "be divided among us the "Ship Yip" or the 10 districts, as our share, and

'all the remainder to be taken by the miners. All this having been settled " we must still follow and abide by all the rules and conditions of the agree- " ment which were made and executed on the 5th day of the 9th Moon in the " year Kin Yew, corresponding to the English 25th day of October, 1873, " by the Ng Tak Tong Kongsi, together with the managers of the "Ship " Yip" or 10 districts—they and others having met together, and discussed " over the subject, mutually consented thereto, and set our signatures to this " agreement as a permaneut proof thereof. But mere word of mouth being " of no avail, this document has been made, executed, and delivered to them " to be kept for ever as a proof."

Witness. [here follow the signatures.]

As to these translations, some question of fact arose at the trial, and the evidence of Mr. Karl, late Assistant Chinese Protector abovementioned was taken on this point. This evidence is as follows :—

" This is a translation of A. [Agreement in October, 1873,] it is correct. " To the miners should be "by" the miners. The *chop* is the *chop* of the " 10 Provinces—" Ng Tak Tong." Referring to the agreement A. the clause " commencing "But should the Larut tin mines fall into other hands," the " translation is, in my judgment, " But should the Larut tin mines be taken " away by force by other people, [*viz.*: the men of the other 4 districts] and " the aforesaid entire percentage be drawn or collected by these other men, " the " Hock Seng" and the "Chin Yang Mow" firms cannot press the men of " the 10 districts [names given] for the re-payment of the capital borrowed, or " precentage (of 7/10). I read the contract by what I know of the facts of " the case. The literal translation is " If Larut tin-mine place, by other " men taken away by force, gone, its percentage of tin, by other men collected, " the borrowed capital and the percentage, it is agreed really 7 shares, the " Hock Seng " and the " Chin Yang Mow " cannot, towards the 10 districts " men, [names follow,] ask for." Whether the words " other people " mean " " other people" indefinitely, or the other people who may be in the contem- " plation of the parties, does not appear in this document. There is no " definite or indefinite article in Chinese, and it may mean either " the other " people " or "other people." The other contract B. [of April, 1874] has been " seen by me and approved of, it is correctly rendered into English. Referring " to agreement A, it is according to Chinese form and custom that this " agreement should be signed as it is with the names and the *chop*. It " would be quite sufficient if the *chop* alone was affixed, and if so would bind " the Kongsi."

The rest of Mr. Karl's evidence has been given in the preceding part of this judgment. After the making of these agreements the agents of the " Hock Seng," did, in fact, collect the 7/10th of the *chabût* from the *Ship Yip* miners, but realized only $16,500 or thereabouts in 2 years ; and early in 1876, the Governor of the Straits Settlements, on the petition of the miners in Larut generally, formally put an end to the levying of any *chabût*, and as a fact no *chabût* was ever again levied in Larut, in favour of the *Ship Yip* Kongsi—the order of the Governor being supported by the Government of Perak. Under these circumstances, the defendant contends that the *chabût* having been forcibly taken away from the *Ship Yip* Kongsi by the Government of Perak, his liability ceases, and this contention I think really to be well grounded.

It may be observed, that in the preceding statement, some confusion exists between the *Ship Yip* miners as a body, and the Kongsi of the *Ship Yip* miners. But the agreements plainly shew,

WOOD, J. 1886.

KOH SEANG THYE v. CHUNG AH QUEE.

that the contract of the payment of the 7/10th of the *chabût* to the Hock Seng Kongsi, was made by the defendant as one of the Kongsi of the *Ship Yip* miners—a contract confirmed by the *Ship Yip* miners themselves, as appears by the second agreement—but it is obvious that the contract sued on was between the plaintiff as representing the "Hock Seng" firm on the one part, and the Kongsi of the *Ship Yip* on the other. The *chabût* granted to the Kongsi of the *Ship Yip* was the subject of the contract, and the property of the Kongsi, and this they agree shall be paid over, as to 7/10th of it, to the "Hock Seng" firm, in consideration of advances to the *Ship Yip* miners.

In this suit the defendant is not sued as a *Ship Yip* miner for advances of money or goods made to him and others, *quâ* miners—but for the non-payment by the Kongsi of the *Ship Yips*, of the 7/10th of the *chabût*, or in the alternative, $10,000 per month. I can see no latent ambiguity in the terms of the contract, whether we take the translation given above, or the literal translation given by Mr. Karl—and Mr. Karl's knowledge of the circumstances which induce him to give a special meaning to the first agreement, are nothing to the purpose. The agreements are fairly to be read from their four corners respectively. The Chinese language very possibly does not distinguish between the "definite" and "indefinite" article, but no doubt, if the construction contended by Mr. Karl was the right one, the Chinese language is capable of expressing such meaning; and having failed to express it, the first agreement which is perfectly good sense and intelligible, must be construed as it stands. It is clear to me, that the defendant's Kongsi meant to limit their responsibility to their means of payment through the *chabût* which was payable to them; and *that* having failed by no fault of their own their liability fails also.

As matter of fact, I may repeat, that I have found that the plaintiff, through his firm "Hock Seng," has supplied to the *Ship Yip* miners in all, the sum of $60,000 in goods, money, and ammunition, over and above payments made on account, and which sum has not been received by him: and as further matter of fact, I have found that a petition of the abolition of the *chabût* was presented by a certain firm of "Hock Leong," creditors of the miners in Larut, and that they did so with the knowledge and sanction of the plaintiff. There was no doubt a general feeling, among all classes, that the mines would not bear such a *chabût* or tax, and I do not find that the defendant was at all instrumental in causing it to be taken away. The *chabût* was, as matter of fact, abolished by the Government of Perak, as necessary to the interest of the staple of the country—the Government of Perak taking over the mines of the country, granting them on leases to whom they pleased, and levying their own tax on tin, for the payment of the expenses of Government, and by a *vis major*, putting an end to its payment or collection, and thus relieving the defendant from liability.

As further matter of fact, I found that the defendant Ah Quee has been in Penang some time in the 4th and 5th Moons of 1876,

and in February, 1879, though in both cases he was in hiding, and keeping himself from public sight.

Upon all these facts, and upon others to be hereafter mentioned, several important questions of law arose, which were argued at great length.

It was contended for the defendant, this action was barred by length of time; to understand which point, it is necessary to review the law applicable to this case as it now appears before us.

This action was commenced on January 4th, 1884. The agreements were entered into as above stated on the 25th October, 1873, and the 28th April, 1874. The breach taking place on 1st February, 1876, on which day the *chabût* was stopped by order of the Government.

By Indian Act 14 of 1859, [the Indian *Limitation of Suits Act*] Section 1.

"No suit shall be maintained in any Court of Judicature within any part of the British territories in India in which the Act shall be in force, unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any law or regulation to the contrary notwithstanding, and the periods of limitation and the suits to which the same respectively shall be applicable, shall be the following, that is to say:—

Sub-section 16—[*which it is admitted is the Sub-section applicable to this case*]—To all suits for which no other limitation is hereby expressly provided, the period of six years from the time the cause of action arose."

By Section 13 of the same Act, it is enacted that—

"In computing any period of limitation prescribed by this Act, the time during which the defendant shall have been absent out of the British territories, in India, shall be excluded from such computation, unless service of a summons, to appear and answer in the suit, can during the absence of such defendant, be made in any mode prescribed by law."

Ordinance 5 of 1868 of the Straits Settlements, Section 29, is as follows:—

"The Court in the exercise of its Civil jurisdiction, may receive, try, and determine actions, suits and proceedings of every description by and against all persons and bodies corporate, in all cases where the persons who are defendant *are present in the Colony*—or the corporate body which is defendant, has its only or chief establishment or place of business in the Colony; and also in the following cases, although the defendant or any of the defendants is *not present*, or has not its establishment as aforesaid *in the Colony*, that is to say, if the property which is the subject of the proceeding, is situate in the Colony, or if the cause of action arose in the Colony, or if the subject of the proceeding otherwi se falls, on general principles of international law or comity, to be determined by the law of the Colony, and all actions, suits, and other proceedings against persons liable jointly as partners or co-contractors, may be commenced and carried on, notwithstanding the absence from the Settlement of some of the persons so jointly liable."

By Section 32 of the same Ordinance,

"If the defendant amenable *as aforesaid*, is not in the Colony, he may be served with a writ of summons stating the nature of the claim, and requiring him to appear within a certain time, after which, and on the Court

WOOD, J. 1886.

KOH SEANG THYE v. CHUNG AH QUEE.

being satisfied that the defendant was amenable *as aforesaid*, and that he was personally served with the writ of summons, or reasonable efforts made to serve him and that it had come to his knowledge, the Court may order the plaintiff to proceed as if the defendant had appeared, subject to such conditions as the Court may impose."

These sections were retained by Ordinance 5 of 1873, Section 103, and the schedule attached to that Ordinance.

By the Court's Ordinance, 1878 [Ordinance 3 of 1878] Sections 18 and 19, jurisdiction is given to the Supreme Court which it is admitted fully enables it to entertain the present suit.

In 1876 certain letters were written, *not* signed by the defendant, but as to which I find, as a fact, that they were written by his direction, signed "Teh Sin Chee," which is another name for the defendant, and stamped with a *chop*.

The following are the letters or such parts of them as are material in my judgment:—

9th July, 1876.

KOH THYE, ESQ.,

SIR,

Yours I have received and its contents read. *It is true that the kindness bestowed by you upon our Ng Fak Tong is to no small extent. Now, although they are ungrateful, I cannot be so bad as that.* The heaven being so high and the earth so deep, do you think there are no gods above us watching our deeds. It is not that I am unfaithful to my words and then keep silent and pay no attention to the matter: but *it is really on account of my being hard up that I cannot further my wish.* Under such circumstances, *although I wish to put the matter to right it is not within my power to do it*, and hereby I have caused you always uneasy, but I can't help it, *should in future I receive the sum from the Government I will not be ungrateful to you.* At present, I hope, you will excuse me leaving some more to be addressed to you on other date.

Yours truly,

TEH SIN CHEE—with seal.

15th September, 1876.

KOH THYE, ESQ.,

SIR,

In perusing your letter I quite understand your feelings. *With regard to the Ng Fak Tong question it is expressed in your letter that you wish me to manage [to pay] one-half of the amount, but should I have any means in my power I have nothing to complain of even [if] I have to manage [to pay] the whole.* Whenever I think of your kindness it has never been out of my memory day or night, For the kindness from other people I have never dared to forget it. Why should I forget your kindness which in comparison is high as the heaven and thick as the earth. As to which I am doing in business you know quite well. Depending on the kindness of Chin Chung Leong *Chop*, I get only enough to keep my body and soul together, it is not that I have great capital to lay out in business. Except this, I have no other way to earn my livelihood. With regard to the amount settled by the judgment of the Government, I have not received anything to help me should there have been any portion given to me it would never have escaped your knowledge At the present time it is not only impossible for you to ask me to manage to get $2,000, but even if I have to hunt up the whole of Larut for $2,000 it is impossible for me to do so. Is not that very difficult?.....

Yours truly,

TEH SIN CHEE—with seal.

20th October, 1876.

KOH SEANG THYE, ESQ.,

SIR,

I have received your letter about the former matters of the Ng Fak Tong and also about searches having been made by Mr. Logan in Court about the petition, etc., presented by the people of the said Ng Fak Tong. With regard to this matter, you are sure to know quite well that out of the various persons who formerly managed the business of the said Ng Fak Tong, there are one-half of whom some absconded and some died. Mr. Seah Hin Tueen and Mr. Tan Yiew Chee have hid themselves somewhere beforehand. Those who remain in Penang all entertain that idea, and throw all the debts on the shoulders of me. "This is plain enough. However men can be deceived, but the heaven cannot be "deceived. Whenever I think of your kindness day or night I cannot forget "it *should I have little better prospects in the future, I would never forget you.* "*I must then first of a'l repay you your kindness.* I hope you will make "yourself easy. If a petition is to be made to the Judge, it must be con- "sulted on with the people of the Ng Fak Tong. I have not finished all I "want to say, I write this to answer yours."

Yours truly,

TEH SIN CHEE—with seal.

Upon this question of the Statute of Limitations I find as follows :—

The cause of action arising in February, 1876, the plaintiff could sue by the Indian Act XIV of 1859, Section 1 Sub-section 16, within 6 years, but then the question arises, whether this Court had jurisdiction to entertain this suit, and I am of opinion, that under Section 29 of Ordinance 5 of 1868, which gives jurisdiction, although the defendant is not present in the Colony, if "the cause of action arises in the Colony," the Court has such jurisdiction. The cause of action did, in my judgment, arise in the Colony—plaintiff's firm being one established in this Colony, and the payment of 7/10th of the *chabût* or $10,000 per month, having to be made to the plaintiff's firm, the cause of action arose here.

I even doubt whether the first contract being a Penang contract, though confirmed by the second one in Larut, and the breach occurring as it did, the "subject of the proceeding" [to use words of Section 29 of Ordinance 5 of 1868] "does not fall on general principles of international law or comity, to be determined by the law of the Colony" and thus I think that the Statute commenced to run from the time of the breach on February 1st, 1876.

On this point of limitation several points were raised which I should wish to notice, as upon them some question may hereafter turn.

It was contended on the part of the defendant, that he having been here in 1876, though in hiding, the Statute of Limitations began to run and having so commenced to run, the action was barred from that date; and in aid of this contention the English cases, which fully support this view [*a*] and some cases decided in the Straits' Settlements [*b*] were cited; but I regret that I cannot follow that reasoning. On examination of the

[*a*.] *Gregory* v. *Hurrill*, 5 B. & C. 341.
[*b*.] *Gan Kim Swee*, v. *Lee Ah Kee*, foot note [*a*], ante p. 138.

WOOD, J. 1886.

KOH SEANG THYE v. CHUNG AH QUEE.

English cases and of the English Limitation Acts, it will be seen that the decisions in the English Courts are decisions on the construction of the English Acts and the rule that the Statute of Limitations commencing to run must be held to continue to run is no hard and fast rule of English law, but follows directly and logically from the language of the Limiation Acts. While in this Colony the Indian Act of Limitation supplies a different test and Section 13 of that Act, which provides, that, "In computing any period of limitation prescribed "by this Act, the time during which the defendant shall have "been absent out of the British territories in India, shall be "excluded from such computation, unless service of a summons "to appear and answer in the suit can, during the absence of "such defendant, be made in any mode prescribed by law" is, to my judgment, language so plain, that but for the bias which may exist in our minds in favor of what we know to be English law it could scarcely fail of being understood in any other than according to its plain and obvious meaning.

There can I should say be no doubt that the English law of limitation in establishing the rule that in the case of an absent defendant, the Statute of Limitations once commencing to run, must continue to do so, notwithstanding the concealed presence of a defendant for any time however short, is, as a point of abstract jurisprudence, hard, unjust, and in a common sense point of view, indefencible in principle, although strictly and logically flowing from the language of Section 19 of 4 Anne c. 16; and though no doubt excellent law in England I assume that the Indian Limitation Act was passed for the purpose of enacting a more reasonable and equitable law, but upon this exact point, I can find no direct case in any Court in India.

In the course of the argument it was contended with much shew of reason, that in construing Section 29 of Ordinance 5 of 1868, wherein it is stated that the Courts may have jurisdiction in cases in which the defendant is "present"—"present," must mean *bonâ fide* and actual presence in an open and undisguised manner, and that whereas in this case the defendant was in hiding and concealment, and no laches can be imputed to the plaintiff, such "presence" is not "presence" within the meaning of the section, as to which, I will only say, that I incline to think that the contention is sound.

It was further contended that "presence" means "presence" at the time of action brought, and not present at the time of, or after breach—inasmuch as the language of the Ordinance is, that the Court.....may "receive, try, and determine actions ..... "by and against all persons .....in all cases where the persons "who are defendants are present in the Colony," but to this contention I do not incline.

Being thus of opinion that the Statute of Limitations began to run on February 1st, 1876, it becomes a question whether the letters written by the defendant, are such an acknowledgment as take the case out of the Statute, and enable the plaintiff to sue in the present action.

On this point, my view of the law is as follows. The earlier English Statutes of Limitation of James and Anne are the law here, as modified by subsequent Acts and Ordinances of the Indian and Straits' Settlements Legislatures—but Lord TENTERDEN'S Act, 9 Geo. IV. c. 14, which provides for acknowledgments in writing is not in force here.

The Indian Act of Limitation 14 of 1859 does of course apply; but the only section having reference to acknowledgment so far as this case is concerned, and supplying the place of Lord TENTERDEN'S Act, is as follows:—

"*Section* 4.—[Revival of right to sue by admission in writing.] If, in "respect to any legacy or debt, the person who, but for the Law of Limitation "would be liable to pay the same, shall have admitted that such debt or legacy "or any part thereof, is due, by an acknowledgment in writing signed by him, "a new period of limitation, according to the nature of the original liability "shall be computed from the date of such admission: provided that if more than "one person be liable none of them shall become chargeable by reason only "of a written acknowledgment signed by another of them."

Thus, the English Statutes of Anne and James are law here, and the law which prevails in connection with them, and flows from them, except so far as they are modified by subsequent Acts and Ordinances—and although the Indian Act modifies the law of Limitation in some respects, in other respects, not modified by that Act, or by other Acts or Ordinances, the law of England is to prevail. And we have to consider, to what extent the law of acknowledgment now prevails in this Colony.

By that law—uncontrolled by Lord TENTERDEN'S Act which does not apply to this Colony—it is I think establised law, that when a defendant *without* writing signed by him, acknowledges his liability and promises to pay, the original obligation is revived, unless by the Indian Acts, such his acknowledgment so ceases to take effect. This in my judgment the Indian Act fails to do—for Section 4 above cited, refers only to the case of a "legacy or debt," and does not, like Lord TENTERDEN'S Act, extend to "actions on the case grounded on simple contract." Thus, the letters of 1876 written by direction of the defendant, are of consequence in shewing whether they do or do not amount to an acknowledgment of liability in respect to the contract sued on and contain a promise to pay.

Upon fair consideration of these letters, I am of opinion that they do acknowledge the defendant's liability in respect of the contract sued on, and his promise to pay, when of ability to do so.

This ability, I find him as a fact to have been possessed of at the time of the settlement of the claims of the Muntri of Larut by the Government in 1879, and within 6 years from the commencement of this suit on 4th January, 1884, and therefore, on the point of the Statute of Limitations, I find for the plaintiff.

I may however state that in the matter of the construction of these letters, I give my opinion with some diffidence.

The law of the matter is I think clear on the authority of the cases of *Tanner* v. *Smart*, 6 B. & C. 603, and *Hammond* v. *Smith*, 33 Beav. 452, but whether these letters do refer to the contract in question, and whether they contain a promise to pay, are points

WOOD, J. 1886.

KOH SEANG THYE v. CHUNG AH QUEE.

upon which different minds may come to different conclusions; but on the best consideration I can give to the matter, and relying on the expressions marked in italics in the copies of the letters given above, the conclusion I have arrived at is as above stated.

The reference to the Ng Fak Tong question is doubtless the question of the liability of the defendant as one of the *Ship Yip* Kongsi to pay the "Hock Seng" firm the money due upon the contract, for in the last letter of October, 1876, he says, "of the persons who formerly managed the business of the said Ng Fak Tong, some are dead, &c., and throw all the debts upon the shoulders of me." Without this, there might in the letters be some possible confusion between the defendant's liability as a miner, and his liability as a member of the Kongsi, but with respect to the remaining point of the engagement to pay, the expressions used can hardly as I think, admit of any other construction than that he promises to pay whenever he shall have the means to do so.

On many other points raised in argument on either side in this case, I give no decision inasmuch as I consider them irrelevant to my present judgment.

The plaintiff appealed against this judgment, but only in respect to the construction of the two agreements. The appeal was heard on the 18th June, 1886, before the Court of Appeal, consisting of *Ford*, C.J., *Wood* and *Sheriff*, J.J.

Van Someren, [*Clutton* with him] for appellant contended, that the words "other people" from the context, only included the faction or Kongsi, the *Si Yips*, who had been fighting against the defendant's faction or Kongsi, the *Ship Yips* being general words, they were controlled by the context, and meant only the people with whom they were disputing—*Nind* v. *Marshall*, 1 Bro. and B. 319; *Payler* v. *Homersham*, 4 M. & S. 423; that the first agreement was a war agreement, and the period it pointed out for its duration was till the restoration of peace. When peace was restored, all the relieving events provided for by the first agreement, came at an end. The second agreement shewed this—it shewed the parties intended that all disputes should be and had been settled. The words "after the conclusion of peace" in it, referred to the relieving events and declared them at an end. The second agreement was almost the whole of it, mere recital, until the words "we must abide"—those were the operative words of that agreement, and it did not provide for relieving events. If the relieving events in the first agreement, were intended to apply after the date of the second agreement, why not insert relieving event in the second—"we must abide by," had only reference to an abiding by paying the seven-tenths, or $10,000 per month. The second agreement shewed clearly, that the first had had its operation, and the time to which it pointed, the restoration of peace, had arrived. The language of the first agreement being vague and uncertain, it might be construed by the second. *Cooke* v. *Booth*, 2 Cowp. 819; *Forbes* v. *Watt*, 2 L. R. Sc. & Div. App. 214: *Fowler* v. *Alexander*, 3 Y. & J. 513, *per*

Alexander C. B. The act of the Straits Government, and the prohibiting the *chabût*, were not a "wrenching" or a taking "by force" of the mines within the meaning of the agreements, and the prohibition was not as "falling into other hands" of the mines. But even if this construction was wrong, there was nothing to prevent the alternative provision of payment of $10,000 per month taking effect.

Ross, for respondent was stopped by the Court.

Ford, C.J., I am of opinion there is no ambiguity in either agreement, and that the second does not cause any ambiguity in the first. There has been an attempt made to shew the first to be ambiguous by the evidence of Mr. Karl, but his evidence does not go far enough for the plaintiff. I will grant that there is no definite nor indefinite article in the Chinese language, but that is immaterial, as the parties might, even in Chinese, have expressed themselves in other words if they meant something else than what they have said. Mr. Karl admits, that the expression they have used—"other people"—might mean the opposite party, or other people generally. This being so, why should we not give the words their obvious and natural meaning? From the circumstances they where placed in at the time nothing would be more natural than that they should state the uncertain condition things were in, and provide against *any* emergency. It would seem that they meant to provide for *all* possible contingencies, and the language they have used, expresses that intention. Their language is, "should the Larut tin mines fall into other hands than in "those of the aforesaid 10 districts, or should the said mines be "wrenched from the hands of the aforesaid 10 districts people, so "that they become unable to draw the aforesaid percentage neither "Koh Seang Thye of the Hock Seng firm nor Khoo Tian Tek of "the Chin Yang Mow firm, can press Tan Yet Hoon . . . . . Teh "Keng Quee [defendant] . . . . for the re-payment of the capital and the payment of the aforesaid "seven-tenths." It seems to me, that the events provided against by that clause, have occurred: the Government of Perak have taken the mines, [whether they have re-allotted them or not is immaterial] and have, by proclamation, prohibited the levying of the *chabût* or percentage. The mines have come under the power of other hands, and their proclamation, is as clear a *vis major* as anything could be. The parties by the first agreement in my opinion have provided against just such an event and the second agreement in no way alters their case. The alternative clause of payment of $10,000 per month, refers only to voluntary change of mind on the part of the defendant and not a change brought about under constraint and by matters over which he had no control. The judgment of the Court below ought, in my opinion, to be affirmed.

Wood, J. I have already expressed myself at length on this point, and see no reason to alter the conclusion I then came to.

Sheriff, J. I concur. The appeal seemed to be from the very first, a forlorne hope; and I am only surprised that learned Counsel could have talked sense for three hours on such a point.

Judgment affirmed. Appeal dismissed with costs.

REGINA *v.* WONG AH KUM.

PENANG.

WOOD, J.
1886.

March 18.

A Warrant of Commitment merely reciting the fact of a conviction is not a "certificate" or a "judicial document" within the meaning of the Orders in Council of 26th June, 1879, and 31st December, 1883, relating to Extradition.

The "British Resident" of Perak, is not a "Minister of State" within the aforesaid orders, and his official seal is no authentication of a document intended to be used under these orders.

This was a Rule *Nisi* calling on the Crown and the Keeper of the Colonial Gaol, Penang, to shew cause why a writ of *Habeas Corpus* should not issue for the discharge of the prisoner from custody. It appeared from the affidavits that the prisoner had been arrested on the requisition of the Perak Government under Her Majesty's Orders in Council, dated 26th June, 1879, and 31st December 1883, with a view to his extradition on a charge of escaping from the Larut Gaol where he was undergoing a sentence of fourteen years' rigorous imprisonment for the murder of a fellow prisoner. The Magistrate [here] by whom the case was heard, had considered the evidence adduced in support of the charge satisfactory, and committed the prisoner to Prison in terms with the Order in Council pending the arrival of the Governor's Warrant for his rendition to the Perak authorities.

Clause 1 of the Order in Council of 31st December, 1883, declared a "fugitive criminal" to include "any person convicted of any crime committed either before or after the date of the principal order," [*i.e.*, the Order of 26th June, 1879,] "which if committed in England or within English jurisdiction would be one of the crimes described in the schedule to the principal Order."

Clause 2 of the same Order in Council [1883] declares that "foreign certificates of, or judicial documents stating the fact of a conviction may, *if duly authenticated*, be received in evidence in proceedings under the principal order as amended by this order, and such certificates or judicial documents shall be deemed to be duly authenticated for the purpose of the principal order as amended by this order, if they purport to be *certified by a Judge, Magistrate, or Officer of the Foreign State* where the conviction took place, *and*, if they are authenticated by the oath of some witness *or* by being sealed with the Official seal of *some Minister* of State."

The document put in evidence before the Magistrate here, to prove the prisoner's conviction in Perak for the murder aforesaid, was a Warrant of Commitment signed by the committing Magistrate in Perak, and sealed with a seal bearing an impress of the Royal Arms and surrounded by the words "British Resident, Perak." The document was not authenticated by the oath of a witness, nor by the seal of any other officer.

D. *Logan*, [*Solicitor-General*] for the Crown and Gaoler shewed cause, contending that the warrant was "duly authenticated," as it was signed by a Magistrate, and was sealed with the Official seal of the "British Resident," who he contended was a "Minister" of the State of Perak.

WOOD, J. 1886.

REGINA v. WONG AH KUM.

G. H. S. *Gottlieb* supported the Rule and cited *Regina* v. *Sirdar Khan*, 2 Kyshe, [*Hab. Cor. Cases*] p. 43.

Wood, J. I must hold this warrant is not sufficient proof of the conviction. The warrant here is but an incidental document following upon the conviction and in terms reciting it; but it is not a *certificate* of a conviction, and I doubt if it is a judicial document at all. It is what it purports to be, viz., a Warrant of Commitment and no more. By the laws of the Straits' Settlements, the best evidence of a conviction is the conviction—[the formal record] itself—unless the rigour of the proof is softened by the terms of the Order in Council. By Clause 2 of that Order, the conviction may be proved by a certificate of conviction or by a judicial document which must however be certified by a Judge, Magistrate, or Officer *and* authenticated by oral testimony on oath or the seal of a foreign "Minister of State." As before stated I doubt if the document here, is a "judicial document." I understand a judicial document to be a document in which the decision of the Court is set forth as a fact and not recited incidentally. The document must also under the Order in Council be certified, which certainly has not been done here, and it must be authenticated by the oath of a witness [which has not been done here] or the seal of a Minister of State. I cannot recognize the seal of the "British Resident" as the seal of a "Minister of State" required by the Order in Council. There was therefore no legal evidence before the Magistrate here and the prisoner should not have been remanded to custody. The Rule will be absolute and the *Habeas Corpus* issue forthwith for the prisoner's discharge.

Prisoner discharged.

HAJEE SHAIK ABDUL CADER *v.* AISHA & ORS. *In re* KYNNERSLEY.

PENANG.

WOOD, J. 1886.

April 19.

A Justice of the Peace sitting in a preliminary inquiry has [notwithstanding Ordinance 3 of 1878, Section 1, which makes his sitting a "Court"] a discretion, whether such enquiry should be had in private or public: such a discretion however should be exercised only with a view to the interests of the public and not in reference to the religious scruples of any class of the Community. [*a.*]

Query. Have Advocates and Solicitors under the combined operation of Sections 1, 51, and 55, of the Courts Ordinance 3 of 1878, a *right* to appear before Justices?

This was a Rule obtained by *Ross* on 9th April last, calling on C. W. S. Kynnersley, Esq., First Magistrate, and a Justice of the Peace, Penang, and Aisha otherwise called Putch, Sittee Fatimah and Shaik Ally the above defendants to shew cause why a *Mandamus* should not issue, commanding the said C. W. S. Kynnersley to hold the preliminary enquiry [in the case of Hajee Shaik Abdul Cader, otherwise called Bengal Kadersah against the said Aisha,

[*a.*] As regards *Magistrates*, see *Regina* v. *Dorasamy Pillay*, 26th March, 1888, *infra*.

WOOD, J. 1886.

HAJEE SHAIK ABDUL CADER v. AISHA & ORS.

In re KYNNERSLEY

otherwise called Puteh, Sittee Fatimah and Shaik Ally on a charge of cheating under Section 417 of the Penal Code] previous to committal to the Assizes in open Court, or why a Writ of Prohibition should not issue, prohibiting the said C. W. S. Kynnersley holding the said preliminary enquiry *in camerâ*, or why such further or other order should not be made as to this Court should seem meet. From the affidavit of the Solicitor for the prosecutor [on which the said Rule was granted] it appeared that the case was called on for hearing at the Police Court before the said Magistrate, sitting as a Justice of the Peace, by way of preliminary enquiry with a view to a committal of the accused to the Assizes; that before they were arraigned, their Counsel applied that the enquiry, might be had in Chambers, on the ground that the first two prisoners were respectable Mahomedan married women, and it would be a disgrace to them to appear in public; that the application was opposed by Counsel for the prosecutor on the ground that a Justice of the Peace had no jurisdiction, even in a preliminary enquiry, to hold such an enquiry in Chambers, but was bound to have it in open Court,—that the said Justice of the Peace considered he had a discretion in the matter and thereupon directed the enquiry to be had in Chambers, but on the application of Counsel for the prosecutor, he adjourned the enquiry for a fortnight to enable him to apply to this Court for a *Mandamus* or prohibition, and for an authoritative decision on the point. This affidavit was not contradicted; but the Solicitor for the accused made an affidavit from which it appeared that the said Justice in ordering the enquiry to be had in Chambers, stated his reasons to be—[in addition to the fact that the accused were respectable Mahomedan married women, and would be disgraced by appearing in public]—that from the information leading to the warrant he thought that it might possibly turn out that the prosecutor had only a civil case against the accused. The Magistrate's own notes on the subject, were as follows. "Mr. Clutton "applies, that this being a preliminary investigation before a "Justice of the Peace it may be heard in Chambers, the defend- "ants being Mahomedan women of position. Mr. Ross opposes "this, and denies that a Justice of the Peace here, has the power "to hear a preliminary investigation, except in open Court. The "Bench decides that this is a case which should be heard *in camerâ*, "and is of opinion that it is within the discretion of the Justice of "the Peace. Mr. Ross applies for a postponement to apply to the "Court for a *Mandamus*—Case postponed to 22nd."

The Rule now came on for argument.

Clutton shewed cause for the Magistrate and the accused. He contended that as this was only a preliminary enquiry before a Justice of the Peace—and not an exercise of summary jurisdiction as a Magistrate—the Justice had a discretion as to whether the enquiry should be in public or not. That the Justice had, in the present case, exercised that discretion, and the Court would not interfere with it—he referred to *Cox* v. *Coleridge*, 1 B. & C. 37; 5 *Burns' Justice of the Peace*, 395; 2 *Russell on Crimes*, s. 436; *Collier*

v. *Hicks*, 2 B. & Ad. 663; *Daubney* v. *Cooper*, 10 B. & C. 237; and *Rex* v. *Staffordshire Justices*, 1 Chit 217. He also submitted, that the reasons given in *Maxwell on Magistrates*, pp. 84–85, did not exclude other grounds on which the Justice might exercise his discretion.

Ross, [*Van Someren* with him] in support of the Rule contended, that under the Courts Ordinance 3 of 1878, Section 1, the sittings of Justices was a "Court," as much as any other Court—and by Section 51 all Advocates and Solicitors had a right to appear in all Courts in the Colony—they therefore had a right to appear before Justices—this therefore did away with the reasoning in *Cox* v. *Coleridge* and the cases cited on the other side. Being a Court it could only sit in public, *Daubney* v. *Cooper*, suprà—unless some Statute or Act or Ordinance enabled it to sit in private. The Judicial Committee of the Privy Council was a Court with such powers—the Supreme Court, could, under Section 242 of Ordinance 5 of 1878 in Chambers make an order which it could have made in Court—but the latter was the only instance in this Colony, where the power was given to deal with cases in private. They also referred to Sections 55, 56, 57 & 58 of Ordinance 3 of 1878, and to 11 & 12 Vict. c. 42, Section 19; *Ibid.* c. 43, Section 12 [which they submitted did not apply to this Colony] and to *Cox* v. *Coleridge* [suprà]; *Collier* v. *Hicks* [suprà], *Reg* v. *Staffordshire Justices* [suprà] per *Bayley*, J.; 1 *Oke's Mag. Synopsis*, 165–66; *Paley on Convictions* 98 [r.]; *Cowdell* v. *Neale*, 26 L. J. C. P. [N. S.] 37; *Lewis* v. *Levy*, 27 L. J. Q. B. [N. S.] 282; *Usill* v. *Hales*, 3 L. R. C. P. Div. 319, 326; *Rex* v. *Justices of Wilts*, 8 B. & C. 380; and *Rex* v. *Justices of Essex*, 2 Chit. 385. They also contended that even if there was a discretion in the Justice of the Peace it would only be exercised where proceeding in public would tend to defeat justice, and in fact the exercise of the discretion was limited to the kind of cases mentioned in *Maxwell on Magistrates*, pp. 23, 79–86, 154. Here the discretion had been exercised on grounds which did not come within those cases, and were no grounds justifying such an exercise of discretion.

Wood, J. I think the Rule must be discharged. I do not intend to decide whether Advocates and Solicitors have or have not the right to appear before Justices of the Peace; but I hold, that notwithstanding the Courts Ordinance cited, a Justice of the Peace has, by the Common and Statute Law as applicable to this Colony, a discretion to hold his preliminary enquiry, in secret, if in his judgment the interests of the public require it. I also decline limiting his discretion; but I might intimate that in my judgment such a discretion ought to be exercised on the grounds of the interest of the public, and not with reference to the religious scruples of any class of the community. In the present case, I am not prepared to say the Justice has exercised—on the materials before him—an improper discretion. The Rule must be discharged with costs.

Rule discharged with costs.

LANGAN & ORS. *v.* LEE CHENG KEAT & ORS.

PENANG.

WOOD, J.
1886.

May 4.

In a suit relating to title to land where the equities are otherwise equal, the Court considers the party who has possession of the Title Deeds as having the better equity. *Lloyds Banking Co.* v. *Jones*, 29 L. R. Ch. Div. 221, followed.

This was a suit to have certain conveyances of lands situate at Love Lane in Penang cancelled, and to have the lands declared to belong to the plaintiffs. One Casimero D'Oliveiro by Indenture tripartite made on 28th day of September, 1839, in consideration of his intended marriage to one Rose Woodford, granted to John Arthur Palmer and John Ross and the survivor of them and the executors, administrators and assigns of such survivor, the lands above referred to upon trust to permit the said Casimero D'Oliveiro and Rose Woodford during their joint lives to live in the dwelling-house upon the said land, and to receive and enjoy the rents and profits of the land, and upon the decease of the said Rose Woodford in the event of their having any child or children of the said intended marriage living at the decease of the said Rose Woodford, upon the further trust for the benefit of such child or children in such manner and subject to such directions as the said Casimero D'Oliveiro by his last Will and Testament might direct and appoint, and in default of such direction or appointment to the children equally. The marriage was in due course solemnized and several children were born to the said Casimero D'Oliveiro, of whom the plaintiffs were some. Casimero D'Oliveiro died some years before this suit, intestate—and subsequently thereto the trustees also, of whom John Arthur Palmer was the survivor. Some years thereafter the said Rose D'Oliveiro married one Captain Stewart who died not long after. The marriage settlement aforesaid had never been registered, and the Title Deeds were in the name of the said Casimero D'Oliveiro and made no reference to the settlement in any way On 9th January, 1882, the said Rose Stewart as the administratrix of the said Casimero D'Oliveiro sold and conveyed the lands to the defendant Lee Cheng Keat for $4,050 and delivered to him the Title Deeds thereof, but did not refer to the aforesaid settlement. In 1884, Rose Stewart died intestate and among her papers were found by her children the plaintiffs, the settlement aforesaid. This was the first they ever knew of its existence. The defendants were then in possession of the lands and the Title Deeds thereof, and were *bonâ fide* purchasers for value, without notice. The plaintiffs on discovering the settlement commenced this suit. There was no evidence to shew how the said Rose Stewart became possessed of the settlement or Title Deeds.

Van Someren, [E. W. *Presgrave* with him] for plaintiffs contended, that as the plaintiffs claimed equitable interests under the settlement, and the defendants were *bonâ fide* purchasers for value, without notice, without however the legal estate which was still in the heir of the last surviving trustee, this was a case of equal equities,—but as the plaintiffs came in earlier in point of time they were entitled to the lands in preference to the defend-

ants—*qui prior est tempore potior est jure.* They referred to *Jones* v. *Powles*, 3 M. & K. 581 and *Philips* v. *Philips*, 4 D. G. F. &. J. 208 [*a.*]

Ross, for the defendants admitted that both the plaintiffs and defendants had only equitable interests, but he contended that the defendants having possession of the Title Deeds of the land, they had the better equity and relied on *Lloyds Banking Co.* v. *Jones*, 29 L. R. Ch. Div. 221.

Van Someren, in reply contended, that *Lloyds Banking Co.* v. *Jones* was distinguishable as there. there had been gross negligence on the part of the trustees and in fact, the charge in favour of the Bank was *already existing* when the settlement was made, and always had priority to it. Here there was nothing to shew negligence on the part of the trustees who had died long before, and the facts were consistent with Rose Stewart having come by the Title Deeds innocently and naturally as the widow of Casimero D'Oliveiro, the children then being all infants. He contended also that mere possession of the Title Deeds was no evidence of negligence on the part of the trustees and did not give a better equity. *Allen* v. *Knight*, 15 Hare 272, on app. 11 Jur. 527; *Robinson on Priorities*, pp. 61, 68–71.

Wood, J. said no doubt the facts in *Lloyds Banking Co.* v. *Jones*, were different from those here and was a stronger case against the *cestui que trust* than here, but he thought it supplied a *ratio decidendi* for deciding this case. The remarks there of *Pearson*, J. applied to this case, and were as follows:—

"The question is whether under the circumstances the Bank are entitled, although they are only equitable mortgagees, to priority over the legal estate vested in the trustee of the settlement. It is said that the infant defendant has a better equity than the trustee has. I demur to that proposition entirely. I think I should be introducing a most fatal doctrine if I were to say that when the legal estate in property is vested in a trustee under a marriage settlement the simple fact that his *cestuis que trustent* are ignorant of what he is doing, gives them a prior equity over any person who has dealings with him, and who is equally ignorant of the existence of the settlement and of the rights of the *cestui que trustent*. The question is, there being two equities and one of them clothed with the legal estate, which of them is entitled to priority. The defendant's Counsel have argued that the equity of the *cestui que trust* is prior in time to that of the Bank, because they say the equity of the *cestui que trust* arose on the 25th of May or at all events on the 29th of May, 1877, whereas the equity of the Bank arising under the second memorandum did not come into *esse* until the 26th of January, 1878, and if the equities are equal then *qui prior est tempore potior est jure.* But the first question I have to determine is whether the equities are equal ..... I think upon the authorities which have been cited and which are so well-known that it would be pedantry for me to go over them again, the doctrine of this Court has always been that where there are equities which are otherwise equal, the possession of the deeds gives priority to the person who has got them, and under the circumstances I must decide that the Banking Company, although

[*a.*] Several other points were also argued, but are omitted as no decision was given on them.

WOOD, J. 1886.

LANGAN & ORS. v. LEE CHENG KEAT & ORS.

only equitable mortgagees are entitled to priority over the defendants, for the amount due to them, on their security, at the time when they received notice of the settlement."

In the present case the settlement and Title Deeds being in the hands of Rose Stewart with whom they should never have been, this was evidence of negligence on the part of the trustees or those representing the plaintiffs, and the plaintiffs as *cestui que trusts* could not have any better right than them—the defendants now having those Title Deeds had the better equity. The suit must therefore be dismissed with costs. [*a.*]

Judgment for defendants with costs.

REGINA *v.* TAN SIM HO.

PENANG.

WOOD, J. 1886.

May 10.

A person cannot be punished under Section 174 of the Penal Code for disobeying a Subpœna, when the time between the service of the Subpœna and the time he is therein directed to appear, before the Magistrate, is not reasonably sufficient to enable him to appear.

Any statement made at the time by the person serving the Subpœna to the person served, that the date mentioned in the Subpœna had been extended to enable him to appear, cannot alter the directions of the Subpœna, or legally bind the person served to appear at such extended date.

Query. Can the public servant whose own order has been disobeyed, hear a charge against the accused under Section 174 for disobedience of that order, and punish him for it.

Query. Can a person who is under Subpœna from both the Supreme Court and the Police Court and intending to obey the former, be punished for disobedience to the latter.

The appellant had been convicted by A. T. Dew, Esquire, Magistrate of Police in this Colony, but stationed at Pangkor. Pangkor was then a dependency of Penang, and an enquiry was pending there before the said Magistrate in reference to a gang robbery. The appellant was required as a witness for the Crown, but was resident in Penang, and was unwilling to go over to Pangkor and give evidence. The said Magistrate thereupon on 11th February, 1886, issued a subpœna to the appellant to appear at Pangkor on the 15th. The appellant not having appeared at Pangkor at any time thereafter, the said Magistrate issued a warrant for the appellant's arrest, and then himself came over to Penang, and then sat at the Police Court in Penang to hear the charge against the appellant of disobedience to the aforesaid Subpœna under Section 174 of the Penal Code and having so done, convicted the appellant and sentenced him to pay a fine of $100. The evidence taken by the Magistrate at such hearing was as follows:—

"*Inspector J. Symes*, sworn, states: On 12th February, I was sent from Pangkor with a subpœna to serve on defendant. I served the subpœna on 15th with a detective from Mr. Holmyard. Defendant said he could not go,

[*a.*] The plaintiffs set the case down as on appeal, but did not prosecute the appeal.

I took him before Mr. Warne and he said he could not go. Also before Mr. Riccard and he said the same. Two days afterwards I went again and asked him to go with me, but he refused. I told him I should take a warrant from Pangkor, but he refused again. I returned to Pangkor and reported it to you, and you issued a warrant.

Cross-examined by defendant [now appellant.] *Question.*—On what date did you serve the subpœna? *Answer.*—Morning of the 15th. *Question.*—When you served the subpœna, did not I ask you if the trial was on 15th? *Answer.*—No; I said the case would be on my return.—*Question.*—Was not the subpœna for the 15th? *Answer.*—Yes, but I said the case could not be tried till I went back. *Question.*—Did I not tell you before Mr. Riccard I had a subpœna to attend at the Supreme Court? *Answer.*—Yes, but Mr. Riccard said there was plenty of time and he also told you, you would have to put up with the consequences if you did not go."

There was no further evidence adduced on either side, and on it the said Magistrate convicted and fined the appellant as aforesaid. From this conviction the appellant now appealed.

Van Someren, for appellant, contended 1, that the appellant was not legally bound within Section 174 to attend unless his expenses for going to Pangkor were first paid him or at least tendered; 2, that he had to obey the subpœna of the Supreme Court and could not attend at the Police Court at Pangkor, and the case did not fall within Section 174 which related only to a wilful disobedience. *Mayne on P. C.* 143; *Re* Sreenath Ghose, 10 W. R. C. R. 33; 3, that the Magistrate was judge in his own cause as it was his order which had been disobeyed, and the whole of his conduct and proceedings shewed this, as well as his *animus* against the accused. *Mayne*, 144; *Queen* v. *Chandra Sekhar Roy*, 5 Ben. L. R. 100; *Queen* v. *Herm Lal Das*, 8 *ibid.* 422; *Starling on P. C.* 147; *Currie P. C.* 116; 4, the subpœna being served on the 15th to appear at Pangkor on the same day, which was a physical impossibility, the appellant could not be said to have disobeyed it: the statement of the Inspector serving it, that the trial of the case in which he was required would not be heard till a later indefinite date, could not possibly alter the direction of the subpœna or extend its terms as he had no power to do so, nor could the appellant be said to have been "legally bound" by such statement. *Mayne*, 143; *Anonymous*, 6 Mad. H. C. [appx.] 10; *ibid.* 29; *O'Kinealy on P. C.* 101; *Queen* v. *Ungun Lall*, N. W. P. Selected Cases 21; *Re* Sreenath Ghose, suprá; *Regina* v. *Ganu bin Patia Selar*, Bom. H. C. Cr. 38.

D. *Logan*, [*Solicitor-General*] for the Crown, admitted he could not support the conviction.

Wood, J. said that it was not necessary for the Court to express an opinion on all the points which had been taken on behalf of the appellant. It was sufficient to dispose of this case for the Court to say that a person cannot be punished under Section 174 of the Penal Code unless he be "legally bound" to obey the order issued and he wilfully disobeyed it. It was impossible to say in the present case that the appellant wilfully disobeyed the subpœna as he was served with it on the morning of the very day he was required by it to attend at Pangkor—a reasonable time must be allowed between the time of the service of the subpœna and the day the person served was required to

WOOD, J. 1886.

REGINA v. TAN SIM HO.

attend, and what was a reasonable time depended on the distance and the circumstances of the case; here no reasonable time had intervened and the subpœna was practically impossible to be obeyed. The statement of the Inspector serving the subpœna extending the time for the appellant's attendance could not affect the case, as he had no power to extend the time mentioned in the order or in any way to alter its terms—the appellant was not therefore "legally bound" to obey what the Inspector said, and the appellant was entitled to have the conviction quashed, and the fine re-paid to him.

Conviction quashed. Fine remitted.

CAUDERSAH & CO. *v.* MAHOMED EUSOFF & CO.

PENANG.

WOOD, J. 1886.

May 11.

A contract by which two firms agree to divide a work between them, so that the one should not interfere or compete with the other, is not void as being in restraint of trade.

A contract between A. & B. by which A. agrees to indemnify B. for all losses occasioned to him by the interference of a third party over whom he [A.] has no control—is not void, as being impossible of performance by A. by reason of such third party persisting in interfering with B.

Taylor v. *Caldwell*, 32 L. J. Q. B. [N. S.] 164, distinguished.

This was a Rule obtained by *Anthony* on 20th April last, calling on Walter Egerton, Esquire, Commissioner of the Court of Requests, Penang, and the defendants abovenamed under Section 10 of the Appeals Ordinance 12 of 1879, to bring up the proceedings in this case in the Court below, and to shew cause why the same should not be reversed, or such other order made so as to secure substantial justice between the parties. The action was brought in the Court of Requests by the plaintiffs to recover $50 from the defendants being the amount of profit lost by the plaintiffs, by the interference of one Hashim, in taking up the duties of Dubash to the British Barque "Gin Kolga" which came into Penang Harbour. This claim was based in an agreement granted by the partners of the defendants' firm, to the partners of the plaintiffs' firm, and was as follows:—

"On the 13th day of June, 1885, this agreement was made and executed by Dubash Mahomed Eusoff of Penang, Peria Patchee and Crany May of the Company called Mahomed Eusoff and Company in favour of Mydin, Kuppay, Mahomed Gunny, Madaru, Matharu and Cassim the Crany, of the Company called Caudersah and Company as follows:—The work to be performed by Caudersah & Co. is as follows:

They shall do all the work in ships consigned to C. S. Tennent or Padday & Co., in ships consigned to the Telegraph Co., in ships consigned to Vappoo Noordeen, Nacoda Merican and others of the said firm.

In ships consigned to Jebsen's Godowns, they shall do all the Serangs' work. The work in all other vessels such as sailing ships and steamers excepted the British India, the Netherlands India, and the Dutch Mails consigned to Liebert & Co.'s Godowns, will be taken in turns by the said Caudersah & Co. and Mahomed Eusoff & Co. The said Caudersah & Company will also do the work in the yachts consigned to any Agency, and with the exception of Men-of-war consigned to the Dutch Consul, all other vessels whether consigned to Chinese Agencies or not, together with all the English

Men-of-war, shall be worked by the said Caudersah and Company from this day and until the agreement is made. In case Mahomed Eusoff's men compete in the work, they will give a damage of $500 to the said Caudersah & Co. and if Hashim should compete, the said Mahomed Eusoff & Company will forfeit the profit and loss sustained thereby.

In this wise we, the said Mahomed Eusoff & Co., have made and executed this agreement, in favour of the said Caudersah & Co.

[*Signed*] MAHOMED EUSOFF.
„ S. M. K. CUPPAY PITCHAY.
„ CRANY MAY."

At the same time as the defendants gave the plaintiffs this agreement, the plaintiffs [except their senior partner, Caudersah] granted the defendants an agreement, which was as follows:—

"On the 13th day of June, 1885, this agreement was made and executed by the Company called Dubash Caudersah, Mydin, Cuppay, Mahomed Gunny, Madaru, Matharu and Cassim the Crany of the said Company and delivered it to the Company called Mahomed Eusoff, Peria Patchee and May the Crany of the said Company as follows. The said Mahomed Eusoff and Company will do the work required of them in ships consigned to Katz Brothers, in ships consigned to Kustermann & Co., in ships consigned to Messrs. Brown & Co., and only Dubash's work in ships consigned to Jebsen & Co. They will also do work in the British and Netherlands India and the Dutch Mails consigned to Liebert & Co., but the work of the sailing vessels and steamers consigned to the said Liebert & Co., will be taken in turn by the said Mahomed Eusoff & Company and Caudersah & Co.

Of the Men-of-war anchoring in this Port, excepting the English Men-of-war, the work in the others shall be taken by Mahomed Eusoff & Co. The said Mahomed Eusoff & Co. shall do work as described above from this day up to the day the agreement is executed. If the said Caudersah and Company makes a competition in the work done by the said Mahomed Eusoff & Co., the former shall be liable to pay a sum of $500 as damages to the latter. Moreover, if the said Caudersah after his return from the Coast makes a competition in the work he and his Company or Partners shall be liable to forfeit all the profit and loss sustained by such competition, by the said Mahomed Eusoff & Co.

Thus, this agreement was made and executed by the said Caudersah & Co., and delivered to the said Mahomed Eusoff & Co.

[*Signed*] MYDIN.
„ CUPPAY.
„ MAHOMED GUNNY.
„ M. SHAIK MADARU.
„ NUTHERSAH.
„ CASSIM."

Before, and at the date, of the aforesaid agreements, the said Hashim [who was a brother of Mahomed Eusoff the senior partner in the defendants' firm] and the said Mahomed Eusoff were not on good terms, and in fact were engaged in litigation between themselves as to a previous partnership-business which had been dissolved. Caudersah the senior partner in the plaintiffs' firm was, at the date of these agreements, in the Madras Presidency. It was supposed by the parties, that as neither the said Hashim nor Caudersah signed either of the aforesaid agreements, it was possible they, or either of them might not consider themselves or himself bound by them, and thus disturb the equal distribu-

WOOD, J. 1886. — CAUDERSAH & Co. v. MAHOMED EUSOFF & Co.

tion of Dubash and Stevedore's work which the defendants and the other partners in the plaintiffs' firm had decided on. It was hoped however, as the said Hashim was a brother of the defendant Mahomed Eusoff, that he would soon be reconciled to him and unite with him in business again, and that as the plaintiff Caudersah was then shortly expected to return to this Settlement, that he would also agree to the arrangements made. With this view, the aforesaid agreements were drawn up as a temporary manner.—until another agreement would be made and signed by the said Hashim and Caudersah as well—and in the meanwhile provided for temporary protection and indemnity by the one Company to the other, from any loss occasioned by the acts of these respective men, Hashim and Caudersah. The hopes entertained of a reconciliation by the said Hashim was never realized, and as a fact, no further agreement was ever made. On 3rd January, 1886, while the said Hashim was still unreconciled to the said Mahomed Eusoff, the British Barque "Gin Kolga" arrived in Penang, consigned to a Chinese firm here named Eng Ban Hong. The plaintiffs' firm sent their Dubashes on board to solicit business; the Captain of the Barque however being informed by his Chief Mate that Hashim had supplied the ship with provisions, &c., on a previous occasion when she was in Penang, and finding also that Hashim's charges were somewhat lower than the plaintiffs' firm—he, [the Captain] decided to employ Hashim. Hashim was not on board at the time, but came on board not long after, while the Captain was ashore, and at the request of the Chief Mate, waited for the Captain's return. On the Captain's return Hashim met him, and was finally engaged by him, and thereafter supplied the ship with all necessaries during her stay in port. By this means, Hashim made a profit of some $60. Upon these facts, the Commissioner gave judgment for the defendants, with costs, holding, that while as a fact there had been a breach of the agreement sued on, yet in point of law, the agreement was illegal and void, on the grounds of impossibility of its performance, and that it subjected the defendants to an unlimited number of actions for breaches of it, which it was impossible for them to prevent. To obtain the reversal of this judgment on the point of law, the present Rule was obtained by the plaintiffs.

G. S. H. *Gottlieb* for the defendants and Commissioner, shewed cause, he contended that the agreement was void on grounds of public policy, as being in restraint of trade and competition. *Hutton* v. *Parker*, 7 Dowl. 739—and also as being impossible of performance, inasmuch as the defendants had no control over Hashim who was bent on acting as he pleased, *Leake on Contracts*, pp. 359–362; *Taylor* v. *Caldwell*, 32. L. J. Q. B. [N. S.] 164: and as subjecting the defendants to an unlimited number of actions for its breach by Hashim.

Anthony, relied on the difference between a contract the subject-matter of which had come to an end, and so the contract rendered impossible of performance as in *Taylor* v. *Caldwell*—and a contract which became impossible of performance by some act, power, or thing which did not touch the subject-matter of it.

In the latter case, however foolish the contract was, the impossibility of performance was no answer to an action for its breach, and he relied on *Jones* v. *St. John's College*, 6. L. R. Q. B. 115; *Pollock on Contracts*, 371–2, 376–77; *Chitty on Contracts*. 46–47.

Wood, J. said the distinction contended for on behalf of the plaintiffs was a well-known one, and the authorities relied on clearly proved it—this case was quite distinguishable from *Taylor* v. *Caldwell* and was one which fell within that class, where performance was rendered impossible by a subsequent event, which might have been provided against, and did not go to put an end to the subject of the contract; and neither impossibility, nor the being subject to numerous actions for each independant breach, was a defence. The agreements were perfectly fair and mutual, and were not in restraint of trade and competition. *Jones* v. *North*, 19. L. R. Eq. 426 [*a*]—the judgment of the Court below must be reversed, and that with costs.

Judgment reversed with costs.

CHINA GUNNY *v.* MUNIANDEE.

The Court has power under Section 25 of the Appeals Ordinance 12 of 1879, to reduce a sentence passed by a Magistrate.

This was an appeal from the decision of C. W. S. Kynnersley, Esquire, First Magistrate, Penang. The appellant [the prisoner] had in another case been bail for the respondent's brother, who was accused of theft—the accused had absconded, and the Bail Bond had been estreated, and the appellant obliged to pay $50 the amount of the bail. Having so done he went in search of the respondent and having met him accused him of having got away his brother and demanded the $50 from him. This led to words, whereupon the appellant struck the respondent a blow on the nose which caused him to fall and then kicked him. The appellant, before the Magistrate, admitted he had struck the respondent and that he was wrong in having done so. The Magistrate convicted the appellant of voluntarily causing hurt, under Section 323 of the Penal Code, and sentenced him to one month's rigorous imprisonment and a fine of $10, which he directed to be paid to the prosecutor [the respondent]. After the Magistrate had risen he considered he had inflicted too heavy a sentence on the appellant, but considered he was powerless to alter it [*b*]. He thereupon wrote to the appellant's Solicitor, stating he had no objection to the sentence being reduced to a fine only, if there was any way in which it could legally be done. The appellant appealed to this Court.

[*a*.] See *Allen* v. *Meera Pullay*, Vol. 1 of these Reports, 394.
[*b*.] *Lim Chow Leng* v. *Opium Farmer*, Vol. 3 of these Reports, 136.

SHERIFF, J. 1886.

CHINA GUNNY. v. MUNIANDER.

Anthony, for appellant. The only question here is, whether this Court has, under the Appeals Ordinance 12 of 1879, power to reduce a sentence passed by a Magistrate. Under Section 34, Clause 5 if the sentence passed is one which could *not* legally have been passed for the offence of which the accused was convicted, this Court could quash the sentence and remit the case to the Magistrate to pass a legal sentence. In the present case, the sentence was one which *might* have been legally passed on the appellant for voluntarily causing hurt, the offence which he was convicted of: Section 34, Clause 5, therefore did not apply. The appellant was desirous of getting the imprisonment removed. The Magistrate had changed his mind, and would probably have remitted it, if he had the power. He however hadn't it, and there was no course left, but for the appellant to appeal to this Court. It is submitted that under Section 25 of the Appeals Ordinance, this Court may *alter* the adjudication of the Magistrate, by reducing the sentence.

D. *Logan*, [*Solicitor-General*] for the respondent. We do not object to the sentence being reduced, if this Court considers it has the power to do so. It has on one or two occasions been done, but it has been doubted how far the Court had the power [*a.*]

Sheriff, J. said, he had no doubt on the point, but as he was sitting in this Court for the first time, he had thought it right to consult his learned brother WOOD, J. on the point: they were both agreed, that as by Section 25 this Court could "*alter* the adjudication of the Magistrate" it could do so by reducing the sentence he had passed, if justice seemed to require it. The case here was practically one of assault, and the justice of the case would be met with a fine only. The order would therefore be that the sentence of the Magistrate be altered by the imprisonment being remitted, and the fine increased to $40.

Order accordingly.

REGINA *v.* DORASAMY.

PENANG.

WOOD, J. 1886.

June 15.

A person who entices away a married woman with intent *himself* to have illicit intercourse with her, is liable to be punished under Section 498 of the Penal Code—and the words "any person" in that Section may include himself, and not necessarily refer to another person.

Regina v. *Kadir*, 2 Kyshe, Cr. Rulings, 105, over-ruled.

Case stated by *Wood*, J. under Section 12 of the Appeals Ordinance 12 of 1879, as follows:—

At a trial held before me on the 18th December, 1885, the prisoner Dorasamy was found guilty of "enticing away from her husband a woman Amurthum whom he knew, or had reason to believe, to be the wife of one Tyen with intent to have illicit intercourse with him the said Dorasamy" and thus was alleged to

[*a.*] See *Reg.* v. *Lim Peng*, Vol. 3 of these Reports, 85, foot note [*a.*] and *Gan Kim Swee* v. *Newland*, *Ibid.* 108.

be punishable under Section 498 of the Penal Code. I was of opinion that he was not so punishable, but reserved the point for the consideration of the Court of Appeal.

The reasons of my so reserving the point are given in full in my written judgment on the case, as follows:--

"The question of whether a man who has enticed or taken away a married woman from her husband for the purpose of adulterous intercourse with her, is punishable under the provisions of Section 498 of the Penal Code has already come before this Court, and I held that in order to preserve the manifest intention of the Ordinance, by which adultery is not made criminal by that Code as modified in this Colony, it must be held that "any person" in that section should be construed to mean "any other person." [*a.*]

This question now comes before me again, and as I understand, it is the desire of the Executive of the Colony that the point should be reserved, in deference to what I apprehend is a difference of opinion entertained on the part of the authorities which I am bound to respect, I will do so, at the same time stating at length the ground of my judgment.

I fully admit that we are bound to construe this section from the four corners of the Ordinance and our knowledge of the pre-existing state of the law before the Ordinance was passed, and that we cannot judge of its meaning by any reference to the debates in the Legislative Council, the utterances of the drafters of the Ordinance, or other extraneous sources of knowledge.

Were we enabled to refer to these, we should doubtless know that the existence of the section in question in our Penal Code is the result of inadvertence and oversight on the part of the adapters of the Ordinance.

The Penal Code of India makes adultery an offence and this section which has found its way into our Ordinance is obviously, as it appears to me, intended to act in the Indian Penal Code as an adjunct to the section which immediately precedes it and is omitted in our Code, and which makes adultery a crime. I say an adjunct, because it deals with overt act, and one might say from which alone an attempt to commit adultery might reasonably be inferred, and the two sections together were framed, so as to meet the subject of adultery, and be fairly exhaustive of it so far as the Penal Code is concerned.

With all this by-gone history and obvious inference it may be assumed, as I have before observed, we have nothing to do, and we must look at the Penal Code of the Straits' Settlements as an Ordinance to be dealt with as it stands.

We know the pre-existing law of England and of the Straits' Settlements as to crime, and that adultery was no crime at the time of the passing of the Penal Code. This is a Criminal Ordinance, and we look through it and find that adultery is not made a crime. We read the section, in question, and see that the

[*a.*] *Regina* v. *Kadir*, Vol. 2 of these Reports [Criminal Rulings] 105 which must be taken as over-ruled by the present case.—J. W. N. K.

WOOD, J. 1886.

REGINA v. DORASAMY.

language if construed strictly, would make a man answerable criminally under certain circumstances for an attempt to commit adultery when he is not answerable criminally for the commission of adultery generally, or under other circumstances.

Such a reading of the Ordinance appears to me to lead to what I cannot help thinking is an absurdity.

Dealing with the Ordinance, as it stands, it seems to me absurd to infer that the Legislature can be held to consider enticements from home for purposes of adultery so much more heinous than adultery under the husband's roof, as to punish the one and permit the other to go unpunished, while it may be deemed probable that the Legislature did intend to punish an individual for abetting another in an act injurious to his neighbour for which he had not, as the adulterer would have, the palliation of strong animal passion, just as a man may render himself punishable for conspiring to seduce a woman where seduction by the individual is not criminal, and then the question arises in such a state of things, what is the Court to do?

I quote the language used by our late Chief Justice, Sir BENSON MAXWELL, in his work on the *Interpretation of Statutes*, Chap. III. Section I., p. 95:—

"Before adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it, for they often point out the genuine meaning of the words. There are certain objects which the Legislature is presumed not to intend, and a construction which would lead to any of them, is to be avoided. It is found sometimes necessary to depart not only from the *primary and literal* meaning of the words, *but also from the rules of grammatical construction* when it is improbable that they express the real intention of the Legislature, it being more reasonable to hold that the Legislature expressed its intention in a slovenly manner, than it intended something which it is presumed not to intend.

"One of the presumptions is that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by unmistakable implication, or in other words beyond the immediate scope and object of the Statute. In all general matters beyond the law remains undisturbed.

"It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringing rights, or depart from the general system of law, without expressing its intention with irresistible clearness and to give any such effect to general words, simply because, in their *widest and natural sense* they have that meaning, would be to give them a meaning in which they were not really used. It is therefore an established rule of construction that general words and phrases, however wide and comprehensive in their literal sense must be construed as strictly limited to the *immediate objects of the acts and as not altering the general principles of the law.*"

I confess that the matter appears to me to be one of common sense rather than of law. Arguments and authorities may be reasonably urged in favour of a strict interpretation of the section in question, though it is difficult to find any case reasonably in point, and the learned Solicitor-General submits with some force that the language of the section is not susceptible of more than one meaning, and that it is not irrational to suppose that the Legislature meant to punish as a crime the inducing of a woman to leave her husband's home even for a short period of time for

purposes of adultery, while adultery under the husband's roof goes unpunished on the assumption that the Legislature deemed the exposure and shame possibly consequent on a wife's leaving her husband's protection, the one thing which makes adultery heinous. But such a line of argument seems to me overstrained and unnatural.

Had the section stood in conjunction with the omitted section of the Indian Penal Code, I do not question, but that we ought to give the section its close and literal meaning that "enticing away from her husband" should mean "enticing away for any time, however short," and that "any person" should mean "any person whatever," including the adulterer, but the omission of the section making adultery criminal, alters the whole principle of construction, and by tacitly declaring the intention of the Legislature, obliges the Court, as a paramount duty, so to construe words which are to any reasonable extent, vague and undeterminate, as I hold those to be, so that that intention may not be violated."

The question reserved now came on for argument before the full Court of Appeal, consisting of *Ford*, C.J., *Wood* and *Sheriff*, J.J.

D. *Logan*, [*Solicitor-General*], for the Crown. I submit that the holding by the Court below, that "any person" in Section 498, was vague, was due to the learned Judge importing his knowledge of the Indian Penal Code. Without that, there is no latent ambiguity even. The language of the section is clear, and needs no interpretation. *Maxwell on Statutes*, p. 3. It is not for the Court to try and make sense, when the language is itself good sense. *Ibid.* pp. 4–5. It is submitted, that there is no right to introduce the fact of the peculiarity of the Indian Code as to adultery being an offence, in order to understand our Code. But it was said by the Court below, that the construction it gave the section, was necessary in order to avoid an absurdity, by punishing adultery in an indirect form, when it was no offence under our Code; but in so doing, the Court has fallen into another, and that is, that you can punish an abetter, the person who entices the woman for another, but not the principal, the person for whom she is enticed. There is nothing however absurd in the conclusion the Court below seeks to avoid—for instance a man may be punished for attempting to commit suicide yet he cannot be punished for actually having completed the act. So here, you may not punish for the completed act, the adultery—but may do so when the prisoner takes a step towards it, by enticing. The section also is for the benefit of the public, and ought to be favourably construed.

[*Ford*, C.J. The commission of the offence indecently, under the husband's roof, you say is not punishable, but doing it in a more decent way, by carrying the woman away first, is punishable?]

That is so; but the Legislature, it is submitted, intended to prevent publicity, which must necessarily be given by her removal from the house.

FORD, C.J. WOOD & SHERIFF. } J.J. 1886.

REGINA v. DORASAMY.

[*Ford*, C.J. The strength of your case is, that the Judge's knowledge of the Indian Code, cannot actually be got rid of, though he may have desired to do so. Would any doubt have arisen as to the meaning of this section, if he were wholly ignorant of that Code?]

Certainly not.

[*Ford*, C.J. We must, of course, leave the Indian Code out of consideration altogether. We shall however take time to consider our judgment.]

Ross, amicus curiæ, pointed out, that such a Section as 497, was not to be found in our Code and that the sections ran from 496 to 498.

[*Ford*, C.J. We are much obliged to you for that information.]

[*Wood*, J. But can that fact put us on enquiry, and so to look into the Indian Code?]

No one appeared for the respondent.

Cur. Adv. Vult

24th June. *Sheriff*, J. This is an appeal which turns upon Section 498 of the Penal Code. In primis let me express the regret that my mind has been charged with the fact that the Indian Penal Code contains a similar section, preceded by another section, which has no place in our Code, making adultery a criminal offence. I regret this because it opens the door to a flood of speculation which should in no way influence the decision of the Court. It is sufficient, to my mind, that Section 498 exists, and I conceive it to be the duty of the Court to read the section according to the Rules of Law. Sir BENSON MAXWELL remarks in his work on the *Interpretation of Statutes*, page 3:—

> "When indeed the language is not only plain but admits of but one meaning the task of interpretation can hardly be said to arise. It is not allowable, says Battel, to interpret what has no need of interpretation..... The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. It matters not in such a case what the consequences may be where, by the use of clear and unequivocal language, capable of only one meaning, any thing is enacted by the Legislature, it must be enforced even though it be absurd or mischievous..... However unjust, arbitrary, or inconvenient the intention conveyed may be, it must receive its full effect. When once the intention is plain it is not the province of the Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands according to the real sense of the words."

Applying this doctrine to the section under consideration, I find that it is an offence for any one to take or entice away from her husband or from any one having care of her for the husband—a woman whom the offender knows, or has reason to believe to be, the wife of any other man, with intent that she may have illicit intercourse with any person, and it is also an offence to conceal or detain with that intent any such woman. The prisoner Dorasamy is charged under the section "with enticing away &c., with intent

to have illicit intercourse with him the said Dorasamy." The learned Judge in the Court below remarks in his judgment:—

"We read the section in question and see that the language, if construed strictly, would make a man answerable criminally under certain circumstances for an attempt to commit adultery when he is not answerable criminally for the commission of adultery generally, or under other circumstances."

And he adds:—

"Such a reading of the Ordinance appears to me to lead to what I cannot help thinking is an absurdity. Dealing with the Ordinance as it stands it seems to me absurd to infer that the Legislature can be held to consider enticements from home for purposes of adultery so much more heinous than adultery under the husband's roof, as to punish the one and permit the other to go unpunished, while it may be deemed probable that the Legislature did intend to punish an individual for abetting another in an act injurious to his neighbour for which he had not as the adulterer would have, the palliation of strong animal passion, just as a man may render himself punishable for conspiring to seduce a woman where seduction by the individual is not criminal."

And in another part of his judgment he says:—

"I confess that the matter appears to me to be one of common sense rather than of law."

And again:—

"Had the section stood in conjunction with the omitted section of the Indian Penal Code I do not question but that we ought to give the section its close and literal meaning that 'enticing away from her husband' should mean enticing away for any time, however short, and that 'any person' should mean any person whatever including the adulterer, but the omission of the section, making adultery criminal, alters the whole principle of constructions, and by tacitly declaring the intention of the Legislature obliges the Court, as a paramount duty, so to construe words which are, to any reasonable extent, vague and undeterminate as I hold these to be, so that that intention may not be violated."

I have alluded to these remarks of the learned Judge to show the process of reasoning by which he arrived at his decision. He cites Sir BENSON MAXWELL, page 95, thus:—

"Before adopting any proposed construction of passage susceptible of a more than one meaning it is important to consider, &c."

But as I have shown from the same authority that where the wording of a passage is only susceptible of one meaning, that meaning only must be given to it. As I read the section it is plain, and admits of one meaning and the law "must be enforced, even though it be absurd" and, the intention being plain, "it is not the province of a Court to scan its [the Legislature's] wisdom or its policy." The learned Judge, as I have shewn, admits that if there were a section making adultery punishable criminally he would have no difficulty in reading Section 498—but if the view I take is correct it is not necessary that there should be any such section and the absence thereof does not raise any ambiguity. I shall even refrain from indulging in the suggestion of probable theories which may have induced the Legislature to enact this

FORD, C.J. WOOD & SHERIFF. } J.J.
1886.
REGINA v. DORASAMY.

section *alone*. I concur with the Court below in thinking it a startling proposition that—

> "A man may be made answerable criminally under certain circumstances for an attempt to commit adultery where he is not answerable criminally for the commission of adultery generally, or under other circumstances."

But the Legislature has so decreed and therefore I am at issue with the learned Judge where he says "I confess that the matter appears to me to be one of common sense rather than of law," for if common sense, by which I understand him to mean sound reasoning, unfettered by legal technicalities or rules, were to be the arbiter, there would be no difference of opinion between us, but for the reasons I have given I think the decision below should be reversed.

Ford, C.J. In this case I have come to a conclusion contrary to the view taken in the Court below, not however, without a sense of the difficulty which the learned Judge has found in construing this section of the Penal Code, or of the weight of the arguments and authorities which he has used and cited in support of that view.

Agreeing entirely with the view that the Court is bound to dismiss from its mind the contents of the Indian Penal Code, from which this section may be an extract, and with the argument that any construction which conducts us to an absurdity is to be avoided, I am not of opinion that the undoubted inconsistency which giving effect to the actual words of the section creates,—in making adultery punishable only when the wife is enticed or taken away from the husband, and leaving it unpunishable when committed under his roof,—is an absurdity in what I apprehend is the legal sense of that term. In popular language the application of such a term may be natural to any state of things which contradicts our views of good sense, but in a legal sense such a term must, I think, have a more limited application, a limitation which would confine it to results which violated the first principles of reason or which led to contradictions irreconcileable in their character, or to results so palpably inconvenient that grave consequential evils would result. In this case I do not see that the natural construction of the words of the section would produce any of these results; the meaning of the words used is clear, and raised no contradiction, and the inconvenience, if any, resulting from their enforcement can raise no grave evil. It may well be that, as argued by the Solicitor-General, the change is advantageous as it stands and the feature of enticing or taking from the house or custody of the husband creates a graver popular scandal than the result of adultery less publicly conducted and an evil requiring punishment where simple adultery does not, but, however this may be, and however inconsistent in principle the punishing one form of adultery and not the other may possibly be, the effect of such Legislation does not seem to me to have that element of absurdity about it which should induce the Court to seek another construction than that which the language of the section clearly expresses. I am the

FORD, C.J. WOOD & SHERIFF. } J.J. 1886.

REGINA v. DORASAMY.

more confirmed in this opinion because the construction given to the section by the Court below by the introduction of the word "other" before "person" in the clause "with intent that she may have illicit intercourse with any person," would seem to me to lead to results not much less inconsistent with good sense than those alleged from the construction it avoids. The effect of the section so construed would be to punish the offence of what is coarsely and vulgarly known as "pimping" in the case of married women only and not of single women; to punish indeed an offence of very rare occurrence—married women, from obvious causes, being rarely the subject of temptations and inducements of this class of offender,—whilst the larger and more general offence of obtaining single women for the purposes of illicit intercourse would remain untouched.

I am of opinion therefore that natural effect should be given to the words used by the section. An illustration of the hastiness with which the subject has been dealt with, [the cause of the consequent difficulty which has arisen] may be seen in the circumstance that the draftsman whilst striking out Section 497 of the Indian Code which deals with adultery generally has omitted to rectify the number of the sections in our local Code and the numbers run from 496 to 498 there being no Section 497 of any kind.

Wood, J. In this case I adhere to my original opinion for the reasons and in the language expressed in my statement of the case.

Judgment reversed. Conviction affirmed.

REGINA *v.* NYA ABU & ORS.

PENANG.

FORD, C. J. WOOD & SHERIFF. } J.J. 1886.

June 15.

In order to constitute the offence of piracy *jure gentium* it is not necessary that there should be any throwing off of the authority of the State to which the vessel belongs, but it is sufficient if there is a taking of the ship on the high seas or the jurisdiction of the Lord High Admiral, from the possession or control of those who are lawfully entitled to it and carrying away the ship itself or any of its goods, tackle, apparel or furniture, under circumstances which would have amounted to robbery if the act had been committed on land.

Definition of piracy *jure gentium* in STEPHENS' Digest of the Criminal Law, p. 64, approved of.

Definition of same in WHEATON's International Law, p. 122 a., disapproved of.

Piracy *jure gentium* is still punishable by death in this Colony, and a prisoner charged with that crime must therefore be tried before a Special Jury.

Where therefore the prisoners had been tried for piracy *jure gentium* and convicted by a Common Jury, the Court treated the proceedings and verdict as a nullity and discharged the prisoners.

Case stated by *Wood*, J. under the Appeals Ordinance 12 of 1879, Section 11, as follows:—

"The prisoners were tried before me and a *Common* Jury at the Assizes, holden at Penang in December last, on a charge that

FORD, C. J. WOOD & SHERIFF, J J. 1886.

REGINA v. NYA ABU & ORS.

they on board a certain ship on the high seas and within the jurisdiction of the Admiralty, upon certain mariners then and there being "piratically and feloniously did make an assault, and them the said mariners in bodily fear and danger of their lives did put, and 60 piculs of pepper" [and other things of a certain value] "in and on board the said ship then being, of the goods and chattels of one Chong Beng Siew, and then in the custody and possession of the mariners aforesaid, then to wit on, &c., upon the high seas aforesaid piratically, feloniously and violently did steal, &c."

The charge and my notes of evidence can be referred to, but the evidence taken in brief, was as follows:—

The evidence for the prosecution was to the effect that the prosecutor Chong Beng Siew with two friends left Penang on the 27th September for Olehleh with piece goods and other merchandize and a thousand pillar dollars; on arrival at Olehleh they obtained a pass to go to a place further down the sea coast of Acheen called Lambezi; that the prosecutor thereupon hired a boat at Olehleh with a crew of six Achinese, and having placed his goods and money on board her started in her for Lambezi in company with his said two friends. They arrived at Lambezi on the 4th October and remained there till the 24th. The prosecutor in the interval sold his merchandize and with its proceeds bought 60 piculs of pepper; his 1,000 pillar dollars he did not make use of as he considered the price of pepper too high. At the Lambezi Kota or fort the three prisoners and two others came to the prosecutor and requested a passage in his boat to Olehleh, but he declined to take them especially as there was a schooner [belonging to one Captain Roura] there which would be leaving for the same port in a day or two. On the 24th the prosecutor shipped his 60 piculs of pepper on board his boat and returned on shore. At 10 o'clock the same night he went on board and on getting there found the three prisoners and their two former companions. On his asking them why they were there he was told by them that he had known them for three or four years, that he need not think they would rob him and he might as well take them as passengers. The prosecutor said that seeing the men were armed with knives he was afraid and therefore allowed the men to remain on board. The boat set sail shortly after [there being then a good breeze] and continued sailing till 11 o'clock when the wind fell and the boat could make no further headway. The boat he said was then outside the bay and beyond three miles of the nearest land. At 12 o'clock, an Achinese boat was observed by the prosecutor making for his boat from the Qualla, and on his asking the prisoners what boat it was, was told it was a fishing boat. As this boat approached the prisoners and their two companions told the prosecutor to haul down his sail and anchor, which he through fear did, and immediately after prisoner No. 3 called out in Achinese "kill the Chinese first and then take their things." The approaching boat was then alongside his and the men from her [several in number] led by one Tunku Ali [a nephew of the Rajah or Tunku Muda of Lambezi] came on to

the prosecutor's boat armed and with torches; they then searched about the prosecutor's boat and finding the 60 bags of pepper and $1,000 took same and placed them in their own boat. In this they were helped by the prisoners and their two companions. Having done this Tunku Ali came up to the prosecutor and wanted to kill him and his two friends, but the prosecutor fell at his feet and entreated him for their lives and they were spared, but not until after he and they had been made to swear [by eating sand and drinking salt-water] that they would not do anything against him and his men. Tunku Ali then went back into his boat followed by his men, the three prisoners and their two companions, and pulled off for the land again making for a place called Qualla Dyah a short distance from Lambezi.

The prosecutor, his friends and the crew were allowed then to proceed in their boat on their voyage to Olehleh, and three days after they arrived there safely, and the prosecutor made his report to the authorities. He then came on to Penang and about a week after meeting the prisoners here, he swore an information against them and procured their arrest on the said charge of piracy.

The evidence shewed that the prisoners were not British subjects, but natives of Rigas [in Acheen], from the Residents of which place they held passports. The boat hired by the prosecutor [and on which the alleged attack was made] sailed under the Dutch flag. Neither the prosecutor nor his two friends were British subjects.

The prisoners called witnesses [being Captain Roura and part of his crew] who said the attack took place not far from his schooner, within the limits of the bay and within three miles of the Qualla Lambezi. They also called witnesses as touching the merits of the case: the nature of this evidence however is not set out as being immaterial to the present question.

It appeared from the evidence that Lambezi was situate some distance up the river, which ran into a bay called the Lambezi Bay. The bay was about nine miles across from one extremity to the other; the southern extremity or point being Qualla Dyah and the northern, Qualla.

The position of these several points may be shewn by reference to a certain Dutch chart which was admitted as evidence as being sworn to by Mr. Kruijt, the Dutch Consul, as being of received authority.

For the prisoners it was contended, that on the facts of the case, the offence proved was not piracy *jure gentium*; as to this view I dissented and directed the jury that piracy was robbery committed on the high seas, but intimated that I should leave the point contended for to be discussed before the Court of Appeal.

The jury by an unanimous verdict found the prisoners guilty, and further found by way of special verdict that the piracy "was "committed at a place more than 3 miles from the nearest beach "and outside of a line drawn from point to point of the Bay "marked in the Chart produced in evidence, but within 3 miles "of that line."

FORD, C. J.
WOOD & SHERIFF. } J.J.
1886.

REGINA
v.
NYA ABU & ORS.

Mr. Van Someren of Counsel for the prisoners contended that, as the prisoners were not British subjects nor the vessel attacked, a British vessel, the Court had no jurisdiction unless the offence amounted to piracy *jure gentium*, and that the evidence disclosed no such offence, as there had been no throwing off of the authority of the State [Holland] to which the prosecutors's boat belonged. He cited as authorities *The Magellan Pirates*, 16 Jur. 1146; *Phillimore's International Law*, § 357 pp. 122 a., 389 to 393; *Wheaton's International Law*, 122 a. He also contended the prisoners should not have been tried by a Common but by a Special Jury under Section 32 of the Criminal Law Procedure Ordinance 6 of 1873.

The points reserved are [1]. Whether the prisoners were guilty of piracy *jure gentium*. [2]. Whether a prisoner charged with piracy *jure gentium* is only triable before a *special* jury.

The prisoners were admitted to bail until these questions are decided. No sentence having been pronounced.

The case now came on before the Court of Appeal consisting of *Ford*, C.J., *Wood* and *Sheriff*, J.J.

Van Someren for prisoners contended 1, that there could be no piracy *jure gentium* unless there was a throwing off of the authority of the State to which the vessel belonged—he referred to *Kent's International Law*, 404-5; *Wheaton's International Law*, 122 a., 167-8; *United States* v. *Klintoch*, 5 Wheaton's Rep; *United States* v. *Pirates*, Ibid. 184; *Maxwell on Magistrates*, 94; *re* Ternan, 33 L. J. M. C. 201; and *Attorney-General* v. *Kwok A Sing*, 5 L. R. P. C. 179. 2, that piracy *jure gentium* was still punishable by *death* and so could only be tried before a special jury. Ordinance 6 of 1873, Section 32; 12 & 13 Vic. c. 96; 1 *Russell on Crimes*, Chap. 8 pp. 144-6.

D. *Logan*, [*Solicitor-General*] *Thomas* with him, for the Crown were not called on as to the *first* point. As to the second they contended that the piracy *jure gentium* was no longer punishable by death and referred to *Arch. Crim. Evid* [1871] 427; 39 Geo. III. c. 37; 7 Wm. IV. 4, and 1 Vic. c. 88.

Van Someren in reply contended that 7 Wm. IV. and 1 Vic. c. 88, did not bear on the point as it only did away with the punishment of death in cases under particular Statutes which it recited, relating to British subjects or which created certain offences into piracy according to the Municipal Law of England; that 28 Hen. VIII. c. 15 related only to procedure. He referred to 1 *Russ. on Crimes*, 147, note, by G..aves.

Cur. Adv. Vult.

24th June. *Sheriff*, J. I have had the advantage of reading the judgments which the other members of the Court have prepared and I concur in the views therein expressed.

On the 1st point I entertain no doubt. Mr. Van Someren's argument while ingenious, was highly artificial and strained, and

if the evidence does not disclose a plain case of piracy *jure gentium*, why then I am at a loss to understand what piracy *jure gentium* means.

I approach the 2nd point with far less confidence, but as the result of the best consideration I can give the subject, I am of opinion that, but for the Imperial Statute 12 & 13 Vic. cap 96, which confers Admiralty Jurisdiction in the Colonies, this Court would have no authority to try for piracy, as the Penal Code is silent on the subject. The original punishment at Common Law for piracy was death. The Act authorizes the same punishment as could have been *then* [that is in 1849] imposed in England. I think that punishment was death, because although various classes of piracy have been dealt with by the Legislature I can find no Imperial Act which provides any other punishment for simple piracy. The 7 Wm. IV. and 1 Vic. cap. 88, sec. 3, substituted transportation or imprisonment for the punishment of death prescribed "by any of the Acts hereinbefore referred." These are 28 Hen. VIII. c. 15; 2 Wm. III. c. 7; 4 Geo. I. c. 11; 8 Geo. I. c. 24, and 18 Geo. II. c. 30. I have referred to these Statutes, but they do not appear to me to touch the case before us. This being so, Mr. Van Someren's argument based upon Clause 32 of Ordinance 6 of 1873 holds good. The prisoners should have been tried by a Special Jury, but they were tried by a Common Jury, *ergo* the proceedings amounted to a nullity—in other words the trial was abortive.

Wood, J. In this case two points are made in favour of the prisoners. *1.* That prisoners being Achinese and so Dutch, and the ship plundered being a Dutch bottom, the offence though committed on the high seas does not amount to piracy *jure g ntium*, the authority of the State [Holland] not having been taken away. *2.* That inasmuch as by Imperial Act 12 & 13 Vic. c. 96, which extends to this Colony, the punishment for piracy is the same as in England at the time of the passing of that Act [1849] and that punishment was death—the prisoners were improperly tried by a Common Jury—contrary to the provisions of the "Criminal Procedure Ordinance, 1873" [Ordinance 6 of 1873] Section 32, which enacts that "trials in all cases punishable by death, shall be had "before a Special Jury."

I. With respect to the 1st of these objections, I will say at once that I see little or nothing in it. Piracy is, in general terms, robbery at sea—although it may be wrong in these days so simply to define it inasmuch as a high authority has defined it in more specific terms. Sir JAMES STEPHENS in his *Digest of the Criminal Law*, p. 64, thus defines piracy:

> "Piracy by the law of nations is taking a ship on the high seas, or within the jurisdiction of the Lord High Admiral, from the possession or control of those who are lawfully entitled to it, and carrying away the ship itself or any of its goods, tackle, apparel or furniture, under circumstances which would have amounted to robbery, if the act had been done within the body of an English country."

This definition—which is declared in the note 1 to this "Article," to be founded on a definition given by Sir CHARLES

FORD, C. J. WOOD & SHERIFF. J.J. 1886.

REGINA v. NYA ABU & ORS.

HEDGES in *Rex* v. *Dawson*, 13 St. Tr. 454, and recognized by the Judicial Committee of the Privy Council in *Attorney-General of Hongkong* v. *Kwok A Sing*, 5 L. R. P. C. 177, 199—may be accepted as a fairly sound one; and I can see no authority for the position that piracy is not piracy *jure gentium* unless the authority of the State to which the vessel belongs has been taken away,—except it be the authority of Wheaton in his *Treatise on International Law*, p. 122 a., in which, I can only suppose there to be some misprint or some misapprehension on the part of the author. Piracy *jure gentium* is, as I understand it, piracy as distinguished from those offences which, not amounting to robbery at sea, where the vessel is over-powered, are still made piracy by the law of the individual State.

II. With respect to the 2nd point, viz., whether piracy such as that charged to be committed by the prisoners, was punishable by death in England in 1849, I am of opinion that the contention made on behalf of the prisoners is sound.

There can be no doubt that until comparatively recent times the punishment for piracy of all kinds was death; by the Statute 7 Wm. IV. and 1 Vic. c. 88, certain amendments of the Law are made. This Act, which is one relating to the crime of piracy, applies to the Colonies, and by it, Section 1 repeals so much of certain Acts therein referred to "as relates to the punishment of the crime of piracy, or of any offence by any of the said Acts declared to be piracy or of accessories thereto respectively." Section 2 provides for the punishment of piracy where murder is attempted, which is not the case of the prisoners before us, and Section 3 enacts that from and after the commencement of the Act, "whosoever shall be convicted of any offence which *by any "of the Acts hereinbefore referred to, amounts to the crimes of piracy,* "and is *thereby made punishable by death*," may be punishable by transportation or imprisonment.

On reference to the several Acts referred to, which were 28 Hen. VIII. c. 15; 2 Wm. III. c. 7; 4 Geo. I. c. 11; 8 Geo. I. c. 24, 18 Geo. II. c. 30, it will be found that the prisoners are not convicted of any offence which "*by any of these Acts amounts "to the crime of piracy—and is thereby made punishable by death*" —but of piratically and feloniously assaulting and robbing, &c., in fact of piracy in a simple form, and that consequently the provisions of 7 Wm. and 1 Vic. c. 88 do not apply to the case of the prisoners before us, who are charged simply as pirates, and as such are liable to death which I understand to have been, at the date of 1 Vic. [1837], and up to the time of the passing of 12 & 13 Vic. [1849], the punishment alike for all forms of piracy.

Ford, C.J. I am of opinion in this case that the direction given by the learned Judge below was correct, and that taking the definition of piracy given in Mr. Justice STEPHENS' well-known Digest of the Criminal Law as a correct one, the facts of this case would bring the prisoners under its terms. That definition is:

"Piracy is by the law of nations"—that is as English Courts interpret that law—taking a ship on the high seas or within the jurisdiction of the

Lord High Admiral from the possession or control of those who are lawfully entitled to it, and carrying away the ship itself *or* any of its goods, tackle, apparel or furniture, under circumstances which would have amounted to robbery, if the act had been done within the body of an English Country."

I am of opinion however that the objection taken by the learned Counsel, viz., that these prisoners should have been tried by a special jury, is a good one. Clause 32 of Ordinance 6 of 1873, says "trials in all cases punishable by death shall be had before a special jury," and the only question is, whether or not piracy, of the class committed by these aliens [piracy *jure gentium*] is in this Colony punishable with death? For the answer to this question, starting from the undoubted position that piracy was a felony at Common Law and punishable with death, we have to search and see if any alterations of that punishment have been made by statutory authority affecting this Colony which derives its jurisdiction to try piracy cases from the grant of Admiralty Jurisdiction in this particular, by 12 & 13 Vic. c. 96, Section 2 of which further enacts that persons convicted of piracy under the Act shall be subject and liable to, and shall suffer all such, and the same penalties and forfeitures as by any law or laws *then* in force, as persons convicted in England. We have therefore to enquire whether piracy was still punishable by death in England at the date of the passing of that Act, viz., the year 1849. The question is obscured by a number of more or less obscurely worded Statutes, but as before stated by Common Law piracy was punishable in the Courts of Admiralty only, and the offence being in aliens a felony, was punishable with death. The Statute of Hen. VIII. c. 15, seems to have done no more than give a co-ordinate jurisdiction to the King's Commissioners on land; and the subsequent Acts cited, the 2 Wm. III, cap. 7; 4 Geo. I. c. 11; 8 Geo. I. c. 24 and 5 Geo. IV. c. 113, only made certain offences—such as [1] natural-born subjects and denizens robbing under a foreign flag, [2] persons trading with and being connected in certain ways with pirates and destroying rather than robbing goods on vessels, [3] and persons engaging in the slave trade—acts of piracy. Then comes the 7 Wm. IV. and 1 Vic. c. 88, which, repealing much of the above Statutes mitigates the punishment for piracy when without violence, but only as I read the section, [3] for offences which *by any of the acts thereinbefore referred to*, amounted to the crime of piracy and which were *thereby* made punishable with death. The acts referred to are those recited in the Statute—those I have enumerated above. The effect of these acts seems to me to leave the question of piracy *jure gentium* untouched. This being so, the offence seems to me in the absence of subsequent legislation affecting this Colony, still punishable with death, although in many cases the Court, acting under the provisions of 4 Geo. IV. c. 48, s. 1, *might direct the sentence to be recorded only.* This verdict therefore cannot stand and must be treated as a nullity.

Prisoners discharged.

SINGAPORE.

PELLEREAU, J.
1886.

August 25.

REGINA *v.* CHEE TANG & ANOR.

Although a prisoner might have successfully objected to the admissibility of a statement of a deceased person, either as a dying declaration, or a deposition under Ordinance 20 of 1870, Section 26, yet he is entitled, in his defence, if he so chooses, to put in the statement as something which was said by the deceased, which goes to help his defence thereby waiving the objection which was based on the omission of a formality required for his protection.

Case stated by *Pellereau*, J. which set out the following facts. The prisoners has been tried before him at the Assizes holden in Malacca on 28th July, 1886, on a charge of murder. During the course of the trial, Counsel for the prosecution tendered in evidence, as a dying declaration, a statement made by the deceased one Tan Jit Foo, in the presence of a Justice of the Peace; but it being objected to, as it could not be shewn whether the deceased at the time thought himself to be in danger of approaching death, the statement was rejected. Counsel for the prosecution then tendered it in evidence as a deposition under Section 26 of Ordinance 20 of 1870. It was shewn by evidence that prisoner No. 2 was present when the statement was made, but No. 1 had not then been arrested. Counsel for the prisoners again objected its admissibility on the ground that notice *in writing* had not been given under the section, to either of the prisoners, and relied on *Reg.* v. *Shurmer*, 17 L. R. Q. B. Div. 323. The Court again rejected the statement. After the close of the case for the prosecution, Counsel for defence tendered the same statement in evidence, for the defence, as being a statement made by the deceased, which, as he contended, went to prove his case. Counsel for the prosecution consented to its being received, but the learned Judge considered that the statement was inadmissible as no notice in writing had been given to the prosecutor under Section 26 aforesaid and that consent did not make it admissible in a criminal case; he referred on the latter point to *Reg.* v. *Bertrand*, 1 L. R. P. C. 520, *s. c.* 36 L. J. P. C. [N. S.] 51, and rejected the statement again. The jury found the prisoners guilty of culpable homicide not amounting to murder, whereupon the learned Judge reserved the point, whether the prisoners, under the circumstances, were entitled to put in the statement as evidence on their behalf, for the consideration of the Court of Appeal; and that question now came on for argument before the Court of Appeal.

Groom, for the prisoners contended, that the statement having been made by the deceased under circumstances which precluded any possibility of collusion between the prisoners and the deceased, any statement made by the deceased as to how he was wounded, and by whom, was admissible, if tendered by prisoners. That the document was headed "The dying deposition of Tan Jit Foo, &c." and had been rejected, as such, both under the English law, and the Indian Evidence Act II of 1855, Section 29. It had also been rejected as a deposition under Ordinance 20 of 1870, Section 26; but neither of those matters afforded any ground for preventing the prisoners afterwards tendering it in evidence as statement made by the deceased, which went to show how he accounted for his wound—it would have been tendered by the prisoners, without the

wrongly descriptive heading. The object of the Ordinance 20 of 1870 was, to throw protection around the accused, and to provide safeguards against the reception of improper evidence against them It was improper evidence for the prosecution, as they had not followed the requirements of the Ordinance, but could it be supposed, that because the prosecution had failed to give proper notice, the prisoners were to be deprived of the benefit of a statement made by the deceased? There was nothing in the Ordinance which excluded them from putting it in as evidence. It would be said the prosecution had no notice under Section 26—but it was their own document, taken under their directions, in their presence. Suppose this statement had said the two witnesses for the prosecution were the perpetrators of the crime and the prisoners were innocent, you would exclude what the victim himself had said and convict the accused on the evidence of the real culprits. He referred to *Nash* v. *Duncomb*, 1 M. & Rob. 104. He also contended the statement was admissible, as the prosecutor had consented to its going in as evidence—*Reg.* v. *Hagan*, 8 C. & P. 167; *Reg.* v. *Hunt*, 2 Cox C. C. 261. He submitted *Reg.* v. *Bertrand* was distinguishable because *there* the witnesses were alive and could have been examined, *here* the man whose statement it was, was dead. It was relevant to the case and having been made by the deceased himself relating the circumstances which resulted in his death, the prisoners were entitled, if they chose, to put it in evidence.

Bonser, [*Attorney-General*] *Drew* with him for the Crown, contended the prisoner was blowing hot and cold, he first wanted the statement excluded and then he wanted it admitted. They relied on the language of Ordinance 20 of 1870, Section 26, which required notice to be given to the prosecutor just as it was required to be given to the accused—the section placed them on the same footing, and what was inadmissible to one, was equally inadmissible to the other. No notice *in writing* having been given, the statement was inadmissible. *Reg.* v. *Shurmer*, *supra*.

Groom, replied.

Cur. Adv. Vult.

29th August 1886, the judgment of the Court [*Ford*, C.J. *Sheriff* & *Pellereau*, J.J.] was now delivered by

Sheriff, J. The point reserved by Mr. Justice PELLEREAU in this case, concisely put, amounts to this. Can a deposition, purporting to have been taken under Ordinance 20 of 1870, Section 26, to which Counsel for the defence has successfully objected on its being tendered against him by the Crown on the ground that an essential preliminary has been omitted, subsequently be produced and put in as evidence for the defence? The Imperial Acts 11 & 12 Vic. Cap. 42 Section 17, and 30 & 31 Vic. Cap. 35 Section 6, regulate the taking of depositions. In cases turning on the former Act, it has been held that to make the deposition admissible against a prisoner it must have been taken in the presence of the Magistrate and the accused, and it must appear that the latter had full opportunity of cross-examining the

FORD, C. J. SHERIFF & PELLERAU. J.J. 1886.

REGINA v. CHEE TANG & ANOR.

witness. Sections 26 of Ordinance 20 of 1870 is based upon 30 & 31 Vic. Cap. 35 Section 6, and it is provided, among other things "that such reasonable notice of the intention to take it, was given to the person, whether prosecutor or accused, against whom it is tendered in evidence," so that he or his Advocate or Attorney might have been present and have cross-examined the deponent. From this we gather that the Legislature while permitting a procedure for the perpetuation of testimony in criminal cases, provided a special safeguard for the protection of the person against whom such evidence might be adduced, so that it might not be sprung upon him unawares, and without his having had the opportunity of cross-examining the witness. This safeguard is "reasonable notice," and such notice, it has recently been held by the Court of Crown Cases Reserved, must be in writing. It is clear in the case before us, that the deposition was not admissible against the personers; and as it was a criminal case, they could neither waive the objection nor could they consent to its reception—but if subsequently [and it was matter in our opinion in the discretion of their Counsel] they wished to put that deposition in as evidence for themselves, we can see nothing in Section 26 which debars them from so doing. The prosecutor was present at the inquiry, so that he is not taken by surprise.

In the case before us it appears that the Counsel for the prosecution did not object; but if the view we take is correct, it is hard to see on what grounds he could have objected with effect. If an accused person could not make use of such a deposition in his defence he might be deprived of evidence which would secure his acquittal and which it might be impossible for him to prove *aliunde*. For instance, the deponent might say "the accused stabbed me but it was an accident." We do not see that the admissibility of such deposition for the defence is affected by the fact that the personers had previously objected to the evidence when tendered by the prosecution. At that stage of the case they could by no act of theirs make such deposition admissible or inadmissible. They were entitled to say "you [prosecution] can't use it, but if, when we come to our defence, we think fit so to do we can tender this deposition in evidence." For these reasons we think the learned Judge was wrong in rejecting the deposition when tendered by the prisoners' Counsel, and that there should be a new trial for culpable homicide not amounting to murder.

Conviction quashed. New trial ordered.

In the goods of HAJEE MAHOMED THAIB.

PENANG. PELLERAU, J. 1886. August 31.

The deceased and his wife together, by an informal Malay document executed a paper appointing another their "Wakil Muthalak" [attorney] over all their property from the date of the paper, to take charge of the same and act in every way for them and on their behalf, and in case of his [the deceased's] death, the "Wakil" should pay all debts due by the deceased and demand and collect all debts due to him, and on refusal by the debtors to pay any of such latter debts to take legal proceedings for the recovery of the same and after payment of all his debts, the "Wakil" should divide the remainder of the property among his [the deceased's] children and his wife, share and share alike.

PEL-LEREAU, J. 1886.

In the goods of HAJEE MAHOMED THAIB.

Held, the paper was a declaration of trust merely and not testamentary in its nature, and Probate was refused to it as a Will. [*a.*]

Doe d. Cross v. *Cross*, 8 Q. B. 714, distinguished.

As a Malay document cannot under Act 16 of 1839, Section 11 Clause 2, be registered—in order to enable the "Wakil" [the trustee] to convey the lands of the deceased to purchasers by Deeds or Conveyances that would be recognized and registered by the Registrar of Deeds, the Court granted administration to the "Wakil" [the trustee] as the nominee of the wife and next-of-kin of the deceased, but required that the dealing with the estate should be as prescribed by the Malay document or declaration of trust.

This was a petition by one Hajee Hussain, the broker of the deceased for probate of a Malay document which, as translated, was as follows:—

"Friday, the 21st day of Zul-ka-adak. In the year 1301. Whereas, at this time, this is to make known that I, Haji Mohamed Thaib bin Pungulu Hassan and my wife Mehnah request my uncle named Krani Kassa to write this deed and after executing it to give to my brother named Haji Hussin bin Pungulu Hassan to be held and kept. I and my wife Mehnah appoint the said Haji Hussin bin Pungulu Hassan to be our true and lawful Wakil Muthalak [attorney] over all our property real and personal. The Title Deeds of all the real property bear my name. From the date of the execution of this deed, I and my wife Mehnah make over to the said Wakil the whole of our real and personal effects and he shall take over the charge of the same and act in every way for us and on our behalf. In case I should die, the said Wakil shall pay all my just debts, and demand and collect all debts owing to me. Should any person or persons refuse to pay any such debt or debts, he the said Wakil shall take legal proceedings for the recovery of the same. After all my debts shall have been paid, the remainder, should there be any, he the said Wakil shall divide equally amongst my children and my wife Mehnah—share and share alike. The said Wakil shall do and act every thing in a just and proper manner, and to enable him to carry out all our wishes into effect we have caused this deed to be written and confirmed by putting our respective signature and mark of hand at the bottom of this in the presence of the undermentioned witnesses. Written this at the request of Haji Mohamed Thaib and Mehnah by me.

[*Signed*] KRANI KASSA.
Signature of "HAJI MOHAMED THAIB BIN PUNGULU HASSAN"
This is the mark of hand of MEHNAH. +
[*Signed*] HAJI MOHAMED AKID.
[*Signed*] LEBBY SAHID.

The petition had originally come on before *Sheriff*, J. on 12th July, but the learned Judge having some doubt as to whether the document was a Will, adjourned the case to enable the petitioner to engage Counsel—subsequently there being two Judges in the Settlement and the estate being sworn to as under $500, the petition was put on the trial list of the second Divisional Court and now came on for hearing before that Court.

Van Someren, for the petitioner contended, that no form of attestation to the document as a Will was necessary, provided there was, as there was in this case, two or more witnesses to it, and they were both present at the same time, and had signed their names in the presence of the testator—Act 25 of 1838, Section 7; that though the document might have had some operation in the lifetime of the testator, it also operated as a Will after his decease—and he relied on *Doe d. Cross* v. *Cross*, 8. Q. B. 714, as in point.

The application was not opposed.

Cur. Adv. Vult.

[*a.*] See *Goods of Robinson*, 1 L. R. Pro. & Div. 384.

PELLEREAU & SHERIFF. 1886.

In the goods of HAJEE MAHOMED THAIB.

7th September. *Pellereau*, J. said he considered that the document was not a Will, but a mere declaration of trust, vesting the property in the petitioner, for the benefit of the husband and wife during their lifetime, and after their decease for their children—that it spoke of itself as a deed, though it was not under seal, and the petitioner was not referred to therein as executor but as "Attorney" simply—and the document from its own terms took effect from its date and had no new operation after the death of the deceased—that in that respect, as well as in the fact, that here the document was the act of both the husband and the wife,—and so was, as operative as regarded the one, as the other,—this case was distinguishable from *Doe d. Cross* v. *Cross*. The application was therefore refused; but the petitioner was entitled to his costs, out of the estate.

On the 15th day of September following, the said Hajee Hussain filed a petition for Letters of Administration to the Estate of the said deceased, as his brother, and as the nominee of the widow and children, who were all of age. The application was heard on the 28th September before *Pellereau*, J., when judgment was reserved. At the request of the Court, the case was more fully argued on the 11th October, before *Sheriff* and *Pellereau*, J.J.

Van Someren, for the petitioner contended, that administration was necessary in order to enable the petitioner to acquire a title to the lands of the deceased in such a way as to enable him to sell and convey them to purchasers, and give them conveyances which would be registered in the Land Office—that although the document might be a good declaration of trust, it was an informal document, and being in Malay, could not be registered in the Land Office under Act 16 of 1839, Section 11, Clause 2—that although that section had been amended by Ordinance 2 of 1871, and Ordinance 5 of 1875, its provision, that the mutation of title must be in English, was untouched—and Ordinance 13 of 1886, which repealed the section, had not come into operation. The object of the application was to enable the petitioner to register his letters of administration, and so acquire a right to deal with the deceased's lands in a way that would be recognized by the Registrar of Deeds, and to convey them to purchasers who could be able to register their conveyances—that as regarded the distribution of the proceeds, the terms of the declaration of trust would govern the matter.

No one opposed the application.

Cur. Adv. Vult.

12th October. *Pellereau*, J. said, that when the question had first arisen on this application, although Counsel had stated the declaration of trust was an informal document, he had not shewn how that could lead to the necessity of administration being granted—that it was on this question of necessity he had taken time to consider and had thought it right to require a further argument before Mr. Justice SHERIFF and himself—that now that the necessity was shewn in the further argument, and was

plainly the result of Section 11, Clause 2 of the Act 16 of 1839,—he was sorry he had troubled Mr. Justice SHERIFF on the point at all —and if they had not delivered judgment at the time, it was not from any doubt they had in the matter, but only from a desire to look more carefully into the Act and amending Ordinances. Having done so, they were satisfied that sufficient reason had been shewn to render it at least advisable to grant administration and the application would be therefore granted.

PELLERAU & SHERIFF. } J.J. 1886.

In the goods of HAJEE MAHOMED THAIB.

HAJEE SHAIK ABDUL CADER *v.* MAMOMED CADER HUSSAIN.

PENANG.

SHERIFF, J. 1886.

September 8.

A document which is encumbered with conditions or puts a person on enquiry to ascertain whether any uncertain event has happened, is not a Promissory-note.

Where therefore A. gave a paper promising and agreeing to pay a sum of money by instalments to B. or his order in consideration of B. discontinuing certain actions which he then had against A.

Held, as it was necessary to shew that the actions had been discontinued, the document obliged any intending holder of it to enquire whether that event had occurred; it was therefore encumbered with a condition, and was not a Promissory-note but an agreement only.

Carlos v. *Fancourt*, 5 T. R. 482, followed.

Costs and expenses incurred by a plaintiff before action in order to perfect his title to commence the action should not be allowed on taxation between party and party.

Action to recover $2,185-83 "on an Agreement or Promis-"sory-note" besides interest. Defence—that the defendant did not promise and did not make the note. The document sued on was as follow:—

PENANG,

9th May, 1882.

I, Mahomed Cauder Hussain, otherwise called Pah Etam do hereby in consideration of Sayna Mahomed Ghouse Merican wholly discontinuing from this date his two actions [No. 285 of 1880 and No. 52 of 1882] against me in the Supreme Court, Penang, promise and agree with the said Sayna Mahomed Ghouse Merican to pay him or Mahomed Mydin Nacodah Merican his attorney or either of their order, the sum of two thousand five hundred dollars [$2,500] in full of all claims by monthly instalments of fifty dollars [$50] a month, commencing from the Ninth day of May, 1882, and in default of payment of any one instalment the whole amount then unpaid to become immediately due and payable.

[*Signed*] MAHOMED CAUDER HUSSAIN, in Tamil.

Witnesses:

[*Signed*] H. N. MERICAN.

[*Signed*] A TAMIL SIGNATURE.

REVENUE STAMP. 25 Cents. 9-5-82.

Endorsed on the back of above was the following:—

Pay to Hajee Shaik Abdul Cader, otherwise called Bengala Kadersah or order.

[*Signed*] SAYNA MAHOMED GHOUSE MERICAN.

[*Signed*] MAHOMED MYDIN NACODAH MERICAN.

PENANG,

9th October, 1885.

SHERIFF, J. 1886.

HAJEE SHAIK ABDUL CADER v. MAHOMED CADER HUSSAIN.

The balance due on the "Agreement or Promissory-note" was the amount claimed in this action. There was also a further document put in being an absolute assignment, dated 9th October, 1885, under the hands of the said Sayna Mahomed Ghouse Merican, and the said Mahomed Mydin Nacodah Merican of the aforesaid balance debt and the "Agreement, dated 9th May, 1882," and all their right, title and interest therein to the plaintiff. Express notice in writing, dated 9th October, 1885, was given under Ordinance 4 of 1878, Section 2, Clause 6 to the defendant, before the bringing of this action. The "Agreement or Promissory-note" sued on was properly stamped as an "Agreement," but not sufficiently stamped as a "Promissory-note," and if the document was a "Promissory-note" there were no means by which the stamp could be now rectified, and it would have been inadmissible in evidence under the Stamp Ordinance 2 of 1881, Sections 32, 36.

Ross, for defendant. The document sued on is not an "Agreement" but a "Promissory-note" and being improperly stamped as a note it could not be remedied and cannot be sued on. *Palaniapah Chetty* v. *Lim Poh*, 1 Kyshe, 548. The fact that it is payable by instalments does not prevent it being a note. *Oridge* v. *Sherborne*, 11 M. & W. 374; *Carlow* v. *Kenealy*, 12 M. & W. 139; *Byles on Bills*, 5, 6; nor the fact that it is attested by witnesses—*Byles on B.* 352—[He was then stopped by the Court.]

Van Someren, for plaintiff. The document is an "Agreement" it may also be called a "Promissory-note," but that does not prevent it operating as an agreement—*per* Martin B—*Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue*, 7 L. R. Ex. 211; *Fisher* v. *Calvert*, 27 W. R. 301; *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue*, 7 L. R. Q. B. Div. 164. It is not a "Promissory-note" as it can only be sued on or used if the suits mentioned in them are actually "wholly discontinued." The plaintiff or the holder of the document must shew these suits have been discontinued or it would be a defence on the part of the defendant to shew that they had not been, and the consideration for the giving of it had therefore failed. This fact however shews the document is payable on a contingency: it shews it is "encumbered with conditions and contingencies" and is for that reason not a "Promissory-note" *per* Lord KENYON, *Carlos* v. *Fancourt*, 5 T. R. 482; *Byles on Bills*, 71. The Court will look at the stamp also in order to construe the document as an "Agreement" or a note—*Hutley* v. *Marshall*, 46 L. T. [N. S.] 186; and if it be doubtful what the document is, and if in holding it to be of one kind it would be rendered useless, and in another would be to give it validity, the Court will hold it to be of the latter. *Yeo* v. *Dawe*, 32 W. R. 203, reversed on appeal 33 W. R. 739, s. c. 53 L. T. [N. S.] 125; *Adams* v. *Morgan*, 12 L. R. Ir. 1, affirmed on appeal 14 L. R. Ir. 140.

Ross, in reply. The note is not payable on a condition—the discontinuing of the action is only "consideration" for the promise; the document states the suits to be discontinued "from this date"—the holder of it need not therefore have enquired

SHERIFF, J. 1886.

HAJEE SHAIK ABDUL CADER v. MAHOMED CADER HUSSAIN.

whether, as a fact, the suits had been discontinued; the document shews they were.

Sheriff, J. said that at the outset he was strongly inclined to hold the document sued on was a Promissory-note, but he was much struck with the observation of Lord KENYON which had been cited, and he could not see how the holder of this document could sue on it, unless he could shew that the suits mentioned in them had, in fact, been discontinued. The effect of that was to oblige persons with whom the document might be sought to be negotiated as a note, to enquire whether the "uncertainty" [the discontinuing or not of the action] had been reduced to a "certainty" which is the very thing Lord KENYON mentioned. The document, in fact, was as Lord KENYON remarks "encumbered with conditions and contingencies," and it could not therefore be held to be a Promissory-note. Judgment would be for the plaintiff with costs.

Judgment for plaintiff.

On taxation of the plaintiff's costs he claimed a sum of $13.50, amount paid by him for Stamp duty on the absolute assignment aforesaid of the agreement and debt to him, besides certain Solicitor's fees for drawing the document and notice; the Acting Deputy Registrar thought it ought to be allowed, but the defendant's Solicitor objecting he referred the matter to *Sheriff*, J. in chambers.

13th September. *Ross*, for defendant contended, that no costs incurred before the action should be allowed as between party and party.

Van Someren, for plaintiff contended, that the item was absolutely necessary as the document sued on being an "Agreement" the plaintiff could only perfect his title to sue by the absolute assignment and notice in writing under Clause 6, Section 2 of Ordinance 4 of 1878—the Stamp duty was incidental to the assignment.

Sheriff, J. considered that the assignment, notice, and stamp fees were only necessary for the plaintiff himself in perfecting his title, but formed no part of the costs of the action, and should not be allowed as against the defendant.

Order accordingly.

DORAL *v.* LESSLAR.

In re MEYAPPAH CHETTY.

PENANG.

PELLERAU, J. 1886.

September 8.

A defective affidavit filed with a Bill of Sale on its registration under Ordinance 22 of 1870, Section 18, only renders the Bill of Sale void as against the Sheriff when he is seizing under process issued against the property of the person giving the Bill of Sale, and in respect of whom the affidavit is defective [*a*].

Where therefore a Bill of Sale was given by two persons A. and B. and the affidavit filed, on its registration, only gave the abode and occupation of A., but not the abode

[*a*.] Ordinance 22 of 1870 has since been repealed—but see note [*a*.] *Duval* v. *Scully*, antè p. 121.

PELLEREAU, J. 1886.

DORAL v. LESSLAR.

In re MEYAPPAH CHETTY.

of B. though it gave his occupation—and the Sheriff seized under process issued against the property of A. alone.

Held, that although the affidavit was deficient as to B. yet as it was sufficient as to A. and the execution was only against A. the Bill of Sale was not void as against the Sheriff.

This was an Interpleader for household furniture and a carriage and two ponies seized by the Sheriff on a *fi. fa.* issued at the suit of the abovenamed plaintiff against the abovenamed defendant. The claimant claimed under a Bill of Sale, dated 2nd June, 1886, made between the defendant and one John Henry Lesslar of the one part, and the claimant of the other part, to secure a sum of $700 and interest. The Bill of Sale was joint and several, and described the defendant as "of Penang, Clerk to Messrs. Gilfillan, Wood & Co.," and the said John Henry Lesslar as also "of Penang, Clerk to Messrs. Boustead & Co." It was attested by two attesting witnesses. The affidavit filed on the 12th June, 1886, on the registration of the Bill of Sale was made by one of the attesting witnesses and began thus: "I, W. A. D. of Penang, make oath and say, &c."—and in para. four thereof stated that the abode of defendant was "at Larut Road and he was a Clerk to Messrs. Gilfillan, Wood & Co., Merchants, residing in Beach Street, and John Henry Lesslar was a Clerk to Messrs. Boustead and Co., Merchants, residing in Beach Street." There was no statement as to the "abode" of the said John Henry Lesslar. Para. six of the affidavit stated that the deponent resided at "Leith Street and was a Clerk to Mr. A. C. Capel, Solicitor, and the abode of J. B. C. [the other attesting witness] was at Larut Road, and he was a Clerk to Mr. Capel also." The plaintiff had recovered no judgment against the said John Henry Lesslar and the *fi. fa.* was only against the property of the defendant.

Kershaw, for the plaintiff, the Execution-creditor, contended that the Bill of Sale was void against the Sheriff under Section 18, Ordinance 22 of 1870, as [1] the abode of John Henry Lesslar was not stated—*Pickard* v. *Bretz*, 5 H. & N. 9, and *Meyappa Chetty* v. *Khoo Bean Teen & ors.*, 1 Kyshe, 510; [2] because the description of the attesting witnesses as of "Leith Street" or of "Larut Road" was insufficient, without shewing where those roads were, —in Penang, Singapore, Malacca, or where. *Pickard* v. *Marriage*, 1 L. R. Ex. Div. 364; Re *Harris*, 10 Ir. Ch. Rep. 100 [cited in 1 *Prideaux on Conveyancing*, 741]; *Murray* v. *McKenzie*, 10 L. R. C. P. 625; *Ex-parte* McHattie, 10 L. R. Ch. Div. 398, and *Duval* v. *Scully*, antè p. 120; that where there were two or more grantors or witnesses, it was not sufficient to give the description of one or some only. *Meyappa Chetty* v. *Khoo Bean Teen*, suprà; *Pickard* v. *Marriage*, suprà—and although the Ordinance spoke of the "grantor" in the singular, yet by the Interpretation Ordinance 14 of 1867, Section 21, Clause 10, the singular included the plural and the plural the singular.

Claimant in person.

Cur. Adv. Vult.

September 13. *Pellereau*, J. held that although the affidavit was defective as not shewing the abode of John Henry Lesslar,

yet the Bill of Sale was not void. That although no case, English or local, could be found on the point yet to decide the question here, the language of Section 18 of the Ordinance 22 of 1870, was to be looked at. By that section it was declared that in case an affidavit omitting to state all the particulars required by the section, the Bill of Sale was to be void [among other persons] as against the Sheriff seizing under process issued against the property of "such person,"—that is the person who gave the Bill of Sale, and whose abode and occupation we required to be stated. Here the Bill of Sale was given by the defendant as one of the grantors; the execution was against him alone—and not against John Henry Lesslar—and the affidavit as to him was sufficient. The defective affidavit as to John Henry Lesslar was immaterial, as he was not the person against whom the execution issued,—he therefore was not "such person" within the meaning of the section. The cases cited were all distinguishable, as in them, the Bill of Sale was given by the very person against whom the process issued and in respect to whom the affidavit was defective. For the purposes of this case, the name of John Henry Lesslar might well be left out, and if that was done there was no objection sustainable against the Bill of Sale as made by the defendant unless the next objection was good. The next objection was as to the attesting witnesses, and if good, was common to the Bill of Sale whether it was to be taken as given by the defendant and John Henry Lesslar jointly or by the defendant alone,—and was sufficient to invalidate such Bill of Sale. The objection was that the abode of the attesting witnesses as "at Leith Street" and "at Larut Road" without saying where those roads were, was insufficient. Cases had been referred to, to shew this; and no doubt if there was nothing more in this affidavit and the Bill of Sale itself, they would be conclusive on the point. They also however were all distinguishable, as on referring to the affidavit here, we saw it made by a deponent who said his abode was "at Leith Street" and at the top of the affidavit he described himself as "of Penang"—and the abode of the next attesting witness was stated to be at "Larut Road" and his occupation was described as a clerk to the same Solicitor as the clerk was deponent to,—the inference was that he was also of Penang, and "Larut Road" was in Penang. Again, the abode of the defendant was stated to be also of the same "Larut Road"—and in the Bill of Sale itself, the defendant was described as "of Penang." The Bill of Sale might be referred to, to amplify the description in the affidavit—*Jones* v. *Harris*, 7 L. R. Q. B. 157; and so doing, the case was clear, and no one could have been misled by reading the affidavit and Bill of Sale together, and this was all that was required—*Ex-parte* McHattie. This latter objection then failing, and the affidavit, as regarded the defendant [against whom alone the process issued] being sufficient, the Bill of Sale was not void under Section 18 and the claimant was entitled to judgment.

Judgment for claimant with costs.

TIJAH *v.* MILAH.

PENANG.

PELLEREAU, J.
1886.

Sept. 28.

Where a party to an action does not offer himself as a witness, but calls his witnesses who are examined, he is not entitled to a new trial on the ground that his evidence was not taken. It makes no difference that his not offering himself was done to ignorance of the procedure in a Court of Justice, and the Judge trying the case omitted to tell him of his right to so offer himself.

A person who for a loan pledges goods to another who is not a Pawnbroker does nothing illegal and commits no offence punishable under the Pawnbroker's Ordinance 7 of 1872, and after tender of the loan with interest [if any] he may maintain an action against the other for recovery of the goods.

Armstrong v. *Lewis*, 2 Cr. & M. 27, distinguished.

This was an application by the defendant under Section 10 of the Appeals Ordinance 12 of 1879 for an order calling on J. B. Elcum, Esquire, Commissioner of the Court of Requests at Bukit Martajam, Province Wellesley, to bring up the proceedings in the case with a view to a new trial being granted, or such order made as to secure substantial justice between the parties. From the affidavit of the defendant and a copy of the Commissioner's notes attached thereto, it appeared that the plaintiff's case was that in consideration of a loan by the defendant to her of $10 she had pledged certain jewellery of her's to the defendant as security for the re-payment of the loan; that before action she had tendered the defendant the $10 with interest and claimed a return of the jewellery, but the defendant had refused to accept the money or to give up the articles. The defendant, on the case being called, was asked by the Commissioner if she disputed the claim and she said [not on oath] she did. Her actual case was that she had purchased the jewellery of the plaintiff. On the conclusion of the plaintiff's case, the Commissioner did not call the defendant into the witness box nor did he take any further statement from her. She did not however offer herself as a witness. The Commissioner did not tell her she could give her evidence if she pleased, but allowed her to call her witnesses and these he examined. On the conclusion of the case, judgment was given by the Commissioner for the plaintiff for $17.50 the value of the jewellery and costs. The defendant then made this application.

Van Someren, for her now moved *ex-parte* for the order and contended 1, The Commissioner was wrong in not taking the defendant's evidence and hearing what she had to state on oath in support of her case; that in fact he had looked on her in the light of a prisoner and so unable to give evidence for herself. Her not offering herself as a witness was due to her ignorance of proceedings in a Court of Justice; 2, that the evidence disclosed a transaction which was an offence under the Pawnbroker's Ordinance 7 of 1872 and was illegal and could not be set up by the plaintiff, a party to it, in order to recover back her jewellery. He cited *Armstrong* v. *Lewis*, 2 Cr. & M. 27 [in Equity 3 M. & K. 45] and Ordinance 7 of 1872, Sections 2, 5, 22.

Pellereau, J. said that the weight of the evidence was in favour of the plaintiff, and he did not consider either of the points taken sufficient to induce the Court to call up the proceedings. There was nothing in the first objection as it was clear the

defendant did not offer herself as a witness. It would have been proper if the Commissioner had informed the parties of their right to give evidence, but his not having done so did not make his proceedings irregular or entitle the defendant to a new trial. As to the second objection even assuming that the defendant had been illegally acting as a pawnbroker and was unable to enforce the contract of pledge had she been plaintiff, still the pawnor the plaintiff here had not acted contrary to the Pawnbroker's Ordinance and was in no way punishable thereunder. She had done nothing illegal and was entitled to recover back her articles if the Commissioner believed her evidence which he had done; that the case of *Armstrong* v. *Lewis*, was distinguishable from the present as there *both parties* were acting in contravention of the Pawnbroker's Act and were *both* liable to penalties. There would be no order, except that the application be dismissed with costs.

PELLEREAU, J. 1886.

TIJAH v. MILAH.

In the goods of ISMAIL.

PENANG.

SHERIFF, J. 1886.

October 5.

The Probate Act of 1857 [20 & 21 Vic. c. 77] does not extend to this Colony and this Court therefore has no power to order an Administration Bond to be assigned in order to be put into suit.

Query. How are Administration Bonds made in former years in favour of the Secretary of State for India to be put into suit?

This was a rule obtained by *Capel* calling on Haji Abubakar, the surviving surety in the administration bond given to this estate to shew cause why the bond should not be assigned to Mariam a niece of the deceased for the purpose of enabling her to sue him thereon. The bond was dated 3rd September, 1863, [before these Settlements became a Colony] and was made by Sadiah the widow of the deceased to whom administration had shortly before been granted by this Court, and the said Haji Abubakar and another as sureties for her; the bond was made in accordance with the then practice in favour of the "Secretary of State for India and his successor or successors in office," and was conditioned for the due administration of the estate of the deceased by the said Sadiah and for her filing her accounts thereof within a year from such date. The said Sadiah it was now alleged on affidavits which were not contradicted had not properly managed the estate and had not filed any accounts; that she and the other surety were now both dead and the said Haji Abubakar was the surviving surety.

Van Someren, for the surviving surety shewed cause and contended that the Court had no power to order the administration bond to be assigned as that was only the procedure authorized by the Probate Act 1857 [20 & 21 Vic. c. 77, Section 83] which did not extend to this Colony. *Allee* v. *Saman*, 1 Kyshe, 480. He also referred to the *Charter of 1855*, 15, 16; Ordinances 5 of 1868; 5 of 1873; 3 of 1878; 5 of 1878; Section 493, and *Howley* v. *Knight*, 19, L. J. Q. B. [N. S.] 3.

Capel in support of the rule relied on *In the goods of* Lebby Long, 2 Kyshe, Ecclesiastical Cases, 27.

SHERIFF, J. 1886.

In the goods of ISMAIL.

Ross as *amicus curiæ* mentioned 20 & 21 Vic. c. 106, Sections 1, 2, 64-66; 22 & 23 Vic. c. 41, Section 6 and preamble; 29 & 30 Vic. c. 115, Section 1; Order in Council of 28th December, 1866, set out in Straits L. R. App. 8, and Ordinance 15 of 1876, Section 27.

Van Someren contended, that those Statutes, Orders, and Ordinance did not help the case as links were wanting in the chain.

Sheriff, J. said it was unnecessary for him to express an opinion whether the right to maintain an action on such a bond as this was by the aforesaid Statutes, Order, and Ordinances now vested in the Attorney-General; it was sufficient for him to say that the applicant had quite misconceived her form of application —the rule was for an order assigning the bond in order to be put in suit: that was only prescribed by the Probate Act 1857, but the Act did not apply here, and the Court had no power to order the assignment. The rule would be discharged with costs.

Rule discharged.

OPIUM FARMER *v.* CHUA AH TONG.

SINGAPORE.

FORD, C. J. 1886

October 12.

Offences though committed on different dates may be tried together under Sections 59, 60 and 61 of the Criminal Procedure Ordinance 6 of 1873, if the offences are of the same kind; but must be limited to three and such as have been committed within one year of each other.

A conviction in the alternative is bad; but it may be altered by the Court under Section 25 of the Appeals Ordinance 12 of 1879 provided the evidence shews clearly which of the alternative statements should be sustained.

A conviction imposing one sentence for two offences is good, but at all events it may be amended under Sections 25, 32 and 33 of the Appeals Ordinance aforesaid.

Those sections apply to objections of substance as well as of form.

Opium Farmer v. *Koh Boo Ann*, Straits L. R. 278; *Regina* v. *Ooi Tim*, 3 Kyshe, 119; and *Cartan* v. *Meenachee*, 3 Kyshe, 151, over-ruled.

This was an appeal from the decision of E. M. Merewether, Esq., Magistrate of Malacca. The facts and arguments so far as material sufficiently appear from the judgment of the Court.

Drew, for appellant.

Joaquim, [R. W. *Braddell* with him] for respondent.

Cur. Adv. Vult.

8th November. *Ford*, C.J. This is an appeal from the decision of a Magistrate at Malacca, under the following circumstances: One Chua Ah Tong, the appellant, was charged with the offences of [1st] Selling illicit chandoo; [2nd] Being in possession of illicit chandoo; and after hearing the evidence, the Magistrate being of opinion that he was guilty, convicted him, 1stly, "In that he the said Chua Ah Tong on or about the 19th day of August, 1886, in Malacca, did knowingly have in his possession, or did receive into his possession, custody, or control, a quantity of illicit chandoo of the value of $50, the same not having been purchased from the Opium Farmer of the Settlement of the current year or from a licensed shop-keeper of the Settlement of

FORD, C. J.
SHERIFF & PRELEREAU. } J.J.
1886.

OPIUM FARMER v. CHUA AH TONG.

the said current year, and thereby committed an offence punishable under Section 3 of Ordinance IV of 1884." 2ndly, "that he the said Chua Ah Tong on the 23rd May, 1886, in Malacca, did knowingly have in his possession, or did receive into his possession, custody, or control, a quantity of illicit chandoo of the value of $21, and did sell or offer it for sale, the same not having been purchased, &c.," following the formal words of the first conviction.

The Magistrate on these convictions passed a sentence directing the prisoner to pay a fine of $500 and to be rigorously imprisoned for a period of 3 months.

Several grounds of appeal were raised, but those which I reserved for consideration were—

I.—That the conviction is bad because the offences charged were of separate dates and tried together.

II.—That the conviction is bad because the offences are found disjunctively and in the alternative.

III.—That the conviction is bad because it awards only a single punishment for two separate offences.

To the first of these objections I think the reply is that there is nothing before me to take the case out of the exceptions to the rule "that there must be a separate charge for every distinct offence of which any person is accused and every such charge must be tried separately" [Section 58 of Ordinance 6 of 1873.]

These exceptions are stated in Sections 59, 60, and 61 of that Ordinance, and although the effect of these sections is a little obscure, still, I think them sufficient to establish that if the offences charged are of the same kind, although committed on different dates, they may be tried together, or separately, or in the alternative [Section 61], [if limited to three, and committed within one year of each other.] The Magistrate would, however, if applied to, clearly have a discretion so to order their framing, that the prisoner should not be put to any disadvantage by their form.

With reference to the second objection, "that the convictions are disjunctive, and in the alternative" the Court would, I am of opinion, be going too far were it to lay down that all such convictions were irregular. A reference to Section 72 of the Penal Code shows clearly that under its provisions some judgments may be given in the alternative, and, of course if a judgment is so given the conviction must be drawn in accordance with its terms. These convictions are not, however, under the provisions of that Code, and I am unable to take them out of the general rule that convictions in such a form are bad for uncertainty, [see cases cited in *Paley on Convictions*, pages 173, 199, and 323] unless I am aided by the provisions for amendment given by the Appeals Ordinance 12 of 1879, or could read the conviction for selling as separate from the alternative conviction preceding. After a careful consideration of those provisions, the only section under which I "could alter such adjudication," or, in other words, amend the conviction, is Section 25, and had I in the evidence sufficient to show me which of these alternative convictions it indisputably sustained, I should exercise the power of alteration given me. I

FORD, C.J. 1886.

OPIUM FARMER v. CHUA AH TONG.

am unable, however, clearly to determine this and therefore cannot exercise this power. Taking the view of the third objection, which I feel compelled to do, the question of sustaining the last of the convictions for selling becomes immaterial for consideration.

The third objection, "that the conviction is bad because it awards only a single punishment for two separate and distinct offences," I feel constrained to allow, although rather on authority, than, in my judgment, on good sense. Were the question before me, apart from previous decisions of the Court, I should be bold enough to decline to follow the purport of *Newman* v. *Bendyshe* 10 Ad. & Ell. 11, upon which these decisions seem to rest, and hold this error a mere error of form, and, under the provisions of Section 79 of the Excise Ordinance, 1879, not to be regarded, or to be amended under Section 32 of Appeals Ordinance, 1879. *Newman* v. *Bendyshe* was a case decided so far back as 1839 when the love of technicalities and forms was stronger than now, and the judgment of the Court is contained in three or four lines and no "ratio decidendi" given. The decision also was in a civil action of trespass to which the conviction had been pleaded, and not therefore one directly on the validity of the conviction [*a*]. I do not know any later case directly on the subject [*b*.] So far as the prisoner is concerned, this single form of sentence is probably somewhat to his advantage, for he probably gets a lesser punishment, and if one of the charges turns out afterwards bad in law, he may get off altogether. The late Sir W. HACKETT, Mr. Justice WOOD, and the late Chief Justice, have however, decided cases in this Court in accordance with *Newman* v. *Bendyshe* [*c*] and Mr. Justice WOOD, and the late Chief Justice have held that the error is not one of form, and is not remediable by this Court under the powers given by Ordinance 12 of 1879. I agree with the view that these clauses do not give the powers of amendment required, and follow reluctantly the authorities cited on the main question.

Conviction quashed.

At the request of Counsel for the respondent the Court subsequently under Section 38 of the Appeals Ordinance 12 of 1879, reserved the case for the consideration of the Court of Appeal.

The points reserved were 1st, whether one penalty for two offences was good—2nd, whether a conviction in the alternative was bad, and if bad whether the Appeals Ordinance 12 of 1879, gave remedial powers to the Court.

The appeal was heard before the Court of Appeal, consisting of *Ford*, C.J., *Sheriff* and *Pellereau*, J.J., on the 13th and 14th December, 1886.

[*a*.] See *Reg.* v. *Salmons*, 1 T. R. 251.

[*b*.] See *Reg.* v. *Baker*, 26 L. J. M. C. 193, s. c. 7 Ellis & B. C. 697, where the objection is spoken of as one of "form." See also *Castro* v. *Reg.* 6 L. R. App. Ca. 329.

[*c*.] *Opium Farmer* v *Koh Boo An*, Str. L. R. 278; *Reg.* v. *Ooi Tim*, 3 Kyshe, 119; and *Cartan* v. *Meenachee*, 3 Kyshe, 151.

FORD, C.J. SHERIFF & PELLERAU. } J.J. 1886.

OPIUM FARMER v. CHUA AH TONG.

Bonser, [*Attorney-General*] and *Joaquim*, for the Opium Farmer contended, that the conviction was good and the case of *Regina* v. *Ooi Tim*, 3 Kyshe 119; *Cartan* v. *Meenachee*, Ibid. 151, and *Opium Farmer* v. *Koh Boo An*, Straits L. R. 278 ought to be over-ruled; that at all events the Court had power under the Appeals Ordinance 12 of 1879, Section 32, to remedy the defect if any—or remit the case to the Magistrate for the purpose.

Drew, for Chua Ah Tong contended, that the cases referred to being based on *Newman* v. *Bendyshe*, 10 Ad. & Ell. 11, were good law and should be sustained; that the Section 32 of the Appeals Ordinance only applied to defects of form and not to those of substance as the present objections were.

Sheriff, J. without expressing any opinion as to whether the objections were of form or substance considered the conviction could be amended under Sections 25 or 33 of the Appeals Ordinance 12 of 1879; that the case of *Newman* v. *Bendyshe* had no application in the face of that Ordinance, and the cases of the *Opium Farmer* v. *Koh Boo An*, *Regina* v. *Ooi Tim* and *Cartan* v. *Meenachee* [suprà] should be over-ruled.

Pellereau, J. considered that as to the first objection the conviction was good both according to English law and the law of this Colony as the punishment awarded was such as might have been awarded for either of the offences of which the respondent had been convicted. That as regarded the second point, the conviction was bad, but although not in "form" only it could be amended under the Appeals Ordinance.

Ford, C.J. held the objections to be of form merely, and such as could be remedied under the Appeals Ordinance.

Order accordingly. Respondent to pay 2/3rds of appellant's costs, and appellant to pay 1/3rd of respondent's costs.

MAHOMED MYDIN *v.* PANA SITTEE MAHOMED.

In the goods of MAHOMED HUSSEIN.

PENANG.

SHERIFF, J. 1886.

NOV. 16.

The Court will not revoke Letters of Administration *durante absentia* granted to a person under a power of attorney from a next-of-kin, or declare it to have ceased or expired, merely on the ground that since such grant of administration such next-of-kin had cancelled and revoked the power of attorney.

This was an action for an injunction to restrain the defendant, his servants and agents from selling or otherwise disposing of certain lands and property of the abovenamed deceased of whose estate the defendant was the administrator *durante absentia* of Mariam Beebee the widow of the deceased who was in the Madras Presidency. Such letters of administration had been granted to the defendant on 9th April, 1883, upon a power of attorney given to the defendant by the said Mariam Beebee as such widow, and dated the 23rd December, 1882. The defendant extracted the letters and thereafter entered into possession of the deceased's estate, but not giving satisfaction to the said Mariam Beebee in respect to his management of the estate she, by a further power

SHERIFF, J. 1886.

MAHOMED MYDIN v. PANA SITTEE MAHOMED

In the goods of MAHOMED HUSSEIN.

of attorney dated 28th June, 1886, appointed the plaintiff abovenamed her attorney in the place and stead of the defendant. She at the same time gave the defendant notice in writing revoking the power of attorney she had granted to him. The defendant after getting this notice proceeded to advertise the lands and property of the deceased for sale by public auction and this action for the injunction was then commenced, and on 27th July, 1886, this Court awarded an injunction restraining the defendant from so selling or otherwise interfering with the said lands and property.

G. H. S. *Gottlieb*, on the first November, 1886, obtained a rule [in the Ecclesiastical Case, in the goods of the deceased abovenamed] calling on the administrator [the defendant in this suit] to shew cause why the letters of administration granted to him on 9th April, 1883, as aforesaid should not be pronounced to have ceased and expired, and why letters of administration to the estate of the deceased should not be granted to the present attorney of the widow, the plaintiff in this suit.

Ross, shewed cause and contended, that the only case in which the Court would revoke letters of administration *durante absentia* was on the coming into the Settlement of the grantor of the power of attorney himself; but in this case the widow was still out of the jurisdiction, and the only case in which the Court would consider the letters had been revoked was by the death of the grantor of the power of attorney. *Suwerkrop* v. *Day*, 8 Ad. & E. 624; *Webb* v. *Kirby*, 2 De G. M. & G. 377; that no case could be produced where the Court had either revoked or pronounced to have "ceased and expired" any letters *durante absentia* where the only ground relied on was that the grantor had changed his attorney; if once it did this there was nothing to prevent the grantor continually troubling the Court each time he changed his mind as to the fitness of his attorney. The plaintiff's proper remedy was to call upon the administrator for an account and to have the estate wound up. He also referred to 1 Wms. on Exors. [6th Ed.] 384, 409.

Gottlieb, in support of the rule contended, that letters of administration *durante absentia* were considered revoked by the death of the grantor of the power of attorney on the principle that the grantor's death operated as a revocation of the power so that the administration, issued on the strength of it, fell with it; but if revocation had that effect why not a revocation of the power by the act of the grantor himself. In point of law one was as much a revocation of the power as the other. The administration was granted on the power—the power had ceased by being revoked—the administration had answered its purpose and had likewise "ceased" and ought now to be pronounced to have "ceased and expired." *Goods of* Cassidy, 4 Hagg Ecc. Rep. 360; 1 Wms. on Exors. [8th Ed.] 476, 517.

Sheriff, J. said he could find no authority for such an application as the present one. If it succeeded there was nothing to prevent the Court from being continually occupied with applica-

tions to revoke and regrant administrations as often as the grantor of the power chose. The proper remedy was for the plaintiff to file a suit to have the defendant's accounts taken and the estate administered, and he would suggest that the writ of summons in this action be amended to suit such a case. The present rule must be discharged with costs.

Rule discharged with costs.

SHERIFF, J. 1886.

MAHOMED MYDIN *v.* PANA SITTEE MAHOMED.

In the goods of MAHOMED HUSSEIN.

HABIB ABDUL RAHMAN & ANOR *v.* ABDUL CADER AND ANOR.

PENANG.

SHERIFF, J. 1886.

NOV. 25.

It is not sufficient that Promoters and Directors of a Company, or partnership, or persons standing in a fiduciary relationship, to have purchased for themselves property of the Company, or partnership, or of which they are the Trustees at its actual market value; it is also necessary that they should have done so with the full knowledge and consent of the shareholders, partners, or *cestuis que* trust, and have first placed themselves absolutely at arm's length from the vendors: otherwise, the shareholders, partners, or *cestuis que* trust [the vendors] are entitled to follow their property and recover it back for themselves. Such Promoters, Directors or Trustees are bound to disclose all information they may acquire as to the property, to the shareholders, partners, or *cestuis que* trust; and to give them the fullest explanation relating to it.

If such Promoters, Directors or Trustees purchase such property without acting as abovestated and afterwards sell the property to third parties who had notice of their position and circumstances—but afterwards re-purchase it from them for themselves [the Promoters, &c.,] at a higher figure—they will not be allowed to deduct as against the shareholders, partner, or *cestuis que* trust, the amount they so paid in excess of the sum they had sold it to such third parties for.

Had the third parties sold to *bonâ fide* purchasers for valuable consideration *without* notice, it would have been different.

Query. Whether the third parties *with* notice, are liable to refund the excess to the Promoters, Directors or Trustees arising from a failure of consideration by reason of the shareholders, partners, or *cestuis que* trust recovering back such property?

Where therefore the defendants as Promoters and Directors of a land speculating Company or partnership acquired for themselves a valuable portion of the land at its actual market value, but unknown to the shareholders or partners,—and afterwards sold a portion of such land to third parties who were aware of their position and the circumstances of the whole transaction—but subsequently re-purchased the portion from such third parties for a sum in excess of the amount they had sold it to them,

Held, the shareholders or partners the plaintiffs, were entitled to follow and recover back the land in the hands of the defendants, and were not bound to refund to the defendants the sum so paid in excess by them to such third parties.

This was a suit for partnership accounts in certain land speculations and for discovery of the defendant's dealings with the land and moneys of the partnership as promoters, directors and managers of the partnership-business; and for further and other relief. On the 2nd day of September, 1884, *Wood*, J. made an order by consent referring the suit to the Registrar to take the partnership accounts and for enquiry and report as to the matters alleged in the Statement of Claim. During the taking of the accounts and enquiry so directed, a question of law arose and was by consent referred to the Court for decision pending the further taking of the accounts. The facts giving rise to the question, and the nature of the question itself, sufficiently appear from the report of the Acting Registrar, dated 11th June, 1886, and a further "statement" of facts agreed to between the parties

SHERIFF, J. 1886.

HABIB ABDUL RAHMAN & ANOR. v. ABDUL CADER & ANOR.

by way of supplement to the report. This latter "statement" was rendered necessary [and was directed by order of *Sheriff*, J.] by reason of certain notes of evidence of the Acting Registrar having been mislaid, and the Acting Registrar [Mr. A. W. Fawkes] having left the Settlement. The material parts of the report are as follows:—

I. Company A. purchased land from Brown & Co., for $100,000. The defendants who were two promoters of Company A. start a Company B. and purchase from Company A. for $32,000 a portion of the land which had been bought from Brown & Co.

II. The defendants then form the Company B. The plaintiffs are two of the shareholders in Company B.

III. The defendants after the formation of the Company B. and in pursuance of the objects for which the Company was formed, cut up the land purchased from Company A. and sell a great number of lots.

IV. One of the above lots was a large strip of land having situated on it the Bagan, and in consequence, the most valuable of the above lots—this lot was sold by auction and knocked down to the second defendant and a third party.

V. The conditions of sale under which this lot was sold, provided, that in the event of the purchaser failing to complete the purchase within a certain time, the lot might be again put up for sale at the risk of the purchaser.

VI. The second defendant and the abovenamed third party failed to complete the purchase and thereupon the first defendant brought an action for specific performance against them, instead of re-selling under the conditions of sale.

VII. A short time after the commencement of this action, proceedings under the action are dropped, and an arrangement is come to, without the knowledge of the plaintiffs and most of the other shareholders, between the first and second defendant, to take this strip of land for themselves and two others named respectively Khan Mahomed and Shaik Ismail, as their private property at or about the price of $13,500—this agreement is carried into effect.

VIII. Within a few months, these four persons abovementioned value the strip of land in question at $20,000, and the two defendants who are promoters of Company B. then buy out Khan Mahomed and Shaik Ismail at that valuation and now claim the strip of land in question as their own property.

Upon these facts, the plaintiffs claim that the defendants being promoters are still in the position of trustees with respect to this strip of land for Company B. or that they should credit the Company B. with the $20,000.

The defendants contend that they should only credit the Company with $13,500.

The "statement" by way of supplement to this report was as follows:—

1. Auctions were held on the 12th, 19th and 26th November, 1881, by Company B. and some difficulty was experienced in getting the purchase-moneys from the purchasers—the plaintiff Haji Mydin being one of such defaulting purchasers to the extent of $390, although he eventually paid up on the 19th September, 1883, and then got his conveyance. In consequence of this difficulty it was proposed that the land remaining unsold should be divided among the shareholders in Company B. and an agreement to that effect dated the 18th May, 1882, was drawn up and signed by the two plaintiffs and some of the shareholders, but the others refusing to sign, the matter fell through.

2. The shareholders then requested the defendants again to put the land up for sale in lots by public auction, which was accordingly done on the

25th November, 1882, when lots were sold to different purchasers to the value of $10,751 and again on the 2nd December, 1882, when lots were further sold to different purchasers to the value of $5,949.

3. Among the lots sold at the first of the said last mentioned auction, was the Bagan land which was knocked down to the defendant Ravena Peechayappah and a third party for the sum of $10,325.

4. These two purchasers made default and thereafter, namely on the 21st day of December, 1882, the defendant Abdul Cader sent them a notice demanding payment of the purchase-money within three days from the date of the service of such notice and threatening a re-sale in case of non-compliance.

5. This demand not having been complied with, the defendant Abdul Cader went to Messers. Palmer, Hogan and Norris [who were not shareholders in Company B.] but who had at the auction of the 25th November, 1882, bid the sum of $10,300 for the said Bagan land and asked them to purchase it privately, but they would then only offer $8,000 for it.

6. The defandant Abdul Cader thereafter commenced a suit for specific performance against the defendant Peechayappah and the third party instead of re-selling the said Bagan land.

7. At both the said sales of 25th November and 2nd December, 1882, there were defaulting purchasers to the extent of $3,500, besides the $10,325 already mentioned, or in all the sum of $13,845.

8. Messrs. Brown & Co., were then pressing Company A. for payment of the balance of the purchase-money due by that Company to them and in turn the managers of Company A. were pressing the defendants for payment of the balance of the purchase-money due by them and they in turn were pressing Company B.

9. The defendants Abdul Cader and Ravena Peechayappah thereafter together with Shaik Ismail and Khan Mahomed, arranged among themselves, without the knowledge of the plaintiffs, or most of the shareholders, to take over the whole of the lots in which default had been made at the said two last mentioned auctions, at the price of $13,500, instead of the said sum of $13,845.—and the above arrangement was accordingly carried out, and the said action compromised on 1st May, 1883.

10. The defendants have, since the filing of the accounts in this action, intimated their willingness to credit Company B. with the difference between the said sums, namely, with the sum of $345; but such sum does not appear in such accounts filed by them.

11. Disputes arose between the said defendants and Shaik Ismail and Khan Mahomed, and it was ultimately, namely, on the 18th February, 1884, agreed—still without the knowledge of the plaintiffs and most of the shareholders,—that the defendants should purchase the interests of the said Shaik Ismail and Khan Mahomed, on the footing that the property should be valued at $23,000, and the defendants accordingly paid the said Shaik Ismail and Khan Mahomed the sum of $4,750.

12. The said value was placed on the property, owing to a rumour that a Railway was going to be laid between Larut and Province Wellesley, with its terminus at Bagan Tuan Kitchee, when the defendants hoped that they would, for their own benefit, be able to sell a considerable portion of the property to the Railway Company, at a large profit.

13. The rumour however proved baseless, and the defendants have since sold a part of the said property, but have re-purchased some of the said land so sold, and now continue owners of such land re-purchased, as well as the unsold lands, which together are now valued at $15,000, at the least.

14. The matters mentioned in paragraphs four, five, six, nine, eleven and twelve hereof, were done without the knowledge of the plaintiffs and most of the shareholders, and were in no way communicated to them by the defendants, the promoters of their Company B. The facts came to the knowledge of the plaintiffs, and most of the shareholders, only after, and consequent on, the dispute between the defendants and the said Shaik Ismail and Khan Mahomed, mentioned in paragraph eleven hereof.

15. The defendants are speculators in land on a very large scale, and promoters and managers of various Companies for that purpose, and have thereby amassed a large fortune.

SHERIFF, J. 1886.

16. The Court is at liberty to draw any inference of law or fact, from the facts set out herein, and in the Registrar's said report.

HABIB ABDUL RAHMAN & ANOR. v. ABDUL CADER & ANOR.

Ross, for defendants contended, that as there was no fraud shewn on the part of the defendants, and they had acquired the property at its true market-value, it was of no consequence that they happened now to be the owners of the property. That the auction sale, and default of the original purchasers, did not bear on the after *bonâ fide* dealing with the property, and the defendants should not be held trustees of the property for the shareholders—but they were only entitled to be credited with the $13,845. If however the defendants were to be held to be trustees of the property,—or the shareholders entitled to be credited with the $23,000,—then they should be allowed to deduct the $4,750 paid to the said Khan Mahomed and Shaik Ismail, in order to buy them out. He referred to *New Sombrero Phosphate Co.* v. *Erlanger*, 5 L. R. Ch. Div. 73; *Bagnall* v. *Carlton*, 6 L. R. Ch. Div. 371; *Emma Silver Mining Co.* v. *Grant*, 17 L. R. Ch. Div. 122; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 L. R. App. Cas. 1256; *Re* Anglo-French Co-operative Society, 21 L. R. Ch. Div. 492; *Re* Cape Breton Co., 26 L. R. Ch. Div. 221; on Appl. 29 L. R. Ch. Div. 795; *Thompson* v. *Christie*, 1 Macq. H. L. 236, and *Sugden on Vendors*, 32.

Van Someren, for plaintiffs contended, that as promoters and directors of the partnership, or "Company B," the defendants stood in a fiduciary relationship to the shareholders—*Re British Seamless Paper Box Co.*, 17 L. R. Ch. Div. 467: and could acquire no right to the property they had attempted to purchase, and fraud was not necessary to be shewn. *Story Eq. Jur.* §§. 315, 316, 316 [a], 322, 462, 468; *Kimber* v. *Barber*, 8 L. R. Ch App. 56, per Lord O'HAGAN, in *Erlanger* v. *New Sombrero Co.*, 3 L. R. App. Cases 1256-7; that the plaintiffs as shareholders for the benefit of the general body of shareholders, were entitled to follow the property, and were now entitled to have it back, or at least its enhanced value, $23,000, *Vyse* v. *Foster*, 8 L. R. Ch. App. 326, 329, 333; that the $4,750 should not be allowed the defendants, as it was not a payment for the benefit of the shareholders, but rendered necessary by the defendants' own wrongful acts. He also referred to the other cases which had been cited, and claimed them as authorities in the plaintiffs' favor.

Ross, replied.

Cur. Adv. Vult.

December 6th. *Sheriff*, J. The defendants in this suit were promoters and shareholders in Company B. In consequence of certain difficulties experienced in effecting sales of land, the property of the Company, the plaintiffs requested the defendants again to put up the same for sale in lots by public auction. This was done on the 25th November and the 2nd December, 1882, when land was disposed of to the value of $10,751 and $5,949, respectively.

One lot known as Bagan land was knocked down to the defendant Ravena Peechayappah and another person for $10,325. They failed to complete this purchase. This sale is open to comment, but as it is not the transaction which is impeached, I pass on. The defendant Abdul Cader having failed in selling the land by private sale to certain persons who had at the public sale bid $10,300, filed a suit for specific performance against the defendant Peechayappah and his co-purchaser. It was open to the defendant Abdul Cader to adopt this course, or under the conditions of sale, again to expose the property for sale at the risk of the two purchasers. He had a discretion in this matter, and I think that up to this point, it may be assumed that he was acting within his powers and in the interests of the Company. Soon after the commencement of this suit, the defendants, together with Khan Mahomed and Shaik Ismail, arranged to take over not only the Bagan land the subject of this suit for specific performance, but the whole of the lots in which default had been made, at the price of $13,500—the actual amount due for the same being $13,845. The defendants have admitted however their liability for the difference, viz., $345. They could not well do otherwise. The arrangement referred to, was entered into without the knowledge of the Company, or at any rate a majority of the shareholders, and only came to light in consequence of subsequent disputes between the four partners. Now, the law applicable to this set of facts is, I think, plain. It is laid down broadly in *Story's Equity Jurisprudence*, Section 315 "..... it is very certain that agents are not permitted to become secret vendors or purchasers of property which they are authorised to buy or sell for their principals." In other words, "no man acting as an agent can be allowed to put himself in a position where his interest and duty will be in conflict," or yet again, "that the purchaser has put himself absolutely at arms' length from his vendor,"—and at Section 322, he remarks, "the *cestui que* trust is not bound to prove, nor is the Court bound to decide, that the trustee has made a bargain advantageous to himself, the true ground being that the prohibition arises from the subsisting relation of trusteeship." It has been ably argued for the defendants that they acquired the property at its actual market-value as evidenced by the prices realized at public auction, and it was immaterial to the plaintiffs, who became actual purchasers, and that the transaction must be viewed as if no default had been made by the purchasers who bought at public sale. But the answer to this is, that it must be assumed that the defendants considered that the property was worth more than the amount they gave, and that their fiduciary position precluded them from acquiring the property at its market-value, or supposed market-value, unless indeed they did so with the knowledge and consent of the Company; as a fact however, so far from obtaining such consent, there was concealment. Now, one of the recognized badges of fraud is *secrecy*, and I must assume that the defendants must have had reasons for not disclosing their acquisition of the property to the Company. The Company were certainly entitled

SHERIFF, J. 1886.

HABIB ABDUL RAHMAN & ANOR. v. ABDUL CADER & ANOR.

to the fullest explanation relating to the property, and the mere fact that they were kept in the dark, engenders grave suspicion, and renders the transaction more than questionable. It may well be that the defendants acquired information as to the property which induced them to purchase it, but it was imperative on them to disclose such information to the Company. The defendants are condemned by their own conduct. It appears that the defendants, in consequence of the disputes I have referred to, bought out Shaik Ismail and Khan Mahomed on the 18th February, 1884, and that the property was then valued at $23,000, it being assumed that a Railway would be laid which would enhance the value of the property. This expectation turned out to be fallacious. The defendants contend that if the agreement is set aside it must be on terms, viz., that the plaintiffs should pay them the sum of $4,750 being the difference in the value of the moiety of Shaik Ismail and Khan Mahomed at the price at which they bought and re-sold the same.

With respect to the original agreement between the four persons, it is not specifically alleged that Shaik Ismail and Khan Mahomed knew that defendants were not authorised to deal with the property as they were doing, but inasmuch as the transaction only became known to the plaintiffs in consequence of the differences which arose between them, it would appear that Shaik Ismail and Khan Mahomed were parties to the concealment, and from this I infer, that they had, if not actual at any rate constructive notice. I am therefore of opinion, that Shaik Ismail and Khan Mahomed acquired no beneficial interest under the agreement, but that they and the defendants must be regarded as trustees for the plaintiffs.

The agreement must be taken as a whole, all the four parties to it are equally affected. It cannot be said to be operative as to Shaik Ismail and Khan Mahomed, and inoperative as to the defendants.

This is important, because if the four persons who effected the agreement were *in pari delicto*, and are to be regarded as trustees for the plaintiffs, the Court would have set aside the agreement upon the plaintiffs re-paying the actual amount paid by them, viz., $13,500. It is a rule [to which no doubt there are exceptions, but which exceptions do not, I hold, apply to this case,] that an assignee cannot take a better title than his assignor. The defendants purchase from Shaik Ismail and Khan Mahomed—that is, two trustees purchase from two co-trustees. The purchasers have full knowledge of the whole transaction, and they can acquire no better title than their vendors. If Shaik Ismail and Khan Mahomed had sold to some person who came within the definition of a purchaser for valuable consideration without notice, no doubt the case would have been different, but Shaik Ismail and Khan Mahomed would have been compelled to make over the profits on their sale, viz , the $4,750 to the plaintiffs. I refrain from expressing any opinion as to what their position may even now be, as they are not parties to the suit, and I have commented on their past position, only in so far as it was neces-

sary to arrive at a decision on the question now before me, nor do I express any opinion as to the liability of Shaik Ismail and Khan Mahomed to the defendants arising from a failure of consideration. These are matters which are not before me. Holding as I do, that the agreement was vitiated from its inception, the plaintiffs have a right to follow the property, and they find that it is vested in the defendants, the originators and prime movers in the wrongful act. As to their own moiety, their liability is clear, then as to the other moiety purchased by them, do they stand in any better position? I think not. They were purchasers with their eyes open, and bought such moiety subject to the equities of the plaintiffs. I think therefore, that the agreement must be set aside—the claim of the defendants as to $4,750 disallowed,—and the parties, as far as it may be practicable, relegated to the position in which they stood at the time of the making of the said agreement. I have only to add, that I consider the circumstances under which Baron Grant was allowed by the Court, in the Emma Silver Mining Company, certain *bonâ fide* expenses incurred by him, such as advertisements, *etc.*, are very dissimilar to the present state of facts, which are governed by other principles and rules of Equity.

Judgment for plaintiffs.

BEEBEE SAMSOO *v.* WRIGHT.

A mortgagee cannot be deprived of his costs of defending an action at the suit of the mortgagor, unless he has been guilty of misconduct or fraud, and he is entitled to deduct such costs out of any balance that may be in his hands as payable to the mortgagor after satisfying his claim even if the mortgagor is suing as a *pauper*.

January 6.

This was a suit by a mortgagor against a mortgagee to have it declared that the mortgagee had improperly sold part of the mortgaged lands, as it was alleged her claim had been satisfied out of other lands previously sold by her, and such improper sale was also at an undervalue. The defendant filed her accounts with her statement of defence, shewing a balance to be in her hands [after satisfying all her claims for principal, interest, and auction charges] of $110.40 which she paid into Court. The plaintiff declined to accept this sum, and proceeded with the suit, but failed in proving her case. The plaintiff sued in *formâ pauperis*.

Van Someren, for defendant, submitted as mortgagee the plaintiff was entitled to have her costs, and that out of the mortgage fund or balance proceeds in her hands; and the fact that plaintiff sued as a *pauper* was immaterial, as this right was a claim on the fund or balance, and not against the plaintiff personally. He referred to Section 25 of the Courts' Ordinance 3 of 1878; Section 463 of the Civil Procedure Ordinance 5 of 1878, and to *Cotterell* v. *Stratton*, 8 L. R. Ch. App. 295; *Turner* v. *Hancock*, 20 L. R. Ch. Div. 303; and *re* Watts, 22 L. R. Ch. Div. 5.

G. H. S. *Gottlieb*, for the plaintiff, submitted that the plaintiff could not be ordered to pay costs as she was suing as a *pauper*,

SHERIFF, J. 1857.

BEEBEE SAMSOO v. WRIGHT.

and to allow the defendant to deduct her costs from the balance which the plaintiff was admittedly entitled to was only another mode of making her pay costs.

Sheriff, J. said the defendant's right as mortgagee to have her costs was looked on by the authorities as a matter of contract prior to the action, and she was entitled to add her costs to her claim against her mortgage security. In defending this suit the defendant had incurred costs, and she should now have them against the balance in Court which were part of the proceeds of her securities. The fact that plaintiff was a *pauper* could not deprive the defendant of this right, and the order he should make was that judgment be entered up for the defendant, and that the defendant's taxed costs be paid out of the $110.40 in Court, and if any balance thereof remained after payment of such taxed costs, such balance should be paid to the plaintiff.

Judgment accordingly.

THE HOK CANTON.

PENANG.

SHERIFF, J. 1887.

January 10.

A person who renders salvage services to a ship at the request of the crew thereof, [the servants of the owner] has a claim for such services on the ship; and the owner who has had the benefit of his services cannot deny such claim.

In order to constitute services rendered in navigating a ship out of port *salvage* services, it is sufficient if at the time they are rendered the ship has encountered a misfortune [such as an attack in such port by pirates who have murdered some of her officers and carried away the captain and others as prisoners] which *might possibly* expose her to destruction if such services had not been rendered.

Such services cannot be considered as mere *pilotage* services.

Suit for salvage, in the Vice-Admiralty Court. The facts and arguments sufficiently appear from the judgment, and need no further statement.

G. H. S. *Gottlieb*, for plaintiff.

Thomas, for defendant.

Cur. Adv. Vult.

Sheriff, J. This is a claim of salvage on the part of Captain Roura for services rendered to the Steamship *Hok Canton* on the 14th of June last. The *Hok Canton*, sails under the Dutch flag, and is valued at $60,000, and was released on bail, the bond being in the sum of £3,300 sterling. A sum $125 has been paid into Court, which it is alleged, is sufficient to satisfy the plaintiff's claim.

The following facts are not in dispute. The *Hok Canton* proceeded to Rigas from Penang to load with pepper. This pepper was to be procured by the plaintiff. The firm Hermann, Jebsen & Co., at Penang, had shipped $45,000 by the *Hok Canton*. This amount was given to Captain Hansen with instructions to pay out the same to the plaintiff as against all pepper delivered on the steamer. Rigas is situate in Acheen in Sumatra. Tunku Omar is the first Chief on the West Coast of Sumatra, and it would appear that the plaintiff had arranged to procure pepper

from him. It was also admitted that the Dutch and the Achinese have for a long time past been engaged in hostilities. The plaintiff informed Tunku Omar that he had $5,000 on board the *Hok Canton*. In all probability the knowledge of this fact incited him to visit the ship. He left the plaintiff weighing pepper on shore, and said he would go on board about some rice.

The plaintiff says—

"As Tunku Omar did not return I went on board the *Hok Canton* to see him. On my way I passed a little Island in the Bay. I saw a small boat coming from the ship. I rowed towards the boat and called out "Tunku Omar"—The men signed with their hands that Tunku Omar was still on board. I then went on to the *Hok Canton*. On arriving, instead of finding Tunku Omar, I found the crew in a state of consternation."

It is unnecessary to dwell upon the details. Captain Roura saw the bodies of the Chief Engineer, and the Chief Officer. They had been slain, and he was the only living European on board, the Captain, his wife, and Mr. Fay having been taken on shore as prisoners. The ship had been subjected to a piratical attack. There had been bloodshed, and she had been pillaged.

Mahomed, the syrang [that is the boatswain] says that "Tunku Omar asked me, boatswain can you sail the ship? I said 'we have no sails, and no hands to weigh anchor.' He said, if you can sail the ship I want you to take her on a reef. Tunku Omar said to me that he was coming back with many men to take the ship ashore."

On the other hand, John Fay, who was the 2nd Engineer on board the *Hok Canton*, and was taken prisoner, deposes.—"Tunku Omar told me after I got on shore that he had no intention of going back to the *Hok Canton* as he had got all he wanted. I asked him if he was going on board." The plaintiff says, "the boatswain gave me command of the ship and I took the same." I would here remark that the vessel was navigated from Rigas to Olehleh by the plaintiff.

Mahomed the boatswain says:—"Captain Roura was in charge I did not give any orders." It is true that Cho Ah Lip, the supercargo, asserts that—"Captain Roura did nothing at all on board the vessel, the boatswain gave the orders," and it is likewise true that Chai Ah Guan says that "on the voyage from Rigas to Olehleh, Captain Roura was a passenger only"—but I don't believe either of them.

It was laid down in "*The Bomarsund*" Lushington, p. 78.

"The plaintiff is therefore entitled to salvage reward, and although his services may not have been of a very difficult kind, the owners whose servants received him on board, and kept him and took the benefit of his services cannot now turn round and deny that his services were in the nature of salvage."

The owners of the *Hok Canton* have, by payment into Court, admitted that services were rendered. The question which I have to determine is, whether $125 is sufficient to compensate the plaintiff, and if not then what amount the Court should award? The

SHERIFF, J. 1887.

THE HOK CANTON.

owners say—1st, That no great skill was required, as the boatswain could have brought out the ship, and had the plaintiff come a little later, the *Hok Canton* would have been moving out. 2nd, That the services rendered were practically only pilotage, and the $125 is considerably in excess of the amount which would be charged for pilotage. 3rd, That the *Hok Canton* was in no danger, as the pirates did not intend to return [see evidence of John Fay, *antè*.] As to the 1st point—The boatswain says. "If there had been no European, I would certainly have taken the ship out, but as Captain Roura had come, he being a European, I gave him charge of the ship. I have sailed for two years and six months in the *Hok Canton* on the Coast. . . . . I have been in Rigas 4 times."

Captain Kerr, now commanding the *Hok Canton*, called by the defence says, "I believe that the boatswain and the supercargo could have taken her out . . . . . Had I been at any time too ill to have navigated the ship I would have allowed the "boatswain" to do so. He understood the telegraph. There were two passages, but the boatswain was competent to take her through. There were also two or three others who were also competent to bring the ship through." If Captain Kerr is right, then the *Hok Canton* was singularly fortunate in having so many competent navigators on board. I would merely add that the supercargo kept all his nautical skill to himself. He simply did nothing. John Fay says, "I know the boatswain. I can't say if he was competent to take the vessel out of Rigas." On the other hand, there is the evidence of Captain Christiansen, a witness for the plaintiff. He is the Manager of the Prye Dock Company, and I must say that I was impressed by the manner in which he gave his evidence. He is a man of experience, having been 27 years at sea, and having been many times to Acheen. He says of Rigas harbour, "It would require local knowledge to know where are the reefs, and it would also require knowledge of the handling of a steamer. I don't think as a rule that a syrang [boatswain] is competent to handle a steam vessel. I am certain, however, that it requires some skill to get out a steamer from Rigas harbour when she is heading to land." The *Hok Canton* was heading to land, and close by was a brig called the *Eagle*, belonging to the plaintiff. In consequence of the plaintiff going to the *Hok Canton*, the brig was taken out of Rigas by her boatswain.

For the defence it was urged that it is easier to navigate a steamer out of harbour than a sailing vessel, and Captain Kerr says so. Stress was laid upon the successful navigation of the brig, but I think the allegation that it is easier to navigate a steamer out of harbour than a sailing vessel, must be taken subject to this qualification that all necessary steps for the due working of the motive power have been taken. I admit the superiority of a vessel under steam, but in my opinion a person may be competent to navigate a vessel under steam and yet may lack the requisite knowledge to set the propelling power in motion. I mean for example, knowledge for the time required to get up steam or the minimum quantity of steam requisite to propel the ship, &c., &c.

Now, the boatswain himself says, "I had given orders to prepare to cut away the anchor before Captain Roura came, but could not get up steam. I gave no orders to firemen "get up steam before Captain Roura came." The fireman Subidin says "I remember the Achinese coming on board the *Hok Canton* at Rigas. I was below. I heard Captain Roura's voice. He ask me how much steam? I said 10 lbs. I promised more steam in 5 minutes. Before then I had got 45 lbs." He is certain that he only got orders from the plaintiff. While I make due allowance for the alarm which the untoward event created, still I am compelled to say that the boatswain had not up to the arrival of the plaintiff, shewn such signs of intelligence as to induce the Court to form a favorite opinion of his ability to manage the *Hok Canton*. He had given orders to prepare to cut away the anchor, but this was a duty which would not occupy any great length of time, and on the other hand, he had not ascertained what steam was available, nor indeed communicated with the firemen at all.

I defer the 2nd point raised, until the 3rd point has been considered. Now, the 3rd point is that the *Hok Canton* was not in any danger, and Counsel contended that the danger must actually exist. It is true according to Mr. Fay, that Tunku Omar said he was not going to return, but it is also true according to the boatswain that Tunku Omar told him that he was coming back with many hands to take the ship ashore. I see no reason to disbelieve either of these statements. Tunku Omar after leaving the *Hok Canton*, well pleased with his booty and captives, may have changed his mind, but it must not be forgotten that he stayed at Rigas for at least two days after, and had the *Hok Canton* remained at Rigas there is no reason why this Malay pirate should not have again changed his mind and determined to renew his depredations. The *Hok Canton* within his reach would have been a strong incentive to plunder. It is therefore clear, that it was a matter of importance that the *Hok Canton* should leave Rigas and with as little delay as possible.

The rule as to the existence of danger is laid down in "*The Charlotte*," 2 Wm. Rob. p. 71, approved of in "*The Strathnaver*," L. R. 1 Appeal Cases 58.

> "It is not necessary I conceive, that the distress should be actual or immediate or that the danger should be imminent and absolute, it will be sufficient if at the time the assistance is rendered the ship encountered any damage or misfortune, which might possibly expose her to destruction if the services were not rendered."

To apply this rule to the present case: When the plaintiff came on board, the *Hok Canton* had been deprived of all her officers. Surely that circumstance may be defined as a misfortune, and if the plaintiff had not taken charge, it is at best doubtful whether the ship could have escaped from Rigas.

I now come to the 2nd point, that the services rendered were practically only pilotage, and that the amount paid into Court is considerably in excess of the amount which would be charged for pilotage. Captain Kerr says, "I consider $125 very good pay for

SHERIFF, J. 1887.

THE HOK CANTON.

9 hours' work. If I got for pilotage $125, I would be over-paid. Under ordinary circumstances, I should be glad to get $100."

In the case of "*The Mary*," 1 Wm. Rob. 448, with the Master and part of the crew captured by pirates, she had a signal of distress and fired guns, and certain persons went off to her, and one took charge and brought her into port. The judgment, so far as it is necessary to refer to the same, reads as follows:—

"Upon this part of the case then, I am of opinion that the service which was rendered by the salvors in conducting this vessel into the Harbour of Amponnam, although in its nature it is to be regarded as a salvage service is one of no great magnitude or merit. It occupied but a very short period of time, probably not more than two hours and a half in its duration, and was attended with no risk and no great exertion to the salvors..... ...The service in question would be amply rewarded by a very moderate remuneration. ..... Under all these circumstances of the case, I think I shall do ample justice to the salvors in awarding them the sum of £30."

In that case it will be noted that *The Mary* was conducted into harbour where the ships of the salvors were, but in the case before me the plaintiff was taken away from Rigas; and he left his ship behind to navigate the *Hok Canton*. I do not think that the plaintiff had cause to fear any violence from Tunku Omar, in whose power he had been that very morning on shore, nor do I think that by taking command of the *Hok Canton* he jeopardised the safety of his brig, which sailed under the British and not the Dutch flag. The plaintiff declares his intention again to go to Rigas so that he evidently does not consider that his action with respect to the *Hok Canton*, has damaged him in the eyes of Tunku Omar.

In the case of the *Duke of Clarence*, 1 Wm. Rob. 346, it was said "when a vessel approaches the shore mere ordinary labor is always to be obtained in great abundance, but labor united with nautical skill, being scarce, it is more difficult to be procured." At Rigas nautical skill was indeed scarce, and the only available person competent to take charge of, and command a steamer, was the plaintiff. His conduct was all that could be desired. He was calm and collected, acted with great promptitude and got the *Hok Canton* safely out Rigas harbour with the least possible delay. I hold that the vessel was, as long as she remained in Rigas harbour, in danger of being attacked by pirates, and that she was rescued from that danger by the plaintiff. I consider that the amount paid into Court is inadequate, and while the services rendered must not be exaggerated still they were undoubtedly more meritorious than those rendered in the case of *The Mary*, and I therefore award the plaintiff £200 and his costs of suit.

Judgment for plaintiff with costs.

YEOH HIM & ORS. *v.* YEOH CHENG KANG & ORS.

PENANG.

SHERIFF, J. 1887.

January 10.

A suit in which the main point was whether the plaintiffs were or were not members of a certain Society of the "Yeoh" tribe or clan, and the object of which suit was to have a declaration that the plaintiffs were such members and for administration of the Society's affairs under the directions of the Court, so that the plaintiffs might enjoy the benefits of the Society, was at the trial by consent of both parties referred to the arbitration and award of certain well-known and influential members of the Chinese

community of the Settlement who were not members of the Society, but who were each and all office-bearers in similar Societies of their respective "Sehs" or clans. The order of reference was, of the "suit and all matters in difference therein." The parties and arbitrators were all Chinese, and the question was one entirely dependant on Chinese custom, usage, and religious practices in connection with such Societies. In accordance with Chinese usage and practice, the arbitrators first of all called and met the plaintiffs and their witnesses, and heard all that they had to say [through certain of their number who were chosen as "spokesmen"] in support of their claim: they [the arbitrators] on a subsequent day, called and met the defendants and their witnesses, and also heard all they had to say [through their "spokesmen"] against the plaintiff's claim. On neither of these occasions was the opposite party present, and no notice was given to them of the arbitrator's intention to hear the case of their opponent, and in consequence there was no cross-examination on those occasions by either party. On a third occasion, the arbitrators called for and met *both parties* at one and the same time, and enquired into certain accounts, and the contents of certain title deeds of lands belonging to the Society, and then heard further statements made by the plaintiff's party in the presence of the defendants, and of the defendant's party in the presence of the plaintiffs. Both parties having each had their full say, the arbitrators announced that they would make and publish their award in a few days. Within a few days they did so, and by the award found as a fact that certain persons through whom the plaintiffs claimed, had been members of the Society, and then proceeded to award that the defendants should pay the plaintiffs the sum of $2,000, and also convey to them two houses in Beach Street belonging to the Society [and which they valued at $22,000], and ordered that the plaintiffs from thenceforth should have no further interest in the Society. The plaintiffs being dissatisfied, moved to have the award set aside.

Held, [by *Sheriff*, J.] that the proceeding of the arbitrators in examining the one party in the absence of the other was irregular and the award must be set aside.

Held, on appeal [affirming the judgment of the Court below] that the arbitrators had not decided or awarded, but had settled or compromised the dispute—that they had acted *ultrà vires* in excluding the plaintiffs from further membership [if they found them to be members] and they had been guilty of "misconduct" within Section 454 of the Civil Procedure Ordinance 5 of 1878, and the award was rightly set aside.

Held also, that the award was indivisible and must be set aside as a whole, and that there had been no waiver on the part of the plaintiffs by their attending and proceeding at the first and third meetings.

The Court of Appeal here has full power and authority on granting leave to appeal to Her Majesty in Her Privy Council to impose as a term, that the appellant lodge his appeal with the Registrar of the Privy Council within a given time [*dissentiente—Pellereau & Goldney*, J.J.]

This was a suit to have it declared that the plaintiffs were members of a certain Society or Kongsi, called the Soo Tee Tong, Sye Tow Kong, but commonly known as the Seh *Yeoh* Kongsi; and to have their rights as such members enforced against the defendants whom it was alleged had usurped the post of office-bearers of the society and were applying the funds of the society to members of the Yeoh clan belonging to a limited class, and excluding the plaintiffs from the benefits of the society. The defendants denied the plaintiffs and all other Chinese of the *Yeoh* tribe who were not natives of a particulars village [the "Eh Yeoh" Seah village] were members, and the question for determination in the suit was whether the society was only for persons of this particular village or for Seh "Yeoh" Chinese generally. The defendants and a portion of the Yeoh Chinese were members of the said "Eh Yeoh" Seah village—the plaintiffs and a large number of their supporters were of the *Yeoh* tribe, but belonged to villages other than the "Eh Yeoh" Seah village. The case was heard on several days before *Sheriff*, J. when banners, lanterns, boards and costumes were produced bearing curious characters, figures and signs, some of which each party claimed as supporting his case. During the course of the enquiry and it

SHERIFF, J. 1887.

YEOH HIM & ORS. v. YEOH CHENG KANG & ORS.

being apparent the question was one peculiarly fitted to be decided by Chinese arbitrators, on the 26th October, 1886, by consent it was ordered by *Sheriff*, J. under Sections 440 & 442 of the Civil Procedure Ordinance, 1878, "that this suit and all matters in difference therein be referred to the award of Khoo Tean Tek, Khoo Sim Bee, Tan Kim Keng, Cheah Hoon Heap, Cheah Tek Soon, Sim Whuah Cheam and Lim Pek Keam or the majority of them." These arbitrators were persons well-known and of some influence in the Chinese community of the Settlement, and each and all of them were office-bearers in the Society or Kongsi of their respective "Seh" or class—and being consonant with the practices, habits, and usages of such societies, were on that very account nominated arbitrators by the parties to this suit. The arbitrators took on themselves the burden of the reference and in accordance with general Chinese usage and practice in arbitrations, they first of all proceeded to call on the plaintiffs and their witnesses to meet them on a certain date—and on that date met them and requested them to appoint some of their number as "spokesmen" and the plaintiffs nominated three of their party as such, and these spokesmen then laid before the arbitrators the plaintiff's case and the evidence in support of it. The defendants were not notified of this meeting and were not present at it. The arbitrators thereafter called on the defendants and their witnesses to meet them on a certain date and on that date met them and requested them to appoint some of their number as "spokesmen" and the defendants nominated two of their party as such, and these spokesmen then laid before the arbitrators the defendants' case and the evidence in support of it. The plaintiffs were not notified of this meeting and were not present at it. Each party at these meetings neither requested nor objected to the non-attendance of the other. Thereafter the arbitrators called on both plaintiffs and defendants and their witnesses to meet them at a given date, and on that date met both parties and in each other's presence further heard the case of each through their respective spokesmen, and then in the presence of both parties called for and examined certain books and accounts of the society, and the title deeds of lands belonging to the society, and on conclusion of this meeting informed both parties that they would be publishing their award in a few days. Neither party objected to this nor did either offer any further evidence nor requested to cross-examine the opposite party or their witnesses. A few days after, the arbitrators made and published their award in Chinese writing, which being translated was as follows:—

"By order of the Judge, and with the consent of the plaintiffs and defendants, and of the lawyers for both sides, the case brought in Penang against those persons of the Yeoh tribe of the Ang Choo village, the Chang Bee village and the Eh Yeoh village of Sam Toe in the Hai Ting district, by those persons of the Yeoh tribe of the other villages is referred to us, Khoo Tean Tek, Khoo Sim Bee, Cheah Hoon Heap, Cheah Tek Soon, Tan Kim Keng, Lim Whuah Cheam, and Lim Pek Keam, the seven arbitrators for decision.

"After careful investigation into the origin, the Sye Tow Kong was in fact founded by those persons of the Yeoh tribe of the Ang Choo village, the Chan Bee village and the Eh Yeoh village of Sam Toe in the Hai Ting dis-

trict, who brought it over to Penang. At that time the number of those persons of the Yeoh tribe of the Ang Choo village, the Chan Bee village, and the Eh Yeoh village of Sam Toe in the Hai Ting district, who came to Penang was great, but the number of those of the Yeoh tribe of the other villages, who then came to Penang was small, and for that reason we draw the inference that towards the establishment of the Idol of Sye Tow Kong for worship, those persons of the Yeoh tribe of the other villages did subscribe, but to a small extent.

"Reasonably speaking, the Sye Tow Kong was founded about sixty years ago, and the management was conducted by the president, Mr. Yeoh Cheam of the Eh Yeoh village, in company with those of the Yeoh tribe of the Ang Choo village, the Chan Bee village, and the Eh Yeoh village of Sam Toe in the Hai Ting district, and thereby the property of the Institution prospered. But those persons of the Yeoh tribe of the other villages had not the management at all, and, in consequence of that, those persons of the Yeoh tribe of the Ang Choo village, the Chan Bee village, and the Eh Yeoh village treated the property as their own.

"The subsequent establishment of the Soo Tee Tong shew some slight complication. Then those of the Yeoh tribe of the other villages also established the Ong Long Tong for themselves, but still they did not dispute the rights of the funds of the Institution.

"Under these circumstances, we, the seven arbitrators unanimously decide that out of the property of Sye Tow Kong of the Eng Guan Temple of the Soo Tee Tong, shall be taken out the house situated with the back facing the sea, and the front facing the land, that is No. 157, Beach Street, now occupied by the *chop* Swee Chin estimated to be worth $14,000, as well as the house situated with front facing the sea, and back facing the land, that is No. 174, Beach Street, now occupied by the *chop* Shing Hing, estimated to be worth $8,000, and also the amount of $2,000 in cash, altogether $24,000, which are to be given over to those persons of the Yeoh tribe of the other villages of Ong Long Tong as the property of their Institution, that is, as the property of their Institution for ever.

"With regard to the cash, and the conveyance of the grants, delivery thereof must be made within the specified time of 15 days.

"The property of the Institution of Sye Tow Kong of the Eng Guan Temple of the Soo Tee Tong and the other articles, shall all go over to the possession of those persons of the Yeoh tribe of the Ang Choo village, the Chan Bee village, and the Eh Yeoh village of Sam Toe of the Hai Ting district.

"With regard to those persons of the Yeoh tribe of the other villages, whose names hitherto appear in the grants as trustees of the Sye Tow Kong's property, those names although they appear in the grants become void from this day.

"With regard to the Member-certificates formerly issued by the Soo Tee Tong, the same are to be brought back to the elders of the Yeoh tribe of the Ang Choo village, the Chan Bee village, and the Eh Yeoh village of Sam Toe of the Hai Ting district within the specified time of a year, and each holder thereof shall receive $2.12½ instead.

"The time allowed is a year, and if any one, whether he be a resident here or abroad, fails to come for that amount within a year, the Member-certificate becomes void.

"The tablet of the late Mr. Yeoh Boom Hien together with the sum of $120, shall be handed back to the elders of the Ong Long Tong, who shall have to take back the tablet of the said Yeoh Boon Hien.

"The names of those elders for the different villages of the Yeoh tribe, formerly appointed by the Soo Tee Tong, hereby become void.

"Mr. Yeoh Cheng Hup kept inside the Eng Guan Temple the Idol of Sye Tow Kong, which they must take back.

"Henceforth those persons of the Yeoh tribe of the other villages, no matter they belong to Hokien, or Kwitan, or Teochoo, cannot raise any dispute and claim again that they have any interest in the property of the Sye Tow Kong of the Eng Guan Temple of Soo Tee Tong in Penang, but those

SHERIFF, J. 1887. — YEOH HIM & ORS. v. YEOH CHENG KANG & ORS.

of the Yeoh tribe of the Ang Choo village, the Chang Bee village, and the Eh Yeoh village of Sam Toe of Hai Ting district, are now at liberty to do anything with the same.

"This having now been justly and properly decided, every one must abide by justice and cannot raise any dispute.

"Each party must pay their own Court costs and the other expenses incurred when they sued each other.

"Moreover, those persons of the Yeoh tribe of Ong Long Tong must advertise the following in the English printed paper for a year:—

"The Eng Guan Temple of Sye Tow Kong of the Soo Tee Tong in Penang, is the property of those persons of the Yeoh tribe of the Ang Choo village, the Cham Bee village, and the Eh Yeoh village of Sam Toe in the Hai Ting district; those of the Yeoh tribe of the other villages have no interest in it.

"This is to prevent dispute—in future every one must obey this.

"Dated the 27th day of the 10th Moon of the year Bear Soot, corresponding with the 22nd of November, 1886.

Arbitrators:

[*Signed*] KHOO TEAN TEK
" KHOO SIM BEE.
" CHEAH HOON HEAP.
" CHEAH TEK SOON and his mark. +
" TAN KIM KENG.
" LIM WHUAH CHEAM.
" LIM PEK KEAM and his mark." +

The award was filed in Court by the defendants on 1st December, 1886. On the 20th December, the plaintiffs obtained a rule calling on the defendants to shew cause why the award should not be set aside. The matters stated in the plaintiff's affidavit were in several respects denied by the arbitrators in an affidavit filed by them.

Ross, [*Van Someren* with him] for the defendants shewed cause and [after raising a preliminary objection as to the form of the rule which led the Court to amend it under Section 263 of the Civil Procedure Ordinance 4 of 1878] they contended that there had been no irregularity as the same course was adopted as to both sides—*Watson* v. *Fraser*, R. & M. 17; *Eads* v. *Williams*, 24 L. J. Ch. 531; *Thomas* v. *Morris*, 16 L. T. [N. S.] 378; that the arbitrators in fact were dealing as experts and arbitrators, and were specially chosen because of their peculiar knowledge of the practices and usages of such societies as the Seh *Yeoh* Kongsi—*Bottomley* v. *Ambler*, 38 L. T. [N. S.] 545; they also contended, the plaintiffs had waived any irregularity by not objecting to the mode of proceeding, but attending the third meeting without objection and lying by till they found the award was against them *Bignall* v. *Gale*, 9 Dowl. 631; *Ex-parte* Wyld, 30 L. J. Bank 10; *Moseley* v. *Simpson*, L. R. Eq. 226; *Re* Hopper, 2 L. R. Q. B. 367, 374 and Russell on Arbitration, 193, 685. They also contended that the award was not *ultrà vires*—*Winter* v. *Letchbridge* McCle. 253; *Burton* v. *Wigley*, 1 Bing N. C. 665; *Boodle* v. *Davies*, 3 Ad. & E. 200; *Harrison* v. *Lay*, 13 C. B. [N. S.] 528, 536-37; *Morley* v. *Newman*, 5 D. & R. 317, and *Kerslake* v. *Cox*, 16 L. T. [N. S.] 396.

Thomas, [E. W. *Presgrave* with him] contended, the proceedings were so irregular, as to require the setting aside of the

award and cited *Redman on Arbitration*, 87; *Haigh* v. *Haigh*, 31 L. J. Ch. 420; *Russell on Arbitration*, 188; *Harvey* v. *Shelton*, 7 Beav. 455; and the fact that the mode adopted deprived the parties of their right to cross-examine was sufficient ground of itself for setting aside the award, and no custom or practice, of Chinese arbitration, could avail. *Re Burke & ors.*, 33 L. J. [N. S.] C. P. 246; they also contended there had been no waiver on the part of the plaintiffs and the arbitrators had acted *ultrà vires* in having excluded the plaintiffs from further benefits of the society though they found them to be members;—whether they should or should not be excluded was not a matter in difference in the suit, and therefore was not a matter referred to the arbitrators to award on.

SHERIFF, J. 1887.

YEOH HIM & ORS. v. YEOH CHENG KANG & ORS.

Ross, replied.

Sheriff, J. said he was most reluctant to set aside the award, as he felt sure the case was one peculiarly fitted to be decided by Chinese arbitrators than by this Court, but the authorities cited, particularly *re* Burke and others, was too strong to be got over. The arbitrators' mode of proceeding was in law irregular and improper, and the award must be set aside; but he would not give the plaintiffs the costs of this rule, but such costs would he costs in the cause.

From this decision the defendants appealed, and the appeal was heard by the Court of Appeal, consisting of *Ford*, C. J., *Wood*, and *Pellereau*, J.J., on the 15th, 16th, 21st and 22nd days of December, 1887.

Ross, [C. *Logan* with him] for the appellants reiterated the former arguments and further contended that the award could only be set aside for misconduct in the arbitrators, but there had been none here, and in addition to the cases then cited, referred to *Hewlett* v. *Laycock*, 2 Car. & P. 574; *Tillam* v. *Copp*, 5 C. B. 211; *Drew* v. *Drew*, 25 L. T. [O. S.] 282; *Re Tunno & Bird*, 5 B. & A. 488; and Sections 451, 452, 454 of the Civil Procedure Ordinance 5 of 1878.

Thomas, [*Clutton* with him] in addition to their arguments in the Court below contended, there had been legal misconduct, but the part of the award which found the plaintiffs to be members of the society, was divisible from the rest of the award and the latter part only need be set aside; that the arbitrators had not decided the case, but merely compromised it, which they had a right to do. In addition to the cases cited by them in the Court below, they referred to Section 451, Civil Procedure Ordinance 5 of 1878; *Russell on Arbitration*, 660; *Dobson* v. *Groves*, 6 Q. B. 637; *Walker* v. *Foobisher*, 6 Ves. 70; *Featherstone* v. *Cooper*, 9 Ves. 68; *Re* Brooke Delcomyn & Badart, 33 L. J. C. P. [N. S.] 246; *Plews* v. *Middleton*, 6 Q. B. 845; *Kirk* v. *East India Dock Co.* 55 L. T. [N. S.] 245; *Phips* v. *Ingram*, 3 Dowl. 669; *Thorburn* v. *Barnes*, 2 L. R. C. P. 384; *Hooper* v. *Hooper*, McCle. and Y. 509; *Hutcheson* v. *Eaton*, 13 L. R. Q. B. Div. 861; *Ross* v. *Boards*, 8 Ad. and E. 290; *Re* Tidswell, 33 Beav. 213; *Kerslake* v. *Cox*, 16 L. T. [N. S.] 396; *Dunhill* v. *Ford*, 3 L. R. C. P. 36; *Morgan*

FORD, C. J. WOOD & PELLEREAU. } J.J. 1887.

YEOH HIM & ORS. v. YEOH CHENG KANG & ORS

v. *Mather*, 2 Ves. Jr. 22; *Re* Hick, 8 Taunt. 694; *Davies* v. *Price*, 34 L. J. Q. B. 8; *Re* Salkeld, 12 Ad. and E. 767.

[*Pellereau* J. referred to *Hagger* v. *Baker*, 14 M. and W. 9.]

Ross, in reply besides dealing generally with the arguments and authorities of the other side, contended the arbitrators had not as a fact found the plaintiffs were members, and the award was not divisible—the award could only be set aside for "misconduct" on the part of the arbitrators, Civil Procedure Ordinance 5 of 1878, Section 454; and if necessary the matter should be referred back to the arbitrators.

Ford, C.J. The judgment must be upheld. I have some doubt whether the acts of the arbitrators amount to "misconduct" under our Civil Procedure Ordinance, but I do not see my way to disturb the decision of the Court below.

Wood, J. I have very little doubt that the judgment of *Sheriff*, J. must be supported. There is no satisfactory proof of moral misconduct. I do not think it indispensable under Section 454. We have to decide what that "misconduct" is. If the Court cannot fairly trust the tribunal in the conduct of the reference,—if there is anything to shew partiality, it cannot be the duty of the Court to refer it back to it. That being so, and without authority to shew what "misconduct" in this Section is, I can only conclude it is what the general run of authority shews it to be. "Misconduct" means "ill-conduct" or "legal misconduct" if you like. If we were to refer the matter back to the arbitrators we could not be sure they would act impartially—there is an imputation of perjury made by the arbitrators against the plaintiffs and the plaintiffs against the arbitrators. This raises such a state of feeling between them as it seems to me would make it most unjust to refer the case back to them. The award is not final. I do not think the award declares the plaintiffs tobe members. I look upon it as extremely vague. I think the case is within Section 454 and I do not think Sections 451 and 452, apply.

Pellereau, J. According to the plaintiff's statement of claim they pray 1st, that the defendants be directed to account and that the accounts be taken in the Registry of this Court in the usual way, and 2nd, for an order declaring that the defendants have not been duly elected and appointed trustees of the society, and directing that the President, Trustees, Treasurer and Committee should be duly appointed under the direction of the Court by the members of the Seh *Yeoh* and for an order directing the defendants to pay over to such Trustees and Committee when appointed, such moneys as may be found due upon the taking of the accounts aforesaid.

These two prayers are based upon the assumption that the plaintiffs are members of the society. The fact that they are members is denied; *that* was the main issue raised and that was what was referred, with the other two matters, to the arbitrators. Have they decided that or not? They have not, but have settled the case. I do not think that this award is divisible. I consider it *ultrà vires* as being a settlement and not a decision. The arbitrators have not dealt justice to the parties as they had

undertaken to do, but have decided on something which was not the issue left to them. They have shirked their duty, they have knowingly abstained from doing justice with the best and most conciliatory intention no doubt, but in a spirit which shews to my mind that they did not mean to deal with parties according to their rights; in doing so, I think they have been guilty of "misconduct." I need not attempt to define "misconduct" in all cases, but it is sufficient to set aside the award that the arbitrators should have committed personal misconduct as arbitrators, and I hold that the above facts amount to such, and bring the case within the meaning of Section 454 of Ordinance 5 of 1878. I cannot therefore dissent from the judgment in the Court below, and I think it must be affirmed and the appeal dismissed with costs

FORD, C. J. WOOD & PEL-LEREAU. } J.J. 1887.

YEOH HIM & ORS. v. YEOH CHENG KANG & ORS.

Judgment affirmed.

22nd August, 1888. The defendants [appellants] having filed [within six months] a petition praying for leave to appeal to Her Majesty in Her Privy Council, such petition came on this day for hearing before the full Court of Appeal.

FORD, C.J. WOOD, PEL-LEREAU & GOLD-NEY. } J.J. 1888.

YEOH HIM & ORS. v. YEOH CHENG KANG & ORS.

Ross, [*Van Someren* with him] for the petitioners [appellants.]

Thomas, [*Presgrave* with him] for the plaintiffs [respondents] asked that if leave were given it should be only on terms of the appellants giving security in $2,000 for the respondents' costs—Section 43 Clause iii of the Appeals' Ordinance 12 of 1879; and limiting a time within which the appellants should lodge their appeal with the Registrar of the Privy Council so as to prevent any unnecessary delay.

Ross, replied.

Pellereau and *Goldney*, J.J. were of opinion this Court had no power or authority to limit a time as it would be interfering with the Privy Council who had their own rules, and could not be bound by what was done here. By one of their rules, unless an appellant prosecuted his appeal within twelve months the appeal stood dismissed. If these appellants did not lodge and prosecute their appeal within that time, all the respondents had to do was to procure a certificate from the Registrar of the Privy Council to that effect, and produce it here and their case would proceed. In their opinion Section 43 of the Appeals Ordinance was *ultrà vires*.

Ford, C.J. and *Wood*, J. were of opinion this Court had full power and authority to limit such a time, and it would in no way be interfering with or binding on the Privy Council, but only on these parties. It would have a very salutory effect by preventing appellants keeping respondents waiting indefinitely, and it should in this case be imposed, in addition to the security in $2,000 for the respondents' costs of the appeal.

The learned Judges being equally divided, *Ford*, C.J. gave his casting vote in favour of the opinion expressed by himself and *Wood*, J.

Order—Leave given appellants to appeal to Her Majesty in Council, on the terms that they give security in $2,000 for respondents' costs of such appeal, and lodge their appeal with the Registrar of the Privy Council within nine months from this date. [*a.*]

[*a.*] The appeal to Her Majesty in Her Privy Council was never prosecuted. —J. W. N. K.

ASHABEE & ORS. *v.* MAHOMED HASHIM & ANOR.

PENANG.

SHERIFF, J.
1887.

January 12.

A devise by a testator of land as "a Wakoff for his children and their descendants" is void as tending to a perpetuity and cannot be construed by application of the *cypres* doctrine as a devise to the children in fee.

The doctrine of *cypres* can only be applied when the intention of the testator can be ascertained.

Cattlin v. *Brown*, 11 Hare 372, and *Pearks* v. *Moseley*, 5 L. R. App. Cases, 714, 19, per Lord SELBOURNE, followed.

A bequest of $400 for "maintenance" of his wife, and to be spent in "Kunduris for the testator," without shewing how much of it was for "maintenance" and how much for "Kunduris," is void for uncertainty and as tending to a perpetuity.

This was a suit to have a certain devise of lands in Burmah Road, and a bequest of $400 in the Will of one Osman deceased, declared void, and the deceased to have died intestate thereto; that the lands might be sold and the proceeds thereof as well as the $400 or such part thereof as remained, divided among the deceased's next-of-kin, and to have the estate administered by the Court. The deceased died in 1853. The material parts of the Will which was in Malay and as translated, were as follows: "There is a piece of land in Burmah Road as per Bill of Sale number 167, the same I hereby devise as a Wakoff for my children and their descendants. My children are seven in number, the issue of one mother, the first is named Pakir Mydin, the second Pakir Malim [and so on naming his seven children]. They have all obtained their respective shares in full. I owe nothing, but there is a Chinaman who owes me $400. Pakir Mydin will become my executor and demand the said sum of money, maintain his mother and Issahak [the youngest son] and spend for *kunduris* for me." At the foot of the Will was a list by which it was declared each child naming him or her had received his or her share in land or money, and "confirmed the Will" and was "finished." There was no residuary clause to the Will. Pakir Mydin obtained Probate of the Will in 1866 and died in 1875 leaving a Will by which he appointed the defendants his executors. The second and third paragraphs of the statement of claim were as follows:—

2. "A 'Wakoff' is a Malay word signifying land devoted to, or set apart for some specific purpose, as a charity or the like, and so rendered inalienable—and a Wakoff for a person's children and their descendants is a somewhat common way in which the natives of this Settlement attempt to tie up property in their families [but not as a charity in its legal sense] so that they may enjoy the produce or income thereof from generation to generation, but the land is prevented from ever being mortgaged or sold.

3. A 'Kunduri' is a Malay word signifying a feast, and a Kunduri for a deceased person is supposed by Malays to confer some benefit on the soul of such person and is generally observed first on stated dates after his death and then on the anniversary of his decease in such succeeding year."

The defendants admitted these paragraphs to be true. On the pleadings being opened, the Court called on

Hogan, for the defendants to support the devise and bequest. He contended that although the restraint on alienation intended

to be expressed by the word "Wakoff" was void, yet full effect could be given to the clause by applying the *cypres* doctrine, and holding the land to be a devise in fee to the seven children as tenants in common, free from all restraint and referred to *Kader Bee* v. *Kader Mustan*, 1 Kyshe, 432. The bequest of $400 for "Kunduris" he admitted was void, but contended the clause for "maintenance" was good and valid.

Van Someren, for the plaintiffs contended, that it was clear the testator never intended to give the lands to his children as their own, as he distinctly declared they had all received their shares in full, and the list at the foot of the will shewed this. To hold that the clause was a devise of the land in fee to the children would therefore be directly contrary to what the testator intended. Beyond the fact that the testator evidently wished to tie up the land for ever so that his children and their "descendants" should in some way enjoy it,—but not as their own, it was impossible to say what he meant. This tended to a perpetuity and as the intention was otherwise uncertain and impossible to be gathered, the doctrine of *cypres* did not apply. Marsden on Perpetuities, 262, 4—305, 312; *Cattlin* v. *Brown*, 11 Hare 372, and *Pearks* v. *Moseley*, 5 L. R. App. Cases 714, 719 per Lord SELBOURNE. As regarded the $400 he contended that the gift for Kunduris was void. *Fatimah* v. *Logan*, 1 Kyshe, 255, 68, 70; *Mustan Bee* v. *Shina Tomby*, 1 Kyshe, 580; and as it could not be ascertained how much of the $400 was for Kunduris and how much for "maintenance," the whole clause was void for uncertainty—*Chapman* v. *Brown*, 6 Ves. 404; *Limbrey* v. *Gurr*, 6 Mad. 151; *Fatimah* v. *Logan*, suprà; as well as tending to a perpetuity.

Sheriff, J. said the law against the perpetuities was law in this Settlement—*Ong Cheng Neo* v. *Yeap Cheah Neo*, 1 Kyshe, 326, 44—and as regarded the devise, the only question was whether the *cypres* doctrine applied in this case. He was of opinion on the authority of Lord SELBOURNE in *Pearks* v. *Moseley*, supra, that it did not, as it could not be ascertained what the testator intended beyond creating a perpetuity, and that the children should not have the land as their own. Failing the application of the *cypres* doctrine the clause was objectionable as tending to a perpetuity, and must be declared void. As regarded the $400, the same objection applied, and as it was also impossible to say how much was for "maintenance" and how much for Kunduris, the whole clause was also void for uncertainty. As the Will contained no residuary clause, the testator must be held to have died intestate as to both the land and the $400, and the same should be dealt with under the Statute of Distributions. The estate would be administered in Court, and there would be a decree in terms of the first and second prayer in the statement of claim. The costs of all parties to be paid out of the estate.

Decree accordingly.

TASERIP *v.* RICCARD.

PENANG. — PELLEREAU, J. 1887. — January 18.

Sections 42 to 48 (both inclusive) of the "Police Force Ordinance" 1 of 1872, do not apply to any action against a Police Officer for the return of specific property. [*a*.]

Selmes v. *Judge*, 6 L. R. Q. B. 724, and *Midland Railway Co.* v. *Local Board of Wittington*, 11 L. R. Q. B. Div. 788, distinguished.

A Police Officer has no right, after a reasonable time from the discharge of a prisoner, to detain property taken from him; and the prisoner's possession of such property is sufficient, without proof of title, to enable him to maintain an action against such Officer for the return of it.

Judgment of *Pellereau*, J., affirmed on appeal.

This was an action [a small cause] to recover $100 forcibly taken from the plaintiff by the defendant's agents and servants and wrongfully and maliciously detained by the defendant, or in the alternative, as money had and received by the defendant for the plaintiff's use. The defence endorsed on the Writ of Summons was [*inter alia*] a denial that the $100 was the plaintiff's; that on the 7th March, 1886, a robbery was committed in a house in Northam Road, and the plaintiff was suspected of being concerned in the robbery, and search having been made in the house occupied by the plaintiff, the said sum of $100 was found and was detained by the Police [acting under the instructions of the defendant, who was the Superintendent of Police at this Settlement], and the plaintiff was charged with the said robbery before the Magistrate, who discharged the prisoner; that the defendant had reasonable and probable cause for believing that the $100 was part of the proceeds of such robbery, and therefore, notwithstanding the plaintiff's discharge, refused to return him the same. The defence also alleged that the defendant acted under Section 31, Clauses 1, 2, 3 and 10 of Ordinance 1 of 1872, and claimed that the action was not brought within three months of the thing complained of, as required by Section 42 thereof. The evidence shewed that a robbery had been committed, and the plaintiff among others had been taken up by the Police on suspicion, that the plaintiff's house had been searched and in a box, of which the plaintiff had then the key, were found the $100. The plaintiff was charged before the Magistrate with the robbery, but there being no evidence against him nor any to connect the $100 with the robbery, the charge against him was dismissed. This was on the 6th day of April, 1886. The Police, after this, were unsuccessful in procuring any evidence. The plaintiff then requested the defendant to return him the $100, which the defendant refused to do considering that, from a statement made by the plaintiff at the time of the seizure thereof, as well as his inability then to say what the amount of money in his box was, he could not be the owner thereof, and from these facts, and that the prisoner's relatives, some of whom lived in the same house with him, had been committed by the Magistrate to take their trial on the same charge, he suspected the $100 were part of the proceeds of the robbery. The charge against the plaintiff's

[*a*.] See *Foat* v. *Mayor of Margate*, 11 L. R. Q. B. Div. 299; *Flower* v. *Local Board of Low Leyton*, 3 L. R. Ch. Div. 347; *Phelips* v. *Hadham District Board*, 1 C. & E. 67.

said relatives was afterwards not proceeded with at the Assizes, a *nolle pros.* being entered on account of the absence of the owner of the property, the Kalahome of Siam, and the want of evidence to identify the property found on them. This was on the 28th day of May, 1886. On 8th July, the plaintiff, through his Solicitors, sent defendant a notice in writing requesting the return of the $100. The defendant still declined to do it. On August 17th, the plaintiff gave the defendant a month's notice of his intention of suing him for the $100. This action was commenced on the 19th October. At the trial, the plaintiff gave a different account to that which he had given the Police on the occasion of the aforesaid search as to how he became possessed of the $100; he, however, denied he had made any such statement to the Police, as they alleged. He called evidence in support of his title to the money. The $100 had *not* been mixed up by the Police with other moneys, but were placed in a bag with a label as to the case and person with which it had been connected, and continued in this condition to the date of this trial and even afterwards.

E. W. *Presgrave*, for the plaintiff contended, the defendant's act was a trespass, and a continuing one *die in diem*, and the three months had not expired, and referred to *Tan Kim Keng* v. *Municipal Commissioners*, 1 Kyshe, 478.

Kershaw, for the defendant, referred to *Saunders* v. *Saunders*, 2 East, 254; *Wordsworth* v. *Harley*, 1 B. & A. 391; *Selmes* v. *Judge*, 6 L. R. Q. B. 724; *Midland Railway Co.* v. *Wittington Local Board*, 11 L. R. Q. B. Div. 788.

Pellereau, J. The evidence shows that the sum of money, restitution of which is claimed, was in the possession of the plaintiff when it was seized by the Police during a search for stolen property, and from all the facts proved, I am satisfied that there is sufficient evidence of possession to lead to the presumption of ownership in the plaintiff, and to justify him in entering this action against the defendant, an alleged wrongdoer.

It appears to me from the evidence, that the seizure of the money was made under circumstances which rendered it lawful, and I cannot give judgment for the plaintiff on the ground of the forcible taking. I am also satisfied that the Police were justified in retaining the money for a reasonable time, for the purpose of further inquiry into the theft which had been committed, and so long as they had reasonable ground for suspecting that they could obtain further proof as to the theft and the offenders. But the seizure had taken place on the 10th March, 1886, prosecution was subsequently entered against the plaintiff and dismissed, the money being still kept by the Police, there does not appear from the evidence that there was, within a reasonable time afterwards, any further grounds for expecting any discovery as to the theft and offenders, and the party from whom the theft had been committed, never laid claim to the money, and was not proved to have any claim thereto. I hold,

PELLEREAU, J. 1887.

TASSERIT v. RICCARD.

that *then* the detention by the Police of the money became illegal and wrongful, and without reasonable or probable cause.

It was argued for the defence, that the action was not entered within three months of the act complained of; this is true in respect of the seizure, but the seizure was lawful and cannot be the foundation of any action, it is the wrongful detention beyond the reasonable time required for the purposes of inquiry, which is the real and substantial cause of action, and should form the starting point from which the three months should be reckoned. It is difficult to fix, with precision, the time at which the detention became wrongful, but I am satisfied, from the circumstances, and the latitude which should be allowed to the Police for the detection of crime, that that time occurred within three months of the commencement of the action, so that if Sections 42 and following, of Ordinance 1 of 1872, apply to this case, the action was entered within the statutory period.

Besides, the wrongful detention was a continuous act, each day was a renewal of the wrongful detention, and it cannot be said that the action was entered beyond the three months laid down by the abovementioned sections, if they do apply. In fact, the wrongful detention on the day previous to the notice which was given, was sufficient to justify the action.

But do the foregoing sections apply? I think not. From the necessity of proving that the Police acted maliciously and without reasonable or probable cause [Section 47], and the fact that if the plaintiff does not recover more damages than the sum tendered he must pay the costs of the action [Section 48], I hold that the sections do not extend to a case where a person seeks merely the restitution of his property, existing in kind, in the hands of the Police; and I must, in consequence of all the premises, give judgment for the plaintiff in respect of the wrongful detention, and adjudge that he do recover the $100 wrongfully detained by the defendant with costs of suit.

Although it is not necessary that I should certify my approval of the action under Section 49 of Ordinance 1 of 1872, I have no hesitation, on motion of Counsel for the plaintiff, in stating that I approve of the action for wrongful detention.

The defendant appealed against this decision, and the appeal was heard before the Court of Appeal, consisting of *Ford*, C.J., *Pellereau*, and *Goldney*, J.J. on the 21st April, 1887.

Ross, for appellant. The Court below has not found that the plaintiff was the owner of the $100, but considered that his possession at the time the Police took the money from him, was sufficient to maintain the action. It is submitted, that possession only, is not sufficient to maintain an action like this. [*a.*]

[The Court intimated that from the judgment of the Court below, they considered it had found, as a fact, the plaintiff *was* the owner of the money.—*Goldney*, J. also, as to possession being sufficient, referred to *Burroughes* v. *Bayne*, 5 H. & N. 296; and mentioned a County Court decision which occurred about four

[*a.*] See *Cattley* v. *Loundes*, 34 W. R. 193.

years ago, and was reported in the *Times*, where a gentleman had lost a breast-pin of great value at the Haymarket. The Police shortly thereafter, took up the plaintiff as a vagrant, and on his person was found a breast-pin also of great value, which it was very unlikely a man in his position could be the owner of. The breast-pin was shewn to the gentleman, who said it was not the one he had lost. The Police were unable to find the owner of the breast-pin, but having good reason to believe the plaintiff was not the owner, kept possession of it. The plaintiff then brought his action for the return of the breast-pin, relying simply on his possession, as he could make out no title to it, and he obtained judgment.]

The next question that arises is as to Section 42 of the Police Force Ordinance I of 1872. The action was not brought within three months of the seizure of the money or discharge of the plaintiff. The action is to recover a sum of money which, though not actually ear-marked, was sufficiently set apart so as to be identified. The case may, therefore, be looked at in the light of an action, in *detinue*, for return of a chattel. In taking the money, the Police were acting within the scope of their duty and are therefore protected by Section 42.

[*Goldney*, J. Section 42 speaks only of a thing done in execution of duty. How was the detention and refusal to give up the money, after a reasonable time, in execution of duty?]

[*Ford*, C.J. I am inclined to think the sections do not apply at all; the defendant is not sued for damages, but the return of specific property.]

The gist of the action is the detention and is quite independent of contract. If the defendant had an honest belief he had the right to detain the money, he is entitled to notice and the three months' limitation.

[*Ford*, C.J. Do you claim to retain the money now?]

Yes.

[*Ford*, C.J. On what possible ground? Suppose some Police Officers came to your house and charged you with having taken certain goods by unfair means, and then took away the goods, but at the same time said to you "we are not going to prove the case against you." Do you think they are entitled to retain possession of the goods?]

In that case, as at the very outset they seemed to have no intention to proceed with the charge they made, there would be fair grounds for questioning their *bonâ fides*. That is not this case, where the Police did prosecute the plaintiff, and though he was discharged for want of evidence, there is strong reason to suspect he was not only not the owner of the money, but that it formed part of the proceeds of the robbery.

[*Pellereau*, J. Suspicion must be based on reasonable grounds.]

Quite true, but I submit here the Police had reasonable grounds.

[*Ford*, C.J. Suppose a case where property, believed to be stolen, is found on a prisoner, and he is put on his trial before a

FORD, C.J. PELLEREAU & GOLDNEY. J.J. 1887.

TASSERIP v. RICCARD.

Jury, but is acquitted by a majority of five to two. That is putting a strong case in support of the view taken by the Police as the man's guilt. Do you think, that even in such a case, they would have the right to refuse to give up the property to the prisoner?]

Perhaps not, but there again, their refusal, under the circumstances, would be evidence of their want of *bonâ fides;* they would have had both views of the case before them, and have known that an impartial Jury, by a majority, it is true, had acquitted him. That is not this case when the Police had nothing before them but their own view; the evidence called by the prisoner in this case was never before them. That was the view they acted under, and did so reasonably, and under an honest belief they were doing their duty, and were entitled to notice. *Selmes* v. *Judge*, 6 L. R. Q. B. 724, is an authority in defendant's favour, the more so, as it was an action to recover back a sum of money, and yet it was held notice was necessary to be given.

[*Goldney*, J. In that case, the defendants believed they were carrying out an Act of Parliament, and *there was* a mode of levying the rate they made; but where is the Act or law here, for detaining the plaintiff's money?]

If the Police had known the money was the plaintiff's, and yet wilfully detained it, probably they would not be entitled to notice; but here they had fair grounds for believing it was not his.

[*Pellereau*, J. Section 48 speaks of tender of amends, which probably means payment of damages for the thing complained of in the action, it does not seem to countenance the detention for ever of the thing sought to be recovered.]

In *Selmes* v. *Judge*, and the next case I shall refer to, although there were sections in the Acts as to the tender of amends, the money was allowed to be detained for ever.

[*Ford*, C.J. How could the plaintiff in *that* case, recover back his money, it would have been spent?]

But he could have been paid out of future rates.

[*Ford*, C.J. How do you make out the Police had the right to detain the money for an unreasonable time?]

In *Selmes* v. *Judge* there was no right to levy the rate under the repealed Act. Yet the section as to notice was held to apply.

[*Goldney*, J. But in that case, the defendants *were entitled* to levy a rate; the rate, which is a formal document, had not been properly signed under the proper Act. They *had* the right, but their proceedings were not those required by the new Act. Here there is a total *absence* of right in the Police.]

Sections of this kind are intended for cases where the Police have no right to act in the way they have done, but have acted under an honest belief they had the right; for if they had the right, there is no ground for an action, nor any need of protection. A more recent case, a decision of the Court of Appeal, *Midland Railway Co.* v. *Wittington Local Board*, 11 L. R. Q. B. Div. 788, is an authority for the defendant's contention.

[*Goldney*, J. There the whole was a mistake on the part of both parties, but that is not our case.]

[*Pellereau*, J. The words of the Act in that case were, "done or *intended* to be done."]

That is so, but from the judgment of BRET and FRY, L. J.J., their Lordships seem to consider the words were the same as "done" only. In the present case, the Police, believing the money to be part of the proceeds of the robbery, how were they to act except by detaining it?

[*Goldney*, J. That may be the difficulty of their position, but it cannot give them the right.]

Under the peculiar circumstances of this case, it is submitted, they had no alternative but to detain the money. If the defendant was entitled to notice, he was entitled to the three months' limitation, as Sections 42 and 43 hang together. But supposing the defendant's detention here was unlawful, the action was not brought within three months from the date it first became so. If the detention became unlawful, it became so on receipt of the notice of 8th July, and the defendant's refusal to comply with it. The Court below has not found on what date the detention first became unlawful, but that it was some time within three months of 19th October, the date the action was commenced. The detention it is submitted, however, if ever unlawful, became so on 8th July, that is, beyond three months of this action.

[*Pellereau*, J. You were entitled to keep the money for a reasonable time in order to make further inquiries and obtain evidence if you could. But an exact date cannot be fixed as being a reasonable time; every case must depend on its own facts. You were, however, entitled to some latitude and taking the notice of 8th July as an intimation from the plaintiff that he wished his money returned, I thought the Police were thereafter still entitled to a reasonable time to make their inquiries and see whether they should return the money or not. Under the circumstances, I considered a fortnight from the 8th July, sufficient; and only after that time, seeing they made no further inquiries, nor had the owner of the money come forward to claim it, I held the detention of it became unlawful. A fortnight from 8th July, however, brings the date of this action, 19th October, within three months. I think it is necessary that I should say this, to show how it was I came to the conclusion that, as a fact, the action was within three months.]

The question, of course, is when did a reasonable time cease? If they were bound to return the plaintiff the money, because the Magistrate had discharged him, the Police were not entitled to any time after that date, and their detention was unlawful from that time.

[*Pellereau*, J. You say, an honest belief on the part of the Police Officer, that he is acting within the scope of his duty, is sufficient to entitle him to the protection of Section 42, and that the section applies to an action for restitution of property, as well as damages. But if the belief of an honest Policeman is to deprive

FORD, C. J. PELLEREAU & GOLDNEY. J.J. 1887.

TASERIF v. RICCARD.

a man of his property, it would be a sad state of things. I am glad to think that is not the law.]

[*Ford*, C.J. It certainly ought not to be the law.]

His reasonable belief is, according to the authorities, all that is required to entitle him to a notice and the shorter limitation.

[*Pellereau*, J. Protection should no doubt be given to the Police, but it must stop somewhere. Protection clauses are made to protect officers who may suffer individual losses. Here it is a case of restitution of the plaintiff's property, the Police suffer no loss if they have to give it up. What then do they want protection for? Again, if Section 42 applies, Section 44 will do so, and the plaintiff cannot recover back his property, unless he can prove the defendant does so maliciously, So that it comes to this, because the Police honestly believe that they are entitled to retain his property, however unlawful it be, the plaintiff is to be deprived of his property, because he cannot prove malice. That is not a law of protection, but of spoliation.]

No doubt in some cases that might be its effect, but not in this case, where there is fair reason to believe the money was connected with the robbery; but even if it did, the hardship of the case cannot alter the law and take the case out of the section.

Clutton, for the respondent was not called on.

Ford, C.J. I concur with the judgment of the Court below in almost all respects. I am not at liberty to go into the question as to whether or not the detention ceased to be lawful on 8th July, the date of the first notice. If the facts of the case were before me, I might have doubts on the point. The learned Judge in the Court below, has distinctly found, as a fact, the detention first became wrongful within three months of the action. We are concluded by the fact found. With reference to the larger question, it is not necessary to determine whether this class of cases falls within the protection of the sections referred to. I strongly lean in favour of the view of the Court below. The sections seem applicable only to sections for damages, for misfeasance or omission of duty on part of Police Officers, and not to action merely for detention of property of another. Having, however, regard to the importance of the question, I will not do more than express a strong leaning to the construction put on the sections by the Court below. It would indeed be strange if the law of the Colony entitled the Police to detain property for any length of time they pleased, simply because in the first instance they had the right to take them. The Court must fix a limit, and here the Court has done it. Within these exceptions, I concur with the judgment of the Court below. As the defendant has persisted in refusing to return the money even up to the time of this hearing, I can see no reason to take his case out of the ordinary rule as to costs.

Pellereau, J. I have been following Mr. Ross' argument with great care, and though he has ably submitted them to the Court, I must say it has not shaken the opinion I formed in the Court below. The language of Section 42 and following sections of the Ordinance 1 of 1872 is, no doubt, very broad, and seems at first sight to

cover all kinds of actions. It begins with "all actions and prosecutions, &c.," but general words must be read *secundum subjectum materia*. The sections are intended to protect Police Officers, who through a mistaken notion of duty, exceed their rights; but here, they simply detain the property of another which will be no loss to them to give up, and the occasion for the protection does not arise. The sections in my opinion must be restricted to actions in which the Police might be proceeded against for damages. I am confirmed in this view by Section 48, which provides for the tender of amends, which can only mean compensation by way of damages. What appears to me further to exclude cases of this kind from these sections, is Section 44. By that section, [if the case falls within Sections 42 and 43] the plaintiff must, before he succeeds, allege and prove malice on the part of the defendant. Why was that protection given? Surely in order to prevent Police Officers being mulcted in damages unless they had acted maliciously and without reasonable and probable cause. Why should the mere detention of property require malice to be proved? If it did, then a Police Officer not actuated by malice, but honestly obstinate is entitled to deprive the owner of property of it simply because he cannot be proved to have acted maliciously. That, as I have said is not a law of protection, but of spoliation. I have already explained how I arrived at the conclusion that this action was brought within three months of the detention by the Police first becoming wrongful, and there is not only no necessity to repeat it, but as a Court of Appeal [leave to appeal against the findings on facts not having been applied for or granted] we are precluded from going into it. For these reasons, I adhere to my judgment in the Court below.

Goldney, J. I concur generally with the judgment of the Court below, but I do not wish to lay down in what cases the Police are entitled to notice. Each case must be decided on its own merits. In Section 7 of the statement of defence, I see the defendant says he was acting under Clauses 1, 2, 3 and 10 of Section 31 of Ordinance I of 1872, but I can see nothing in them corresponding to the facts of this case, nothing to justify him in detaining this money. The defendant has not made out his defence and is not entitled to notice.

Appeal dismissed with costs.

In re PIPER.

The order of a Magistrate, committing a prisoner to prison under the Extradition Act, 1870 [33 & 34 Vic. c. 52] is final; and all this Court has to decide is, whether such order is legal or not; if therefore the evidence before the Magistrate, is deficient in any respect, or the formalities required by the Act have not been complied with, this Court has no power [in an Extradition Case] to remit the case to the Magistrate to supplement the evidence.

Query. Whether the Supreme Court has power, in any case committed to the Criminal Assizes, to remit the case to the Magistrate to supplement the evidence against the accused?

PELLEREAU, J. 1887.

In re PIPER.

Query. Whether a proceeding by a Rule *Nisi* for a *Habeas Corpus* is the proper proceeding within Section 11 of the Extradition Act. 1870?

Neither the "Resident" of the East Coast of Sumatra, nor the "Consul-General" for the Netherlands in Penang, are "Ministers of State" within Section 15 of the Extradition Act, 1870, and their seals are therefore no "authentication" of the "Foreign Warrant" or "Depositions" within the meaning of that Act.

If the "Foreign Warrant" is not "duly authenticated" according to Sections 9 and 15, the proceedings in Extradition fail, and the order of commitment by the Magistrate is illegal, and this Court will order the prisoner to be discharged.

Where a Rule *Nisi* was made absolute for a *Habeas Corpus* to issue for a prisoner's discharge under the Extradition Act aforesaid, the Court, in order to be regular in its proceedings, declined to discharge the prisoner then and there, but required the *Habeas Corpus* to issue and be returnable "forthwith" and upon return made, discharged the prisoner.

The abovenamed prisoner [J. W. J. Piper] had been arrested in Penang, on the requisition of the Netherlands Government on a charge of culpable homicide not amounting to murder by causing as it was alleged, the death of a Chinese coolie at Taboeran Estate, in Deli, Sumatra. The extradition of the accused having been applied for, His Excellency the Governor issued an order under Section 8 of the Extradition Act, 1870, to the First Magistrate to proceed with the enquiry. The accused was remanded from time to time between his arrest and the receipt by the Magistrate of this order, and was finally brought up before the Magistrate, on the 27th January last, when he was committed to prison for fifteen days [under Section 10] with a view to his rendition to the Dutch authorities, and under the Magistrate's warrant was detained by the Gaoler. The "Foreign Warrant" and "Depositions" were signed by the "Deputy Attorney" [shewn by evidence to be the Magistrate] of Deli, and were sealed, firstly, with the seal of the "Resident of the East Coast of Sumatra," and next with the seal of the "Consul-General for the Netherlands, Penang." The signature of the "Deputy Attorney" or Magistrate to the depositions was attempted to be authenticated by the oath of a witness, viz.: Mr. Kruijt, the Consul-General, who said he was not personally acquainted with the gentleman who was the "Deputy Attorney" and had never seen him; but he had frequently corresponded with him officially and received replies from him, and by this means he [Mr. Kruijt] was able to swear to the gentleman's signature. No evidence was given as to the signature on the "Foreign Warrant." There was also no evidence as to the prisoner's identity beyond the fact that his name was that which appeared in the "Foreign Warrant." On 9th instant, a Rule *Nisi* was obtained on behalf of the prisoner calling on the Superintendent of Prisons and the Gaoler to shew cause why a writ of *Habeas Corpus* should not issue for the discharge of the accused.

The Rule now came on for argument.

Ross, [for the Solicitor-General] shewed caused.

Van Someren, in support of the rule.

At the opening of the case, *Pellereau* J. intimated that he had great doubts whether the proceeding by a Rule *Nisi* was the proper course in face of Section 11 which provided for the issue of the writ of *Habeas Corpus* itself as the mode of proceeding.

Van Someren, pointed out that the proceeding by a Rule *Nisi* was the practice in England under this very Act, and the practice

here too, and referred to *Regina* v. *Ganz*, 9 L. R. Q. B. Div. 93, note; *Regina* v. *Nillins*, 53 L. J. M. C. 157; *Regina* v. *Lauvadier*, 15 Cox C. C. 329, and *Regina* v. *Sirdar Khan*, 2 Kyshe, Hab. Cor. Ca. 43.

Ross, referred to *Regina* v. *Portugal*, 16 L. R. Q. B. Div. 492, and note.

Pellereau, J. said he would decide nothing now against the practice, and would say nothing more as the point was not raised.

Ross, thereupon before shewing cause applied to the Court that the case might be remitted back to the Magistrate in order to enable the prosecution to supplement the evidence on two points; 1, on the point of the identity of the prisoner with the person who was accused of the offence and whose extradition was desired; and 2, on the proof of the signature of the Magistrate [the Resident] of Deli to the "Foreign Warrant" and "Depositions" which had been issued and taken in Deli by and before him, and which had been admitted in evidence before the Magistrate here. He contended that although the Extradition Acts contained no express section enabling the Court to do so, nevertheless it had full powers in its ordinary jurisdiction to make such order, which had been done in cases where a prisoner had been committed to the Criminal Assizes and it was desired to supplement the evidence against him.

Van Someren, opposed this application contending, that the Magistrate was *functus officio* once he had committed the accused to prison—and not merely remanded him for further enquiry. *Ex-parte* Terraz, 4 L. R. Ex. Div. 63—that it was doubtful whether the Supreme Court had the power claimed in any criminal case other than an appeal under Ordinance 12 of 1879; but it certainly had not the power in Extradition Cases after commitment, as such powers were entirely dependent on the Extradition Act.

Pellereau, J. said he was of opinion that the Court had not the power to remit the case to the Magistrate; that although under Section 9 the law to be administered was the same as the law in England, yet that only referred to the sufficiency of the evidence and went no further; that as the offence had been committed out of the jurisdiction, so far as the State applying for the extradition was concerned, the order of the Magistrate here was not final; yet, as regarded the extradition of the accused and the British possession of which the extradition was asked, the order of the Magistrate was final, and it only remained with this Court to decide whether such order was legal or not; that from the date of the order of the Magistrate, the fifteen days were to be counted under Section 11, and after that time if there was no application to the Supreme Court the Governor's order for the rendition of the prisoner would be made. There was no express provision enabling this Court to refer back the case for further evidence, and it was not to be implied as there was nothing to give the prisoner a right to a second term of fifteen days, as he should have, if the order for commitment was not final. The powers of the Court in territorial matters were sought to be

PELLEREAU, J. 1887.

In re PIPER.

invoked. In such matters, no doubt, the Court might have the power to refer back a case, but an extradition case was different. It was true that even in an extradition case this Court could direct further enquiry where the proceedings were uncompleted, and the prisoner remanded for further enquiry [*per* Kelly, C. B. *Ex-parte* Terraz, 4 Ex. Div. L. R. 63, 68], but here the proceedings were completed. The warrant on which the prisoner here was detained was not a warrant for his remand till further enquiry, but a warrant for commitment to prison at the end of the enquiry with a view to his being extradited. Such an order was final, and this Court had no power to re-open the matter by a reference. The application was therefore refused [*a.*]

Ross, then shewed cause and he contended that as the "Foreign Warrant" and "Depositions" were signed by the Dutch Officer at Deli as "Deputy Attorney" and had the seal of "the Resident of the East Coast of Sumatra" on them, they were "duly authenticated" under Section 15 of the Act of 1870, although he was one and the same person; that in fact as "Deputy Attorney" he had signed the warrant as a "Magistrate .....or Officer of the State," and his seal as "Resident" was the seal of a "Minister of State" and that term was to be construed according to local circumstances of each Foreign Colonial possession.

Van Someren, pointed out that while there was an attempt to authenticate the "Depositions" by the oath of a witness, there was no such authentication of the "Foreign Warrant." [He was not further heard.]

Pellereau, J. said that the "Resident of the East Coast of Sumatra" was not a "Minister of State" within the meaning of Section 15 and his seal as Resident was not an authentication of the "Foreign Warrant" required by the section—nor was the seal of the Consul-General affixed thereto, as neither was he a "Minister of State." As to the alternative mode of authentication, by the oath of a witness, was clearly applicable, but this mode had not been adopted; that the authentication by the seal having failed, the objection that there was no authentication by the oath of a witness was a most serious one and sufficient to render the Magistrate's order invalid, as the commitment under Section 9 could only be made if among other things the "Foreign Warrant" was "duly authenticated." This it was not, as the witness who was examined stated nothing respecting the "Foreign Warrant" and there was no authentication at all of that warrant by the oath of a witness, and for those reasons the Rule must be made absolute for a *Habeas Corpus* to issue.

Van Someren, then asked that the prisoner might be discharged at once without the formality of a writ of *Habeas Corpus* issuing for the purpose.

Pellereau, J. said it was always best to be regular in its proceedings and refused to do this; but he would adjourn the Court

[*a.*] See *Re* Favier & Provin, L. T. newspaper, 30th Oct. 1886, reproduced in *Re* Rajah Samsudin Tunku Jaksa, 12th March, 1888, *infrà*.—J. W. N. K.

for half-an-hour and the writ could be issued at once and made returnable "forthwith," and on its return, the prisoner could be discharged.

The writ was then issued and a return made thereto that the prisoner was detained on the aforesaid Warrant of Commitment of the Magistrate under the Extradition Act. The prisoner was thereupon brought up and discharged.

FATIMAH & ANOR *v.* ARMOOTAH PULLAY.

The Court will not presume in favour of polyandry, but of marriage.

Semble. There is not that unity between a Mahomedan husband and wife as disables a wife conveying land to her husband or *vice versâ*.

A Mahomedan married woman, however, must prior to the Mahomedan Marriage Ordinance 1880, have acknowledged her Deed of Conveyance of realty under Act 31 of 1854, and until she had done so, it would be inoperative in law, and not binding either on her or her representatives.

Kader Meydin v. *Shatomah*, Straits L. R. 260, followed.

Ordinance 5 of 1880, the "Mahomedan Marriage Ordinance" is not retrospective in all respects, for by the proviso in Section 18, past contracts and rights are expressly saved.

Where, therefore, a Mahomedan married woman conveyed her lands by deed in 1859, which she omitted to acknowledge under Act 31 of 1854, such property not being *settled* to her separate use,

Held, notwithstanding the question arose subsequently to the Mahomedan Marriage Ordinance, and that Ordinance [Section 18] applied to cases of marriages solemnized before as well as after the Ordinance, and by that Ordinance a Mahomedan married woman's property is declared to be her separate property and her Deed of Conveyance need not be acknowledged,—the conveyance was inoperative and not binding on her administrators. [*a.*]

Under the Limitation Act 14 of 1859, *adverse* possession is necessary before a plaintiff's claim to realty can be considered barred.

"Adverse possession" is a possession in denial of the plaintiff's claim and cannot exist where the defendant [or those through whom he claims], however long before, came in with the consent or permission of the plaintiff [or those through whom he claims], unless it can also be proved that something was done by the defendant [or those through whom he claims] to show he or they held no longer under such consent or permission.

A conveyance before administration taken out by a person who, as a next-of-kin, has a share in lands forming the estate of a deceased is *not* valid and binding even for the share of such person therein, as land in this Colony on the death of its owner is to be considered as chattels real, and until the estate is administered and debts paid, it would be impossible to say if there would be any estate to share or divide.

Abdulrahim v. *Drahman*, 1 Kyshe 171, followed.

The nature of this case, the facts giving rise to it and the arguments sufficiently appear in the judgment.

Ross, [*Van Someren* with him] for plaintiff's referred to *Cader Mydin* v. *Showtamah*, Woods' Oriental Cases, 42, s. c. Straits L. R. 260; *Shatomah* v. *Kader Meydin*, Straits L. R. 275; *Chulas* v. *Kolson*, Ibid. 462, 465; *Cahill* v. *Cahill*, 8 L. R. App. Ca. 420; *Williams* v. *Walker*, 9 L. R. Q. B. Div. 576; *Lush on Husband and Wife*, 29-40, 355, 6, and Act 31 of 1854, Sections 3, 5.

Thomas, for defendant referred to Ordinance 5 of 1880, Section 27, Clause 10, 18; *Taylor* v. *Meads*, 34 L. J. Ch. [N. S.] 203.

Van Someren in reply referred on the point of limitation to Act 14 of 1859, Section 1, Clause 12. *Thompson on Limitation*, 156-8,

[*a.*] See *Armootah Pillay* v. *Fatimah Bee & Anor*, 28th September 1888, *infrà*.

PELLEREAU, J. 1887.

FATIMAH & ANOR. v. ARMOOTAH PULLAY.

208, 9, 384; *Rada Bhai* v. *Shama*, 4 Bom. H. C. Rep. [App.] 155; *Asher* v. *Whitlock*, 1 L. R. Q. B. 1, and *Leigh* v. *Jack*, 5 L. R. Ex. Div. 264; and on the point of the conveyance of a share, prior to administration being taken out, to *Abdulrahim* v. *Drahman*, 1 Kyshe 171.

Cur. Adv. Vult.

14th March. *Pellereau*, J. In this case, the plaintiffs, who are the administrators of one Haleemah deceased, claim to have it declared that certain lands are the property of the said Haleemah deceased, and certain conveyances thereof, No. 745 of 1858-59 and 108 of 1883, to be subject to a parol trust or arrangement mentioned in paragraph six of the statement of claim; or in the alternative, to have the said conveyances declared inoperative in law, and the latter of them also fraudulent and void in fact, and to have the conveyances delivered up to be cancelled, and for an injunction restraining the defendant, his servants, and agents from disposing of, mortgaging, or otherwise, howsoever dealing, or interfering with the said lands, and for further and other relief. There are several points to be decided, both of fact and law. The first question—being one of fact—to be decided is, whether the said Haleemah was married to one Saboor Ally, from whom the defendant alleges he purchased the lands in question. There can be no doubt, from the evidence that Haleemah and Saboor Ally were reputed as man and wife,—and I think there can also be no doubt that they were married. A ceremony, purporting to be a marriage between them, took place in 1848; the Kali was called and produced his Register with the entry of the marriage, and there was also the evidence of other persons who were present at it. Mr. Thomas for the defendant however, argued that one Pakeer Bawa, the admitted first husband of the said Haleemah, was alive in 1848; and he relied on the statements of two witnesses in support of his contention. Of these witnesses, one was called by the plaintiffs, and the other by the defendant. The first of these two men, Hussain, no doubt says that Pakeer Bawa died about 31 years ago; and the other Goolmal, says he thinks Pakeer Bawa died in 1850 or 1851; but the evidence of these witnesses on that point when carefully looked at, does not support Mr. Thomas' contention. Hussain, in re-examination by Mr. Ross, said his memory was not good as to dates, but he was certain that Haleemah and Saboor Ally lived as man and wife only after Pakeer Bawa's death and not before—and Goolmal, in cross-examination, said he had no distinct recollection of the date of Pakeer Bawa's death, and it might have been in 1846 or 1847 instead. I am satisfied that the memory of natives of the class of these witnesses is not to be relied on as to dates, but may be relied on as to facts. I cannot from these statements presume in favour of polyandry; on the contrary, according to a case in 1 Kyshe [*a*.], the presumption is always in favour of

[*a*.] *Ong Cheng Neo* v. *Yeap Cheah Neo*, Vol. I of these Reports, 326.

marriage. In this case we have abundant evidence of reputation in support of the presumption, and above all, we have the entry in the Kali's book, in which Haleemah is described as "widow" of Pakeer Bawa, and the agreement of 27th April, 1870, put in by the defendant himself, and made by Saboor Ally and Haleemah with him, in which Saboor Ally speaks of Haleemah as his "wife." I can have no doubt from the evidence that Pakeer Bawa was dead when the ceremony of marriage took place between Haleemah and Saboor Ally, and that these were lawfully married. The next question, also one of fact, is whether the Conveyance No. 745 of 1858–59 from Haleemah to Saboor Ally was fettered with a trust. It was admitted by Mr. Ross for the plaintiffs that he had failed by his oral evidence to prove this trust, but he relied on the Act of 27th April, 1870, which I have already mentioned, as proof of the fact. In this document, Haleemah is a party, and the plaintiffs argued that there was no reason why Haleemah should have been a party if she had entirely divested herself of her interest by the conveyance of 1859—that that fact was only consistent with the hypothesis that she, notwithstanding that conveyance, still retained an interest in the land, and the defendant in taking the agreement of her as well, shewed he so knew it. This act shews, no doubt, that the plaintiffs' contention is not altogether devoid of truth. It is true the defendant has sworn that Haleemah was only a witness to the document, but I prefer to believe the evidence of the act itself, rather than the oral evidence of an interested party. It may be that Haleemah and her son Kader Mydeen, had however, only an interest in the four lalongs which the act deals with, but whether this be so or not, unfortunately for the plaintiffs, this very act which shews Haleemah had an interest, cuts both ways. It shews she must have had some equitable interest, but whatever that interest was, it also shews she joins with Saboor Ally in transferring it to the defendant. What the legal effect of such a transfer is, is another question, and will be dealt with when I come to the question of acknowledgment; but as a fact, she has so transferred her rights. On that ground I cannot say she retained any equitable interest in the land. On the second branch of the claim, I also do not think there is any evidence of fraud on the part of the defendant as regards the conveyance of 1883 from Saboor Ally, nor do I think he had notice of any rights retained by Haleemah. He only appears to have had notice of her claim to the four lalongs dealt with by the Act of April, 1870, but also sees that by it she divests herself of that interest, and when he saw the conveyance to Saboor Ally by Haleemah, may have acted in good faith in the sale in 1883. I must hold there is no evidence of fraud, and on the first branch of the case as on this question of fraud, judgment must be entered up for the defendant. I now come to the questions of law that have been raised. It is first said by the plaintiff that the conveyance of 1859 from Haleemah to Saboor Ally is inoperative, as husband and wife are one person in law and cannot convey to each other—that this was so even in the case of Maho-

PELLERAU, J. 1887.

FATIMAH & ANOR. v. ARMOOTAH PULLAY.

medan married women, and the conveyance went for nothing. I do not think there is that unity between Mahomedan husband and wife as between Christians, but I need not decide this point as I think the next objection fatal to the conveyance. It was not acknowledged under the Indian Act. XXXI. of 1854. It was held by Sir WILLIAM HACKETT in this Court, in the case of *Kader Meydin* v. *Shatomah* [Woods' Oriental Cases, 42, s. c. St. L. R. 260], cited by Mr. Ross, that the Act of 1854 applied to all wives—the wife in that case being a Mahomedan. I do not know what I might have decided had the question come before me for the first time. There are sections in the Act itself, such as Sections 12 and 18 on which an argument might be raised. Section 18 says: "Nothing in this Act contained shall extend to any cases to which the English law is not applicable." It may be a question whether English law applied to Mahomedam wives. Section 12 says: "Nothing in this Act contained shall abridge, extend, or affect the powers of alienation or disposition, which any married women might have exercised over any property or right otherwise than by levying a fine or suffering a recovery, or by joining in one of such assurances before the passing of this Act." It might be a question whether the Act applied at all to Mahomedam married women. But the point is concluded by precedent—the case I have referred to has laid down the principle of Jurisprudence and Practice in Conveyancing which has hitherto been followed throughout the Colony, and I cannot upset these, even were I disposed to do so, I must hold that the Act applied to Mahomedan married women, and that the conveyance by Haleemah is not binding on her nor on the plaintiffs, her representatives. This property was not settled to her separate use, so as to bring in the principle of *Taylor* v. *Meads*, [34 L. J. Ch. [N. S.] 203, and I have no hesitation in ruling that Haleemah's conveyance to Saboor Ally is not binding and is invalid. The Act of 27th April, 1870, is also invalid for the same reason. The defendant knew Haleemah was a married woman; he bought with his eyes open, and the maxim *Caveat Emptor* applies. It was contended, however, by Mr. Thomas for him, that Ordinance 5 of 1880 [the Mahomedan Marriage Act], was retrospective, and he relied on Clauses 10 and 18 of Section 27. Clause 18 is as follows:—

> "The provisions of the several clauses of this section, except Clause XV. shall be held to apply to all cases in which the death or marriage happened before as well as after the coming into operation of this part of the Ordinance. Provided that nothing in this section contained shall, without the consent of the parties or, in case of suits, the leave of the Court, be held to affect any suit commenced or any contract entered into or the administration of any estate commenced before the coming into operation of this part."

On reading the clause, it will be seen that so far from shewing that the act is retrospective, it is clear that it saves past rights. The conveyance of 1859 being inoperative, the one of 1883 falls with it. On the point then that these conveyances are inoperative, judgment must be entered for the plaintiffs. I next come to the question of Limitation. On this point, two questions arise; firstly, whether there was

adverse possession on the part of the defendant; and secondly, if there was, when did the time begin to run. This second point is dependant on the question of unity of a Mahomedan husband and wife, and need not, I think, be decided by me. It may be remarked that the Limitation Act deals with married women generally, and treats them all as being under disability during coverture, but the period of limitation after removal of the disability is three years under the Act, and not twelve as it was supposed in argument. However, as I have said, there is no occasion to decide this point as I find adverse possession did not exist. In cases of realty there must have been possession, adverse to the plaintiff. In *Thompson on Limitation*, under the Indian Act XIV. of 1859, which is our law, p. 162, it is stated:

"In a suit to establish a right to possession to lands, it was held by the Court of first instance that inasmuch as the lands in dispute had been lying waste for a period of forty or fifty years, they had not during that time been in the possession of the plaintiff, and that his suit was consequently barred. But, it was held on appeal that until there was adverse possession, there was no cause of action, and that consequently, the suit was not barred if brought within twelve years from the time when adverse possession was actually taken."

This is consistent with the other authorities quoted in the work. Adverse possession must be a possession in denial of the plaintiff's claim. Can the defendant say he was in possession adverse to Haleemah? From his own evidence and the act of 1870 he has produced, it is clear the possession of Saboor Ally and the possession of the defendant was a confirmation of her possession, for both claimed through her. I rule that the Statute of Limitations cannot apply. The authorities quoted by Mr. Van Someren are in point, they shew such possession to be permissive, and something must be done by the defendant to alter the quality of his possession. He must do something to shew he is in possession adversely, and no longer under the permission. On the question of limitation, judgment must be for the plaintiffs. Mr. Thomas has however also contended, that as Saboor Ally survived Haleemah, as her husband, he was entitled to a share in her estate and so the conveyance by him to defendant was good *pro tanto*. Unfortunately, for the defendant however, the local law is against him. I do not like the case of co-heiresses in England in whom the legal estate would be vested, on the death of the owner intestate, and a conveyance by one of her share, would be good without administration being taken out. Here, realty on the death of the owner, is of the nature of chattels real, and the legal estate is in the executor or administrator. The husband has, no doubt, a right to a share in the proceeds of the estate after payment of deceased's debts, but cannot bind it before administration is taken out. The case referred to by Mr. Van Someren on this point is an authority if one were wanted. Under these circumstances, I hold that the legal estate was not in Saboor Ally; he had only a right to claim a share of what proceeds there might be. The conveyance by him cannot hold good for a portion of the estate, which after all may not exist after payment of debts. The plaintiffs have taken

PELLEBEAU, J. 1887. — FATIMAH & ANOR. v. ARMOOTAH PULLAY.

out administration to Haleemah's estate, and the conveyance which was made before administration was granted cannot prevail against them. On this point, therefore, the judgment must be for the plaintiffs.

I have made a summary of the judgment which I have just delivered, which I shall read, and then hand down to the Registrar to be filed with the papers in the case. It is as follows:—

The Court finds, 1st.—That Haleemah was duly married to Saboor Ally in the Mahomedan year 1265, *i.e.*, about 1848 of the Christian era.

2nd.—That there is no proof of any oral trust or arrangement as alleged in the statement of claim; nor of Armootah Pullay having had notice of any such; and that, in consequence of the first branch of the claim, judgment be entered for the defendant.

3rd.—That as regards the second branch of the claim, it is not proved that the conveyance to Armootah Pullay was fraudulent. But the Court rules as regards the second branch of claim,

4th.—That the Indian Act XXXI. of 1854 applied to the conveyance made by Haleemah to Saboor Ally which must be held ineffectual and inoperative for want of the acknowledgment required for the protection of married women, and that Armootah Pullay can have no more right than Saboor Ally.

5th.—That the Statute of Limitations cannot apply against the representatives of Haleemah, as Armootah Pullay did not hold the land, the subject-matter of this suit by adverse possession.

6th.—That Saboor Ally could not dispose of the share he might have claimed in Haleemah's, his predeceased wife's estate, as the legal estate was vested in her legal representatives and the conveyance by him to Armootah Pullay cannot be held valid even for that share.

The Court thinks it needless to decide the following questions which were raised [1.] whether a Mahomedan wife can sell land to her Mahomedan husband; [2.] at what time the right of action accrued to Haleemah or her representatives under the law of limitation.

Judgment for the plaintiffs on the second and third branches of the claim, except as to the point of fraud which is dealt with in para. 3 of the present judgment.

Half costs of plaintiffs to be paid by defendant. [*a*.]

TIO ANG BOI *v.* HIA MA LAI.

PENANG. — PELLEBEAU, J. 1887. — March 28.

The requirement towards the end of Section 13 of Ordinance 3 of 1887, of a notice in writing, applies *only* to the *last* of the alternative offences mentioned in that section, viz., the retaining of the men in service. [*b*.]

A Magistrate might after the case for the prosecution has closed and the prisoner has addressed the Court in his defence, allow a further witness to be called by the prosecution, provided he gives the prisoner an opportunity to explain away or rebut by evidence or otherwise, such further evidence.

[*a*.] See *Armootah Pillay* v. *Fatimah Bee & anor.*, *infrà*. September, 1888.

[*b*.] See *Ramsamy* v. *Low*, 16th July, 1888, *infrà*.

Ong How v. *Abdulrahman*, Straits L. R. 354, and *Chooashary* v. *Cassim*, 3 Kyshe, 98, followed.

But even if it were irregular and improper for the Magistrate to have done so, still it is no ground for quashing a conviction, unless there is not sufficient other evidence to support it, or injustice has thereby been done.

Whether there is that sufficient other evidence or not, and whether injustice has been done or not, is for this Court on appeal to determine, under Section 33 of the Appeals Ordinance 12 of 1879, and not for the Magistrate.

Query. Whether Ordinance 5 of 1870 applies to the Police Courts?

The words "knowingly" and "so bound" in Section 13 of Ordinance 3 of 1877, apply only to the contract for service, and not to the period of the contract—so held by the Court of Appeal.

The appellant had been convicted by J. K. Birch, Esquire, Magistrate, Province Wellesley, of crimping, by harbouring or concealing certain labourers under contract of service at Batu Kawan Estate under Section 13 of Ordinance 3 of 1877.

G. S. H. *Gottlieb*, for him contended 1, that notice, in writing, was necessary to have been served on him under the section before he could be convicted, in order to shew he "knowingly" harboured the men; 2, that the evidence of Tan Ah Nio one of the harboured men was inadmissible as it disclosed a previous desertion and therefore a former offence; 3, that this witness had been called by the Magistrate after the close of the case for the prosecution and the prisoner had made his statement in defence, though before he had called his witnesses, and the proceedings were therefore irregular. On these second and third points he cited *Mamsah* v. *Mahomed Lebbye*, 3 Kyshe, 130.

[*Pellereau*, J. referred to Section 44 of Ordinance 5 of 1870.]

Gottlieb contended that, that Ordinance did not apply to Police Courts, and referred to *Veramah* v. *Thaivoo*, 3 Kyshe, 117; 4, that the evidence of one Awang, a witness called by the appellant had been improperly rejected.

Ross, for respondent contended, that notice in writing was not necessary and the words in Section 13 requiring a notice must be limited to the last alternative offence mentioned in that section —that the evidence of Tan Ah Nio did not refer to a previous desertion—that the calling of him by the Magistrate at the stage he did was not material, and that the evidence of Awang was as to irrelevent matters; and also that no injustice had been done by any of the alleged irregularities, and there was sufficient other evidence to support the conviction which should not therefore be quashed. He referred to *Ong How* v. *Abdulrahman*, Straits L. R. 354; *Chooashary* v. *Cassim*, 3 Kyshe, 98; *Versay* v. *Mahomed Haniff*, 3 Kyshe, 79; *Reg.* v. *Mun Bomoh*, 2 Kyshe, [Cr. Rulings] 110; Act II. of 1855, Section 57, and Ordinance 12 of 1879, Sections 33, 34.

Gottlieb, replied.

Cur. Adv. Vult.

29th March. *Pellereau*, J. The Magistrate convicted the appellant of crimping by knowingly harbouring certain labourers on Batu Kawan Estate under Section 13 of Ordinance 3 of 1877. The points raised by Mr. Gottlieb were, that under Section 13 it

PELLEREAU, J. 1887.

TIO ANG BOI v. HIA MA LAI.

was necessary that a notice, in writing, should have been served in order to prove a guilty knowledge and constitute the offence of knowingly harbouring or concealing; but I do not agree with this contention. If the words "after receiving notice, in writing, that such labourer is so bound as aforesaid" in this section apply to the offence of harbouring, they apply to all the offences mentioned in it, but if we were to adopt such construction, we should arrive at a strange conclusion. It would be this; the section says:

"Any person who shall knowingly seduce or take, or attempt to seduce or take, from his service or employment any labourer bound by any contract of service, such contract being for a period of not less than one month, to serve any other person, whether within or without the Colony, or who shall knowingly take any labourer while so bound into his service or employment, or who shall knowingly harbour or conceal any labourer who shall have absented himself without leave from the service of such other person to whom he is so bound, whether such service is to be performed within or without the Colony, or who shall knowingly retain in his service any labourer bound under any such contract to serve any other person, whether within or without the Colony, after receiving notice, in writing, that such labourer is so bound as aforesaid, shall be liable on conviction, to a fine not exceeding twenty-five dollars, or to imprisonment, which may be of either description, for any period not exceeding three months, or to both, in respect of each and every such labourer."

The notice would then be required to be given even to the man who seduced the man away, before he did so. This would be absurd and shows that the requirements of the section, as to notice, in writing, is limited, and does not qualify the first of the offences in the section. But if it is limited, then how far is it so? I consider it is limited to the last of the offences mentioned in the section—the retaining the men in service. I can quite understand why it should be so and not to the offence of harbouring or concealing, which are in themselves more culpable acts. It was also argued by Mr. Gottlieb that the *scienter* had not been proved. I have carefully read the depositions, and they leave no doubt in my mind that the appellant acted with a guilty knowledge that the men were not only deserters, but were under some contract of service. I also think that this was so as to all the four men, and not only as to two of them as was contended. That disposes of the case on its merits. But a third point was taken, and it was contended, that there had been an improper admission of evidence, that the Magistrate, after the evidence for the prosecution had closed, had called Tan Ah Nio, and was wrong in doing so. From the authorities that have been cited, I have no doubt that, although Ordinance 5 of 1870 may not apply to Police Courts, a point I need not decide, yet the Magistrate may call witnesses as was done here, provided he allows the prisoner to rebut it by evidence, or otherwise, as he [the prisoner] chooses. Here that was done, and I do not think the Magistrate acted improperly in admitting the evidence. Besides, supposing that the evidence was improperly admitted, still I consider there is sufficient evidence [apart from the evidence improperly received] to support the conviction. Under Section 38 of the Appeals Ordinance, I have o

decide, not whether the Magistrate would have considered there was sufficient evidence but whether the Court which hears the appeal so considers it. As I have said, I think there is sufficient evidence, and no injustice has been done to the appellant. The case cited by Mr. Gottlieb is not at conflict with my so ruling, as in that case, the Court, on appeal, considered there was not sufficient independent evidence, apart from the objectionable evidence which had been received, and therefore quashed the conviction. On the other hand, we have another case, in which it was held not to be a ground for setting aside a conviction under Section 33, although there had been an irregularity, which however had caused no injustice. I see no grounds therefore for quashing the conviction as I consider no injustice has been done. Then it is said the evidence of Tan Ah Nio disclosed previous offences and was also inadmissible on that ground. There are some cases, no doubt, in which previous offences might be given in evidence to prove a guilty knowledge, but I am not aware that it would apply to a case of this kind. But the fact is, I am not satisfied that the evidence of this man relates to previous offences. On the contrary, I think it relates to the same offence with which the appellant was charged, as I find that the witness Awang was stopped as soon as it was found he was about to speak of something which happened on a previous date. There is no proof that Tan Ah Nio's evidence applied to a previous offence, and this ground of appeal must be rejected by me. Next it is said that the evidence of Awang was improperly rejected. The Magistrate's note on this point is as follows:—"Awang sworn states:—I am a padi-planter at Alma Estate. About three months ago—told to stand down." This shows that he could not have known anything in connection with the offence charged. The Magistrate had to deal with a man who had no knowledge on that point. If the prisoner had insisted on the Magistrate examining the man further in order to ascertain whether he really knew anything in connection with the offence charged and the Magistrate had refused to do it, he would have been wrong; as we have it now, it only appears that all Awang knew was something of a former occasion and was not evidence at all in this case. The Magistrate did not act wrongly therefore in telling him to stand down. He neither acted illegally nor improperly in so doing, and this point must also be dismissed. There is one point, however, which I shall reserve for the Court of Appeal, that is, what is the meaning of the word "knowingly." Is it to be construed as applying to harbouring or concealing only, or does it also apply to the fact that the deserter or absentee was bound by a contract of service, and in addition to that, a contract for service for not less than one month. I have some doubt on the point, but my impression is, that it means knowledge not only of the harbouring or concealing, but also of some contract of service, but not of a contract for not less than one month. If it did, the section would be almost useless. I think this point should be reserved for an authoritative decision on it, and I shall therefore reserve it for the Court of Appeal, but only this point. All the others I dismiss.

FORD, C. J. PELLEREAU & GOLDNEY. J.J. 1887.

TIO ANG BOI v. HIA MA LAI.

The point reserved was argued on 21st April, 1887, before the Court of Appeal, consisting of *Ford*, C. J., *Pellereau* and *Goldney*, J.J.

G. S. H. *Gottlieb*, for the appellant.

D. *Logan*, [*Solicitor-General*,] for the respondent.

Ford, C.J. I think the construction of the section is clear; the *scienter* extends only to the contract of service and not to the period of the contract.

Pellereau, J. I agree. The difficulty I felt arose from the first phrase in Section 13. It appeared to me, that the expression "such contract not being less than one month" defined the contract of service, and "knowingly" applied to the period as well as to the fact of the contract. The further clause, as regards harbouring or concealing, requires that the prisoner should do so, knowing that the men harboured was "so bound," which seemed to mean the contract of service and a contract of the particular kind. After considering the point, however, I hold "knowingly" and "so bound" apply to the contract of service only. The period of the contract must of course be proved in order to bring the case within the section, but it is not necessary that the *scienter* should include the period of service.

Goldney, J. I concur.

Conviction affirmed. Appeal dismissed with costs.

REGINA *v.* ISMAIL & ANOR.

PENANG. PELLEREAU, J. 1887. March 28.

A conviction for letting a hackney carriage to hire the license of which has been cancelled can only be sustained where the license has not only been cancelled, but notice [in writing] thereof given under Section 11 of the Hackney Carriage Ordinance 5 of 1879 to the owner.

The driver of a *first* class hackney carriage is bound as much as the drivers of a carriage of any other class to take out a license as such driver: and the word "himself" at the end of the proviso to Section 21 of the aforesaid Ordinance is confined to the owner who acts himself as driver and does not include another person who might act as driver for him—and the driver cannot be said to be "using" the carriage within the meaning of the proviso when he is driving for the owner.

The fact that for ten or twelve years *first* class carriage drivers have not been required to take out a license cannot alter the case.

The only exception in favor of a *first* class carriage driver is that he is not required to carry any badge.

A carriage which is engaged by a person for a month or any fixed period exclusively for his own use is by that very fact taken out of the category of "hackney carriages" and does not nor does its driver require to be licensed.

The appellant Magness who was the owner of a hackney carriage was convicted by C. W. S. Kynnersley, Esquire, First Magistrate, Penang, under Section 9 of Ordinance 5 of 1879, for letting to hire on the 3rd December, 1886, a carriage the license of which had been cancelled. The appellant Ismail was convicted under Section 21 of the same Ordinance for having acted as the driver of the carriage when he had not been licensed as a driver. The evidence shewed that the appellant Magness held a license for the carriage as a first class carriage, dated 12th January, 1886;

that at the half-yearly inspection by the Registrar of Hackney Carriages, he or his officers considered the carriage should not be passed as a first class carriage, and refused to grant a license therefor, but offered to grant a license for the carriage as of the second class. The appellant Magness refused the offer. The register of the carriage of 12th January, 1886, was cancelled in the books of the Registrar, but beyond the verbal intimation above no notice was given him as required under Section 11 of the Ordinance. The license of 12th January was still in his hands, and he continued to hire out the carriage as of the first class notwithstanding the intimation aforesaid. On the 3rd December aforesaid he did so, and the appellant Ismail acted as the driver. The carriage was standing at Penang Road, not far from the appellant Magness' house, and was there engaged by certain passengers on hire to convey them to Ayer Etam. The respondent, a Constable, pursuant to previous instructions took Ismail and the carriage into custody, and the aforesaid charges were entered against the appellants by the Registrar of Hackney Carriages, which resulted in both appellants being convicted as abovestated. They now appealed.

G. S. H. *Gottlieb*, for the appellants contended, that neither of the convictions could be sustained. 1.—As regarded the appellant Magness, the license was not cancelled in due course of law under Section 11 of the Ordinance by a notice in writing, and he had therefore committed no offence. 2.—As regarded the appellant Ismail, that the driver of a first class hackney carriage need not be licensed, and no such license as a fact had ever been granted to such a driver for the past ten or twelve years. He submitted the case fell within the proviso of Section 21 and the word "himself" there, included the driver of the owner, as well as the owner personally, as there was no reason for it to be otherwise and *facit per alium facit per se.*

D. *Logan*, [*Solicitor-General*] admitted the conviction of the appellant Magness could not be supported. He also admitted that drivers of first class hackney carriages had not been licensed for the past ten or twelve years. He contended however that that made no difference since now the question had arisen, and that a driver of such a hackney carriage was not exempted from taking out a license. A first class carriage was a carriage used for the conveyance of passengers for hire, and was therefore a hackney carriage within Section 1 of the Ordinance, and as a "hackney carriage" the driver thereof required to be licensed. The proviso in Section 21 he submitted only exempted the owner personally while he was himself the driver, but not another person who was acting as driver for him.

Gottlieb, replied.

Cur. Adv. Vult.

31st March. *Pellereau*, J. In this matter the conviction as to Magness is quashed, the Solicitor-General admitting it cannot stand. With regard to Ismail, the point taken was that a driver or coachman of a first class hackney carriage was not bound to

PELLERAU, J. 1887.

REGINA v. ISMAIL & ANOR.

have a license; that it was not within Sections 19, 20 or 21 of the Hackney Carriage Ordinance 5 of 1879, but was protected by the proviso in Section 21. On reading Section 19 it will be found it makes no difference between a second or third class carriage and a first class carriage. Neither does Section 20, Clause 1 do so. From Clause 2 the inference is that first class carriages are included in the previous sections. It is as follows:—

"The driver or conductor to whom such badge is delivered shall at all times while acting as driver or conductor of a hackney carriage of the second and third class, or while attending before any Magistrate, carry such badge strapped on his left arm above the elbow in such manner that the number of such badge shall be clearly exposed to view."

It is clear, therefore, the whole preceding part includes all descriptions of hackney carriages; the only exception being in favour of first class carriage drivers not carrying any badge. As this clause is expressly restricted to second and third class carriages, the conclusion one arrives at is that as the preceding part is not restricted to such carriages they are intended to apply to all hackney carriages. Section 21, reads as follows:—

"It shall not be lawful for any person to act as driver or conductor of a hackney carriage whether such person shall or shall not be the owner of such carriage, unless such person shall be licensed as a driver or conductor under this Ordinance. Every owner of a hackney carriage who shall act as driver or conductor thereof without being duly licensed under this Ordinance, or who shall knowingly suffer any person not so licensed to act as such driver or conductor shall for every such offence be liable to a penalty not exceeding fifty dollars; and any person not being the owner who shall act as driver or conductor of a hackney carriage without being licensed as aforesaid, shall be liable for every such offence to a penalty not exceeding twenty-five dollars. Provided that nothing in this Ordinance contained shall prevent the owner or any person hiring or using a hackney carriage of the first class from driving the same himself."

The word "himself" in the proviso clearly means that it is not allowed to drive by means of a driver or coachman, but by the owner himself personally. The former person is not protected unless the coachman can be said to be "using" the carriage. I think he cannot. When he drives it is not he who uses the carriage, but his employer. The coachman is not "himself," and is not within the proviso. He falls within the first part of the section, and the conviction as to Ismail must be affirmed. A point has been taken that if this were so a person who hires a carriage for a month could not employ a coachman; but that is not so—There, the carriage will no longer be a hackney carriage, as it cannot be used for the conveyance of passengers in general—but exclusively for the use of the particular person engaging it. It is taken out of the category of "hackney carriages" *pro tem.* In this case the carriage was still a "hackney carriage," but was not protected by the proviso. My ruling only applies to carriages which still continue "hackney carriages."

REGINA *v.* YEAP HOCK TIN.

PENANG.

PEL-LERRAU, J.
1887.

March 28.

An ordinary dwelling house in no way fitted up or shewn to be previously used as a common gaming house was entered early one morning by the Police under a warrant. The appellant and three other persons were found in the house who attempted to rush out as the Police entered, but were arrested. No gaming of any kind was going on at the time, but on searching the room the Police found on the floor a solitary small bundle of papers which on examination proved to be *Wha Whey* or lottery collecting tickets on some of which names and stakes were written. There was no evidence to shew what a *Wha Whey* was. The appellant was the occupier of the house. The Magistrate convicted him of assisting in a place which was kept or used by the occupier thereof for the purpose of gaming.

Held, on these facts that Section 11 of the Gaming Ordinance 15 of 1879 applied, and the house must be presumed to be a common gaming house, and to be kept by the occupier for the purposes of gaming until the contrary was shewn by him, and that as the contrary had not been shewn as occupier of a place so kept, the appellant must be taken to have assisted in it and the conviction was therefore right and should be affirmed.

Regina v. *Abass*, 3 Kyshe, 184, distinguished.

The appellant in this case was convicted by Walter Egerton, Esquire, Magistrate, Penang, of assisting in the business of a common gaming house under Section 2, Clause 4 of Ordinance 13 of 1879. The evidence shewed that at 8 p.m. on the 26th October, certain members of the Police force entered an ordinary dwelling house in Cannon Lane under a warrant and found in the front room the appellant and three others all of whom attempted to rush out, but were arrested. Two women, the wife and mother of the appellant at the time came into the room from the back. In the room on the floor were found a bundle of papers which on examination proved to be *Wha Whey* collecting tickets on some of which were written certain names and stakes. There were some books and a box with a *chop* also found which however turned out to have no connection with gaming. The Interpreter of the Police Court was called before the Magistrate as an expert to state what the tickets were, but beyond describing them as above there was no evidence to shew what a *Wha Whey* was or how it was carried on. The appellant said to the Police that he was the occupier of the house and that one of the other three men arrested was his son. The remaining two men were outsiders. There was no evidence to shew gaming had ever been carried on in the house, or that the house was fitted up as a common gaming house. All the men were convicted by the Magistrate; the appellant of assisting and the others of being present in a common gaming house. The appellant alone appealed.

G. S. H. *Gottlieb*, for him contended, there was no evidence of the house being a common gaming house or that the appellant assisted therein; that mere possession of *Wha Whey* tickets was no offence, *Regina* v. *Abass*, 3 Kyshe, 184, and there was no evidence to shew what a *Wha Whey* was so as to enable the Court to say it was illegal. *Regina* v. *Sheik Hossain*, 3 Kyshe, 98.

D. Logan [*Solicitor-General*] contended, that the evidence was such as to bring the case within Section 11 of the Ordinance 13 of 1879 and the house was to be presumed to be a common gaming house, and that it was kept or used by him for that purpose until the contrary was shewn. He referred to *Regina* v.

PELLEREAU, J. 1887.

REGINA v. YEAP HOCK TIN.

Lee Hong Kang, 3 Kyshe, 145, and submitted *Regina* v. *Abass* was distinguishable as there there was no house nor was the place lawfully entered. The conviction under Section 2, Clause 4, he also submitted was meant for Section 2 Clause 3 and could be amended under the Appeals Ordinance 12 of 1879.

Gottlieb, replied.

Cur. Adv. Vult.

31st March. *Pellereau*, J. In this case it is shewn by the depositions taken before the Magistrate that Yeap Hock Tin was in the room, on the premises, when the Police entered. His wife and mother were also seen coming from the back. The Magistrate has or at least I have come to the conclusion that Yeap Hock Tin was the occupier of the premises. The house was lawfully entered under a warrant and lottery tickets were found in it; people also were seen to attempt to rush out of the place. Under these circumstances Section 11 creates a presumption on which the Solicitor-General relies. That section is as follows:—

"Whenever any cards, dice, balls, counters, cloths, mats, tables, boards or other instrument or appliance whatsoever of gaming or lottery is found in any place lawfully entered under this Ordinance or upon any person found therein, or persons are seen or heard to escape therefrom on the approach or entry of a Justice of the Peace or a Police Officer, or any person having authority under this Ordinance to enter or go to such place is unlawfully prevented from or obstructed or delayed in entering or approaching the same or any part thereof, it shall be presumed until the contrary is shewn that the place is a common gaming house and that the same is so kept or used by the occupier thereof."

On these facts as I hold that Yeap Hock Tin was the occupier, the presumption raised by the section applies, and the house is to be taken to have been a common gaming house and to have been kept or used by him for the purpose of gaming. Clause 3, Section 2 therefore entirely applies to his case, because if as occupier he is to be taken as having kept or used the place as a gaming house he must be taken to have assisted in it. That is the offence he has been convicted of, and the statement in the conviction that he committed an offence under Clause 4, I shall amend by substituting 3 for 4. The conviction so amended will be affirmed.

Conviction affirmed [*a.*]

REGINA *v.* WEE SIM TIAN & ORS.

MALACCA.

FORD, C. J. 1887.

March 30.

Semble. The Crown, though not a party to an appeal from the decision of a Magistrate, nevertheless has a right to be heard on the appeal.

Punghulu Allang v. *Him*, 3 Kyshe, 144, and *Regina* v. *Shaik Ishmael Lebby*, Ibid. 99 [on this point] dissented from.

The simple fact that one of two Magistrates who have decided a case under the Dangerous Societies Ordinance 19 of 1869 is a Member of the Executive Council and as such, had under Section 3 seen and considered the evidence afterwards adduced by the prosecution in the case is no ground for quashing the decision, although the Court fully recognises the impropriety of his having sat to adjudicate on the case.

[*a.*] This decision although under the repealed Ordinance is retained as it is considered applicable to the new Gaming Ordinance.—J. W. N. K.

Where persons had been convicted of being managers of a Dangerous Society under Ordinance 19 of 1869, but the evidence did not shew the Society consisted of ten or more members under Section 1, the Court refused to quash the conviction, but remitted the case under Section 25 of the Appeals Ordinance, for further evidence on the point.

FORD, C.J. 1887.

REGINA v. WEE SIM TIAN & ORS.

This was an appeal by the abovenamed Wee Sim Tian and others, against the decision of the Hon'ble W. E. Maxwell and C. J. Skinner, Esquires, Magistrates, Malacca. The appellants had been convicted of being managers of a society which had not been registered under Ordinance 19 of 1869, as amended by Ordinance 4 of 1885. The evidence did not shew that the society consisted of ten or more members, which was the kind of society provided against under Section 1 of the former Ordinance. One of the two Magistrates who convicted the appellants was a Member of the Executive Council of the Colony, and it was shewn that prior to the institution of the present charge the whole of the evidence afterwards adduced by the prosecution in this case had been laid before the Governor and his Executive Council, at which Council the said Magistrate was present as a Member of the Council. Several objections were taken on this appeal which occupied the Court for three days; but as the Court expressed no opinion on any but the three hereinafter mentioned, this report is confined to those three points. On the appeal being called on

R. W. *Braddell*, [*Groom* with him] for the appellants objected to the Crown being heard, and they contended that under the Appeals Ordinance 12 of 1879, the only parties to the appeal were those in the Court below, the prosecutor and the accused, and relied on *Punghulu Allang* v. *Him*, 3 Kyshe, 144, and *Regina* v. *Shaik Ishmael Lebby*, Ibid. 99.

Ford, C. J. said he could not see upon what grounds those decisions proceeded, but he certainly did not agree with them.

The objection was not further pressed.

Braddell and *Groom* then contended, that the conviction was bad as one of the Magistrates was a Member of the Executive Council, and had as such, seen or heard the evidence afterwards adduced against the accused and had formed an opinion thereon before he sat in the trial; they referred to Ordinance 19 of 1869, Section 3, and Ordinance 4 of 1885, Section 13.

Ford, C. J. said he fully recognised the impropriety of a Member of the Executive Council sitting, but without strong proof of interest he thought that the simple fact of his having afterwards been an adjudicating Magistrate did not constitute grounds for quashing the conviction.

Braddell and *Groom* then [among other things] contended, that there was no evidence to bring the case within Ordinance 19 of 1869 as there was nothing distinctly to shew the society consisted of ten or more members; they referred to Section 1.

Bonser, [*Attorney-General*] for the Crown contended, the evidence sufficiently shewed there were more than ten members in the society, but if the Court thought otherwise it should send the case back to the Magistrate under the Appeals Ordinance 12 of 1879, Section 25, for further evidence on the point.

FORD, C.J. 1887.

REGINA v. WEE SIM TIAN & ORS.

Braddell and *Groom* replied, contending that there were no materials from which any amendment could be made, and that the evidence in the case irrespective of the number of members was so weak that the Court ought not to stretch the Appeals Ordinance in favour of the Crown.

Ford, C.J. If I had to decide this appeal on the merits only, I should have no hesitation in quashing the conviction on the objection taken by Counsel for the appellants, there being no evidence that they assisted in the management of such a society as need be registered under the Ordinance. But under the Appeals Ordinance 12 of 1879, the power of this Court is very great and the Court of Appeal in a recent case has decided that where the merits of the case require it, the Court below may be ordered to take further evidence; therefore, I am bound to send the case back to the Magistrate under Section 25 to take further evidence as to the number of members the proof of which the depositions do not shew. When I have got that I will adjudicate upon the case in Singapore. The defendants will, of course, be at liberty to adduce evidence on the point.

Case remitted for further evidence.

LIM SENG EE *v.* WRAY & ANOR.

PENANG.

PELLEREAU, J. 1887.

March 31.

The words "or otherwise" in Clauses 1 & 2 of Section 42 of the "Police Force Ordinance" 1 of 1872 are not unmeaning, but include not only laws in force at the date of that Ordinance, but also future laws of whatever kind under which Police Officers and those aiding them might be called upon to act.

Chawana Mahomed Hussein v. *Mahomed Mustan*, antè p. 1, followed.

Bryson v. *Russell*, 14 L. R. Q. B. Div. 720, distinguished.

Sections 42 and 44 of the said Police Force Ordinance are not to be read together, and before it is necessary for a plaintiff to prove malice under Section 44 against a Police Officer, the case must fall within Section 43, and before it is necessary for a plaintiff to give a month's notice under Section 43, the case must fall within Section 42.

The words "anything done . . . . . in the execution of his duty as such Police Officer" in said Section 42, do not only mean an act within the scope of his duty as a Peace Officer, but also an act done in excess of his duty, under a reasonable or honest belief it was within his duty.

Where an Inspector of Police and a Justice of the Peace entered a common gaming house under a warrant issued under Section 8 of the "Gaming House Ordinance" 13 of 1879, for the search of the premises for "appliances" of gaming [such as cards, dice, &c.,] and arrest of all persons found therein,—but after making such entry and finding no gambling on or "appliances" of gaming, but discovering that the place was fitted up with the "contrivances" [such as heavy doors and trap-doors, bars, bolts, &c.] mentioned in Section 12, with the object of testing Section 13 of the Ordinance, they broke down, demolished, and carried away such "contrivances," whereupon they were sued by the occupier of the premises for trespass in removing such fixtures, but without having been first served with a month's notice under Section 43 of the aforesaid Ordinance 1 of 1872 or at the trial the plaintiff attempting to prove malice on their part,

Held, that as by Section 13 it was plain, and the defendants could not but have seen that it was only a Magistrate who could order a demolition of the "contrivances" and that, only after summoning the parties before him to shew cause and judicially enquiring into the matter—they could not be said to have had either a reasonable or honest or *bonâ fide* belief [within Section 42 of the said Ordinance 1 of 1872] that they were acting within the scope of their duty, and were therefore not entitled to a notice under Section 43 nor was the plaintiff bound to prove they acted maliciously under Section 44.

Judgment of *Pellereau*, J, affirmed on appeal.

Section 47 of the said Ordinance 1 of 1872 applies only to cases where a Police Officer does an act in "good faith" and the act is done under *that* Ordinance and not some other.

Ko Bo An v. *Punghulu Shaik Beenan*, 1 Kyshe, 273, distinguished.

This was an action of trespass, for that the defendants, on 18th January, 1886, having lawfully entered into premises No. 129, Beach Street, Penang, occupied by the plaintiff, unlawfully broke down and carried away certain fittings therein. The defendants justified under a warrant issued by A. D. Neubronner, Esquire, a Justice of the Peace, for the search of the said premises, for instruments of gaming and arrest of persons found therein, and under "The Police Force Ordinance" [I of 1872], Section 31, Clauses 1, 2, 3, & 9, and Section 8 of "The Gaming House Ordinance" [13 of 1879], and claimed that they were entitled to judgment, as the plaintiff had not given them a month's notice prior to action, under Section 43 of "The Police Force Ordinance," and had not alleged or proved that they acted maliciously and without reasonable and probable cause, as required by Section 44. The evidence shewed, that the house had been a common gaming house, and that the last conviction of persons found gaming therein was in the latter half of the year 1885. The fittings which were broken down and removed, in respect of which damages were claimed in this action, were trap-doors, bars, doors, posts and other contrivances for obstructing an entrance, or facilitating an escape, commonly used in a common gaming house. The material parts of the evidence of the defendant Wray appear in the judgment of the learned Judge.

Van Someren, [*Clutton* with him] for the plaintiff referred to Act 13 of 1856, Section 112; Act 48 of 1860, Section 29, Ordinance 1 of 1872, Sections 31, 42, 43, 44; *Huggins* v. *Waydey*, 15 M. & W. 358; *Arnold* v. *Hamel*, 9 Ex. 406; 24 Geo. IV. cap 44; 11 & 12 Vic. cap. 44, Sections 1, 2, 8 & 9; *Kirby* v. *Simpson*, 10 Ex. 358; *Taylor* v. *Nesfield*, 3 El. & Bl. 724, 30; *Wedge* v. *Berkeley*, 6 Ad. & E. 663, per COLERIDGE, J.; *Che Him* v. *Robertson*, 1 Kyshe, 131; *Davidson* v. *Ord*, 1 Kyshe, 205; *Bryson* v. *Russell*, 14 L. R. Q. B. Div. 720; *Chawana Mahomed Hussein* v. *Mahomed Mustan*, antè p. 1; Ordinance 13 of 1879, Sections 8, 12, 13, 14; *Cook* v. *Leonard*, 6 B. & C. 351; *Hermann* v. *Seneschal*, 32 L. J. C. P. 43; *Heath* v. *Brewer*, 9 L. T. [N. S.] 653; *Chamberlain* v. *King*, 6 L. R. C. P. 474; and *Agnew* v. *Jobson*, 47 L. J. M. C. 67.

Ross, [*for the Solicitor-General*] for the defendants referred to Ordinance 1 of 1872, Section 31, Clauses 1, 2, 3 & 9 and Sections 42, 43, 44 and 47; *Ko Bo An* v. *Punghulu Shaik Beenan*, 1 Kyshe, 273; Ordinance 13 of 1879, Sections 8, 13; *Che Him* v. *Robertson*, 1 Kyshe, 132, 34; *Selmes* v. *Judge*, 6 L. R. Q. B. 724; *Wordsworth* v. *Harley*, 1 B. & Ad. 391; *Roberts* v. *Orchard*, 33 L. J. Ex. 65; *Leete* v. *Hart*, 3 L. R. C. P. 322; *Chamberlain* v. *King*, 6 L. R. C. P. 474; *Midland Railway Co.* v. *Local Board of Wittington*, 11 L. R. Q. B. Div. 788; *Bird* v. *Gunston*, 2 Chit. 459; *Hughes* v. *Buckland*, 15 M. & W. 355; *Huggins* v. *Waydey*, 15 M. & W. 358; *Wedge* v. *Berkeley*, 6 Ad. & E. 663; *Reed* v. *Cowmeadow*, 6 Ad. & E. 661; *Hardwick* v. *Moss*, 31 L. J. Ex. 205; and *Salmon* v. *Duncombe*, 11 L. R. App. Ca. 627.

PELLEREAU, J. 1887.

LIM SENG EE v. WRAY & ANOR.

[During the arguments, *Pellereau*, J. referred to 2 Taylor on Evidence, Section 312 [8th Ed.]; 2 Tudor's L. C. in Eq. [5th Ed.] 1140; Ordinance 12 of 1879, Sections 32, 33; *Chua Ah Tong* v. *Opium Farmer*, antè p. 188; *Cann* v. *Clipperton*, 10 Ad. & E. 585; and *Derecourt* v. *Corbishley*, 5 E. & B. 188, s. c. 24 L. J. Q. B. 313.]

Cur. Adv. Vult.

13th April. *Pellereau*, J. It is contended for the defence:—

1.—That the house from which the fittings were removed was a gaming house, and that the defendants had the right, under the general law, to remove the fittings in order to produce them before the Magistrate as evidences of guilt.

2.—That the removal fell within the scope of Dyer's duty as a Peace Officer, and that Wray assisted him.

3.—That if it did not, the defendants entertained a reasonable, or at least an honest belief, that they were acting in the discharge of their duty.

4.—That they had not acted maliciously.

5.—That they were entitled to notice of action under Section 43 of Ordinance I of 1872, a notice which they had not received.

It was argued on behalf of the plaintiff that he was not bound to prove actual malice under Section 44 of Ordinance I of 1872, except in cases where notice of action had to be given under Section 43, and that by this section, notice was required only in cases in which protection to Peace Officers or those acting in their aid was given by Section 42; by this section, it was submitted, as a first proposition that the protection was granted only when the wrong done falls within the scope of the Peace Officer's duty, and as a second proposition, that even if the reasonable or honest belief of the Peace Officer were entitled to the protection, there was proof that in this case, no such belief did exist. In consequence it was contended, that malice need not be proved, and that a notice was not required.

Many authorities were quoted on both sides, and the case was fully and ably argued. I will first apply myself to the facts of the case and ascertain what they are. The first inquiry is whether an unlawful act was committed, for without this no action can lie. The articles removed were not the gaming "*appliances*" described in Section 11 of Ordinance 13 of 1879, called "The Gaming House Ordinance, 1879," such as cards, dice, balls, counters, tables, boards and others, moveable by their nature,—but doors, partitions, windows, window and door frames, and lintels of doors, which were part of the building and are termed by Section 12 of the Ordinance, "*contrivances*" for facilitating gambling. Was this removal an unlawful act? I see no legal principle, either in the general or special laws of this Colony, by virtue of which this removal was authorised. It is true that by special enactments, evidences and subjects of guilt may be searched for and seized without a warrant under certain circumstances, that parties arrested may be searched for such evidences, as well as for the instruments of guilt, but in all these

cases, the articles are personal property, and nowhere do I see, that part of the realty can be removed, without consent, or without express order, and that a house may be even partly demolished to supply evidence of the guilt before a Court of Law. What appears to me conclusive on the point is, that "The Gaming House Ordinance, 1879" allows such removal and demolition by order of the Magistrate, and only after the owners and occupiers have been summoned to shew cause why a demolition should not be ordered. Such provisions would not have been required if the Police had power to remove. In this case there was no Magistrate's order, and the search warrant which Dyer held, does not authorise the removal of contrivances, but merely the arrest of the persons found in the place where such contrivances exist. I must therefore hold that the act complained of, was unlawful.

Was it within the scope of the Peace Officer's duty, or of a Justice of the Peace? I think not. No such duty, nor such power are mentioned in "The Police Force Ordinance of 1872"; and "The Gaming House Ordinance of 1879" imposes the duty upon a Magistrate, who has the power to act only after judicial inquiry; this was enacted as a due protection to the owners of realty, and to conciliate such protection with the necessity of suppressing gambling. Nor can I hold the defendants had reasonable or probable cause for believing that they were acting in the discharge of their duty; the search warrant held by one of them mentioned no such duty, and "The Gaming House Ordinance" is so plain in giving the power to the Magistrate, and not to the Police, that I can see no circumstances indicative of reasonable belief. Besides, the defendants could not make a reasonable mistake between the "contrivances," which are part of the realty, and the "appliances," which are moveable or personal property; this will appear more clearly from the facts which I point out below.

The question of honest belief is more delicate, but after careful examination of the facts, I come to the conclusion that the defendants cannot have acted under the *bonâ fide* supposition that they had the power to do what they did. Wray states in his deposition, that "*he was sent in December, 1885, from Singapore to Penang to suppress gambling, take the Ordinance in detail, and test its weak points, and report.*" He further states that "*before he went to the search, he had read Sections 12 or 13 of the Ordinance, and the warrant gave him the power under Section 8.*" He had the fittings, immediately after seizure, taken to the Magistrate, telling Dyer to apply for a summons, and he had procured Superintendent Riccard to issue two notices, under Clause 2 of Section 12 of the Ordinance, one to be posted up on the house, and the other to be served on the owner. He also states that, "*it was the practice to remove fittings, but this was seldom done, because it is very rare that they exist.*" The object which he had in view, as he says, was [*1*] "*to stop gambling in future;*" [*2*] "*to test the section, and find if it was sufficient to raise the presumptive evidence against the owner and occupier, so as to obtain the Magis-*

PEL-LERRAU, J. 1887.

LIM SENG EE v. WRAY & ANOR.

trate's summons." From all these facts, and the deposition generally, I come to the conclusion that Wray knew Sections 8, 12 and 13 of the Ordinance quite well; that he wished to test one of the sections, and obtain the Magistrate's summons. Now, the section under which the summons can be issued, is No. 13, and it enacts express words, *inter alia*, that if the Magistrate thinks that the house was fitted with the contrivances mentioned in Section 12, the summons [the very summons Wray was trying to obtain] shall require the owners and occupiers to show cause why the demolition directed by Section 14 should not be ordered. This is not a point of difficulty, it is written in the section in so many words, and Wray who must have read the Ordinance carefully to test its weak points, and who was specially enforcing the Sections 12 and 13, could not have been ignorant of the provision as to demolition, and must have known that it was placed within the Magistrate's duty, and not within that of the Police, or of a Justice of the Peace. If he had doubt on the subject and wished to test the Ordinance and ascertain its weak points on this subject, this would not shew a *belief* that he or Dyer had the power, but a *doubt*; and if protection is to be extended under Section 42 of "The Police Force Ordinance, 1872" to acts which did not fall within the scope of duty, by reason of honest belief in the wrongdoer that they do fall within such scope, it must be a belief, and not a doubt. Unlawful act, coupled with belief, may be protected; but unlawful act, coupled with a doubt, is not.

As to Dyer, he acted jointly with Wray, he was advised by Wray as to the steps taken, he held the search warrant which shews clearly that the power of removing fittings was not given, he took away the fittings to apply to the Magistrate for a summons, he also must have known the summons to have been the very summons by which the owner and occupier were to be called upon to shew cause, before the demolition could take place. By demolishing, before the Magistrate had given his order and heard the parties concerned, I hold, that neither he, nor Wray, who went together on an expedition to test the Ordinance and ascertain its weak points, could have been in good faith under the belief that they, or either of them, were acting within the limits of their duty; they must have known that they were encroaching upon the Magistrate's province. It may be that they took a bold step to secure a desirable object, but the special act complained of, was a rash act under the present state of the law, which they knew. On the question of honest belief, I must therefore find against them.

On the other hand, I do not think that they acted maliciously; malice, is the formed design of doing mischief, and of this there is no evidence. The plaintiff's Counsel have admitted this; and they admit also that no notice of action was given.

I also find, that although Wray was more active than Dyer in the commission of the act, he was acting conjointly with him under cover of a search warrant which Dyer held, advising and instructing him, as well as co-operating with him, and he is entitled to be dealt with under the same protecting clause of the

law, as Dyer, the Peace Officer, with whom he acted in the execution of the search warrant addressed to all Peace Officers.

On these facts now arise the questions whether the plaintiff must prove malice to succeed in his action and whether he was bound to give notice previous to bringing it.

Section 47 of "The Police Force Ordinance, 1872" was relied on to shew that the Peace Officer is protected unless the act is done maliciously, but there are two reasons why the section cannot apply to this case—[1] the act is required to have been done "in good faith believing in a power to act," and I have found as a fact that there could be, in this case, no honest belief in a lawful power;—[2] the section applies only to something done or intended to be done under that Ordinance; the words "*or otherwise*" which exist in Section 42, are here omitted, and when I bear in mind that they exist in two clauses of Section 42, but are left out in the 3rd clause of that section—that in Section 45 the defence is allowed to be set out under that Ordinance, "*or under some other Ordinance or law*"—that Section 47 treats of malice, just as Section 44 has done,—I cannot help coming to the conclusion that Section 47 deals with special matters, and restricts the protection under it, to acts done within the authority provided by Ordinance I of 1872. In the present case, the act was not done under this Ordinance; there is no section, within the scope of which the act can be brought, nor, according to the evidence was it intended that it should be done under this Ordinance, but under "The Gaming House Ordinance of 1879." Section 47 cannot therefore help the defendants.

The case of *Ko Bo An* v. *Punghulu Shaik Beenan*, 1 Kyshe's Reports, 273, was referred to as authority requiring the proof of malice. But the act done there was an arrest, and this fell under the scope of the authority provided by the Indian Act 13 of 1856, of which the Indian Act 48 of 1860 must be read as a part; Section 29 of the latter Act expressly enacts, that if an act is done under the provisions of both those laws, malice must be proved. The precedent cannot apply to a case in which the act was neither done, nor intended to be done, under the law which contains the protecting section, nor done within the scope of authority provided by a law.

It was further contended for the defence, that Section 44 of "The Police Force Ordinance, 1872," must be connected with Section 42, and that thus read, the protection which this section gives, extends to all acts which are not malicious; if this were done, the consequence of the connection would be, that whenever the act is malicious, no notice would be required, a consequence diametrically opposed to the plain reading of Section 44, which enacts the malice must be proved, when the notice is required. This mode of interpretation cannot, therefore, be correct. It was, it is true, pointed out for the defendants, that if Sections 42 and 44 are disconnected, a strange consequence is produced, as in case honest belief is protected under Section 42, the occasion of proving malice under Section 44 would never arise, and this section would remain a dead letter. This would be true, if mere honest

PELLERAU, J. 1887.

LIM SENG EE v. WRAY & ANOR.

belief in a lawful power were protected under Section 42, when a wrong is committed, but it might be then, that the honest belief would be referable to the *power* of doing the act, whilst in Section 44 the malice would refer to the questions *whether an offence has been committed, and who the offender may be.* Supposing, however, there be such a clashing as the result of disconnecting the two sections, there would be the clashing already pointed out on connecting them. The best mode of construing the section in this difficulty, is to read them in their plain sense, and in the order in which they are found. When this is done, it is evident that malice is required to be proved in the case referred to by the previous sections which requires the notice, and this section itself refers to the preceding Section 42; the logical inference is, that Section 42 must be construed first, apart from Section 44, and that in doing so, malice should be taken out of its consideration; the proof of malice, will be required in cases only which fall within the protection of Section 42, just as notice will be required, only in the same cases; and if no notice is required, judgment should go for the plaintiff.

In construing Section 42, there can be no doubt, that a wrongful act must have taken place, and that the Peace Officer must have acted in his official character. A difficulty has been raised by the plaintiff, as to the words "*or otherwise*," on the ground that they are unmeaning. A decision of Sir T. SIDGREAVES was quoted, as showing that he considered them to be so in Section 422 B of "The Civil Procedure Ordinance, 1878" [*a.*]; but in that case, the learned Judge appears to have stated, that he estimated the sense of the words "*or otherwise*" from the general scope of the section of which they form part, and from the special circumstances of the case. I believe that to be a sound proposition. In following this precedent, I find, that in this case, Section 42 is meant to afford protection to Peace Officers, and that the Ordinance of which it forms part is a general law which regulates the Police Force and puts upon it certain duties; it is natural to infer therefrom that the protection is co-extensive with the duties. Those duties are many, and *inter alia* for the detection of crime or offences, irrespective of the fact that the offences have been created by previous or subsequent laws; they include also the carrying out of many other laws. I am clearly of opinion, that all such laws, past or future, are included in the words "or otherwise," and were meant to be so included. In several sections already pointed out, they have been left out, and when found in Section 42 must be intended to enlarge the meaning of the words "*this Ordinance*," so as to afford to Peace Officers adequate protection in the discharge of their various duties, and this includes the Ordinance on Gaming Houses. An English case was referred to [*b.*] but the section applied there evidently restricted the protection to past laws. I therefore hold, that if the act complained of in the present case, has been done under "The Gaming

[*a.*] See *Chawana Mahomed Hussein* v. *Mahomed Mustan*, antè, p. 1.
[*b.*] *Bryson* v. *Russell*, suprà.

House, Ordinance, 1879," the protection afforded by Section 42 of "The Police Force Ordinance, 1872," extends to the Officer who has done it.

Now to obtain this protection, the act must be within the duty of the officer. According to the opinion of Baron Platt in *Kirby* v. *Simpson*, 10 Exch. 367, "duty" and "office" are synonymous terms. The act need not strictly be within the duty of the officer, as there would be no unlawful act in such a case, and by its nature and description, it should fall within the class of duties imposed upon the office of the Peace Officer. Unfortunately for the defendants, the act complained of, that is, the removal of fittings, is not placed by law within the scope of Police duties, but within the jurisdiction of Magistrates.

Some of the authorities, the most recent of which is *Agnew* v. *Jobson*, 47 L. J. M. C. 67, extend the protection even to cases which do not fall within the scope of the officer's duty, when he has been under the reasonable belief that he had the power to act; I am inclined to adopt the view taken by those authorities. There are others which go further still, and lay down that the officer's belief, if honest, though not reasonable, should protect him; the two most recent authorities quoted in support of this view are *Selmes* v. *Judge*, 6 L. R. Q. B. Div. 724 and *Midland Railway Co.* v. *The Wittington Local Board*, 11 L. R. Q. B. Div. 788. This seems also the view adopted by Sir B. MAXWELL in *Che Him and others* v. *Robertson*, 1 Kyshe, 131. On applying these authorities, touching reasonable belief and honest belief, to the facts found in the present case I am however driven to the conclusion, as no such belief existed, that Section 42 does not protect the act done by the defendants; that no notice, previous to action, was required, and that no malice need be proved, to enable plaintiff to succeed.

Judgment must therefore be in his favour, but the damages have been proved only up to nearly $484, the amount at which I assess them.

Defendants to pay the costs, taxed as costs in the first Divisional Court.

The defendants appealed against the above judgment, both as regards the findings on fact, as well as law.

The Appeal was heard on the 22nd April, 1887, before *Ford*, C.J., *Pellereau* and *Goldney*, J. J.

Ross, for the appellants. It is admitted the defendants intended to act under Section 13 of the Gaming House Ordinance 13 of 1879, but it is submitted, that where there is authority for doing part of an act, the mere excess of authority, done under an honest belief that it was within his powers, does not deprive a Peace Officer of his right to a notice under Sections 42 and 43 of "The Police Force Ordinance" [I of 1872.] The defendants here, had authority under Section 8, to enter the premises with the warrant, there they found certain fittings, and their desire was, to have the house declared a common gaming house. In removing

FORD, C. J. PELLEREAU & GOLDNEY, J.J. 1887.

LIM SENG EE v. WRAY & ANOR.

the fittings, they acted *bonâ fide*, thinking they could take them before the Magistrate, in order to procure a summons against the owner. If they had an honest belief, as I submit on the evidence they had, they were entitled to notice.

[*Goldney*, J. The defendant Wray does not say he believed the warrant gave him the power, but he wished to test the weak points of the Ordinance.]

I submit that is not what he says, what his evidence means is not that he wished to test the Ordinance, but to test whether the fixtures raised sufficient presumptive proof against the owner, to enable him to get a summons.

[*Ford*, C.J. What right had the defendant to test whether the *production* of the "contrivances" before the Magistrate would raise the presumptive proof for a summons? He could have given evidence that such "contrivances" existed in the house, which would have sufficed to raise the presumption.]

We having carefully considered the Ordinance for this case, and now know he had not the right or power, but it does not follow that the defendant knew it, or could not have believed he had. He acted *bonâ fide*, under the honest belief he had the power, and that according to the authorities, is sufficient to entitle him to a notice.

[*Goldney*, J. The defendant tells us his two objects, but neither of them is to the effect that his object was to obey the warrant.]

The defendant had no doubt he had the power though we now find he was mistaken. He considered he had the power under Section 8 mistaking the "appliances" there mentioned for the "contrivances."

[*Goldney*, J. It rather seems to my mind, that the defendant having failed in his search under Section 8, thought he ought to have a case against the owner. He thereupon ceases to act further under the warrant and Section 8 and tries to get a case under Section 13.]

[*Ford*, C.J. The defendants' object was, probably, to find a short cut to put a stop to gambling.]

One of his objects was, no doubt to put a stop to gambling, he tells us so; but that was not his object in removing the fittings his object in doing that, was, to see if they raised sufficient presumptive evidence, for a summons against the owner.

[*Pellereau*, J. But that very summons that he wanted, was to call on the parties to show cause why the Magistrate should not order the demolition. As a fact, he did not apply for that summons till after he had been served with a notice.]

That is so, but he had told Dyer, the same day as he removed the fittings, to do so, but Dyer omitted it. Dyer was absent, and has not given us his reasons for not doing it.

[*Goldney*, J. There must be a *bonâ fide* belief in the defendant, that he had the power, before he is entitled to notice. I cannot see how, in the face of what the defendant himself tells us, we can say he had such *bonâ fide* belief.]

[*Ford*, C.J. If the defendant had said he was an innocent man, ignorant of the provisions of "The Gaming House Ordi-

nance," and believed he was carrying out its provisions [and that is to put the case as strong as it could possibly be in your favour] he might, perhaps, have been entitled to notice; but here the evidence of the defendant himself, is the reverse of this.]

It is submitted, that his evidence when carefully looked at, does not shew he had not the belief; but I cannot add more than I have said, to shew this is so. The question of the defendant's *bonâ fides*, and honest belief, is entirely a question of fact for the Court, and if the Court has made up its mind on that point against me, there is no necessity for my addressing myself to the law in the case.

Van Someren, [*Clutton* with him] for respondent, were not called on.

Ford, C.J. I can only say I was most desirous [as I feel quite sure the defendants intended to act only as Public Officers] to find on the evidence some flaw in the reasoning of Mr. Justice PELLEREAU, but after giving a couple of hours' attention to the arguments that have been addressed to us, I have not found a way out of it. I therefore concur with the learned Judge below, in his finding on the facts. The law of the case is clear. The defendants exceeded their duty, but without an honest belief that they were acting within the scope of it. As regards the costs, I see no reason to take this case out of the ordinary rule that they follow the event.

Pellereau, J. I adhere to my judgment in the Court below.

Goldney, J. I concur with the judgment of the Court.

Judgment affirmed. Appeal dismissed with costs.

ABDULLATIF *v.* MAHOMED MEERA LEBE.*

The custom in Malacca for a cultivator of land to pay a tenth of the produce to the proprietor of the land in lieu of rent—and as long as the cultivator does so he cannot be ejected—is a good and reasonable custom, and one this Court will recognise and uphold.

This was an action to recover possession of a piece of land at Bukit Tampurong, Malacca, which the plaintiff had acquired under a Conveyance, dated 16th June, 1816. The plaintiff alleged in his complaint that he had been in possession of the land for about a year and leaving for some country out of the jurisdiction, he left the land in charge of his mother Inche Siliah and his brother Khatib Mahomed. On his return he found the defendant in possession of the land, he having unjustly and unlawfully ejected the said Inche Siliah and Khatib Mahomed. The defendant, in his statement of defence, denied having ejected the said Inche Siliah and Khatib Mahomed, and alleged that he had resided on the said land "for thirty years or thereabouts, during which time he had cultivated the same without any interruption; sowing, planting and reaping thereupon; that according to the general custom

* Coram: *Claridge*, R. & Hon'ble S. *Garling*, Resident Councillor. This case was discovered amongst the records in this Settlement at this stage of the work, and is now reported only on account of its importance.—J. W. N. K.

CLARIDGE, R. 1829. ABDULLATIF v. MAHOMED MEERA LEBE.

of Malacca, and sanctioned by time to the contrary whereof the memory of man is not, all husbandmen being tenants of the said soil and cultivating the same, are held and bound to pay unto the proprietor of such land one tithe or tenth part of the produce thereof; that during the period of seventeen years previous to the plaintiff becoming proprietor of the said land, the defendant paid unto all and each of the predecessors of the plaintiff one-tenth part of the produce of the land, such land being all that time under cultivation by the defendant; and that during the last twelve years, the said Inche Siliah and Khatib Mahomed had received from the defendant for and on behalf of the plaintiff as such proprietor as aforesaid, one tithe or tenth part of the produce, all of which the defendant prayed might be enquired of by the Court."

The parties appeared in person.

Claridge, R. This is an action to recover possession of a piece or parcel of ground in Malacca. The plaintiff and defendant have both been examined and evidence has been heard on both sides. It has been proved that in the territories of Malacca the owners of the soil and the cultivators of it are entirely distinct persons, except in and in the immediate vicinity of the town. That the owner of the soil cannot eject the cultivator as long as he continues to pay him a certain portion of the produce—generally one-tenth. That the owner of the soil may sell or otherwise dispose of his interest without prejudice to the cultivator, and the cultivator *vice versâ*. That in case the cultivator allows the land to lie waste, the owner of the soil may eject him by due process of law. That the fact of lands being uncultivated for certain periods is evidence of waste. That the period allowed for paddy land is 3 years—Cocoanut trees and other fruit trees, &c., 3 years—Gambier 1 year—and Pepper 1 year. In the present case the defendant has been shewn to be such a cultivator and has continued his cultivations regularly and paid a tenth of his produce to the plaintiff's predecessors in title, and to his agents. The plaintiff cannot therefore eject him and there must be a non-suit with costs.

Non-suited with costs. [*a.*]

LI AH CHEW & ORS. v. PENANG TRAMWAY CO.

PENANG. PELLERAU, J. 1887. April 4.

The mere laying of a pole, twenty-five feet in length, across the lines of a steam tramcar, which is stopped on the obstruction being seen, does not constitute "mischief" under Section 426 of the Penal Code, but only an "attempt" to cause "mischief" within Sections 426 and 511.

A conviction for "mischief" was therefore amended by altering it to one for the

[*a.*] The custom here upheld has, within recent years, been recognised by Legislative Enactments, but it has been thought well to give, as matter of history, the earliest actual recognition of it by the Courts of the Colony. See also *Attorney-General* v. *De Wind*, Vol. 1 of these Reports, 303; *Sahrip* v. *Mitchell & anor.*, Straits L. R. 466; Act XVI. of 1839, Act XXVI. of 1861, and Ordinances 8 and 9 of 1886. An extract of this case from Court records with commentaries will also be found in *W. E. Maxwell's "Law and Customs of the Malays with reference to the tenure of land,"* 1885, pp. 30, 31 & Appendix III.—J. W. N. K.

"attempt," and the sentence reduced accordingly by virtue of Section 34, Clause 6 of the Appeals' Ordinance 12 of 1879.

PELLEREAU, J. 1887.

LI AH CHEW & ORS. v. PENANG TRAMWAY CO.

The appellants had been convicted by C. W. S. Kynnersley, Esquire, First Magistrate, of committing mischief by placing a pole on the tramway line with intent to cause damage to the tramcars of the respondent-Company under Section 426 of the Penal Code. It appeared from the evidence that at one o'clock in the morning of the 7th February last, as the tramcars were at Weld Quay on their way to town from the country, it being a clear moonlight night, the engine-driver noticed the appellants placing a pole about twenty-five feet in length across the tram lines about 20 feet from the engine. He immediately stopped the engine and ordered a fireman and others to arrest the appellants who ran off, but were chased into and arrested in a tongkang moored some little distance off. The Magistrate having convicted them of mischief, sentenced them to three months' rigorous imprisonment. They now appealed.

Capel, for them contended, that the decision was against the weight of evidence, and did not shew that mischief had been done. He referred to *Regina* v. *Denoo Bundhoo*, 12 W. R. Cr. 1, and *Mahomed Aniff* v. *Ebram Khan*, 3 Kyshe, 88.

Ross, for the respondent admitted that the evidence did not shew mischief, but he contended it was sufficient to shew the appellants attempted to commit the offence under Sections 426 and 511 of the Penal Code.

Capel, replied.

Pellereau, J. In this case the appellants have been convicted of mischief, but there is no proof of mischief under Section 426. An attempt to do so I consider was proved and that, with the intent required by the section. The facts as disclosed do not constitute the offence of mischief, but they do constitute an attempt under Sections 511 and 426. The appellants should have been convicted of such attempt, and under Section 34, Clause 6 of the Appeals Ordinance 12 of 1879 I shall amend the conviction by convicting them of the attempt, and reduce the punishment to six weeks' being the half under Section 511 of the term imposed by the Magistrate. The conviction as amended will be affirmed.

TAN SENG QUI *v.* PALMER.

PENANG.

PELLEREAU, J. 1887.

April 14.

If a contract for purchase contain no clause providing for the forfeiture of the deposit on breach by the purchaser, but provides a general penalty for breach of the contract, such latter provision excludes the idea that the parties intended the deposit to be forfeited and no forfeiture will be allowed.

Thomas v. *Brown*, 1 L. R. Q. B. Div. 714, and *ex-parte* Barrell, 10 L. R. Ch. App. 512, distinguished.

Palmer v. *Temple*, 9 Ad. & E. 508, followed.

Semble. Although there might be good reason for considering that Sections 13 and 14 of the Courts Ordinance 3 of 1878 do not confer on this Court all the jurisdiction

PELLERAU, J. 1887. —— TAN SENG QUI v. PALMER.

and powers of the Probate Division of the High Court of Justice in England, yet there is no reason for restricting Section 10 of that Ordinance in respect to powers and jurisdiction vested in such High Court of Justice in matters of Common Law and Equity – and this Court therefore might award damages in lieu of decreeing specific performance, as might be awarded by the Chancery Division of the High Court of Justice under Lord CAIRNS' Act [21 & 22 Vic. c. 27] and the Judicature Acts.

Semble. If in a suit for specific performance, the Statute of Frauds would be no bar by reason of part performance—the Statute would be for the same reason no bar to this Court awarding damages under the aforesaid Section 10 in lieu of such specific performance.

Sayers v. *Collyer*, 28 L. R. Ch. Div. 103; *Lewers* v. *Earl of Shaftesbury*, 2 L. R. Eq. 207, and *Olley* v. *Fisher*, 34 L. R. Ch. Div. 367, considered.

Suit for specific performance or for damages for breach of contract. The plaintiff had contracted to purchase from the defendant certain lands in Province Wellesley and an agreement [set out in the judgment] was signed by him. The plaintiff by *viva voce* evidence sought to make out that this agreement did not through the alleged fraud of the defendant set forth the true arrangements between them. He however, persisted with his claim for specific performance as well as the alternative claim for damages and claimed a return of his deposit. The defendant had let the plantiff into possession of the land, but afterwards turned him out. The defendant had signed no agreement for sale. As regarded the claim for damages only, the defendant pleaded the Statute of Frauds. He alleged the breach of contract was on the part of the plaintiff and he counter-claimed for damages sustained by him by such breach and also claimed to retain the deposit.

Van Someren, for defendant contended, that as the agreement was in writing and the plaintiff claimed specific performance, he could not get it with a variation of the terms of the written document, and *viva voce* evidence was inadmissible to prove such variation. *Woolam* v. *Hearn*, 2 Wh. & T. L. C. in Eq. 404; that as regarded the claim for damages the plaintiff was not entitled to recover as there was no contract signed by defendant—the part performance was immaterial as regarded this claim and no case could be found in which part performance had been held sufficient to take a case out of the Statute of Frauds, other than cases for *actual* specific performance; further, that this Court could not award damages in lieu of specific performance, as that power was given in England under Lord CAIRNS' Act, which did not extend to this Colony.

[*Pellereau*, J. referred to *Sayers* v. *Collyer*, 28 L. R. Ch. Div. 103; *Lewers* v. *Earl of Shaftesbury*, 2 L. R. Eq. 270; *Olley* v. *Fisher*, 34 L.R. Ch. Div. 367; and Section 10 of the Courts' Ordinance 3 of 1878.]

Van Someren, submitted that Section 10 did not vest such a power as was given in England by a special Statute, and referred to Sections 13 and 14, and to *Lim Chye Peow* v. *Wee Boon Tek*, 1 Kyshe, 236; *Goods of* Lebby Long, 2 Kyshe, *Ecc. Ca.* 27; *Allee* v. *Saman*, 1 Kyshe, 480; *Goods of* Ismail, antè p. 187 As

regarded the defendant's claim to forfeit the deposit, he referred to *Thomas* v. *Brown*, 1 L R. Q. B. Div. 714; *Ex-parte* Barrell, 10 L.R. Ch. App. 512, and *Ung Ah Chin* v. *Cheah Tek Soon* [*a*].

G. S. H. *Gottlieb*, for plaintiff contended, the Court had power to award damages before and independently of Lord CAIRNS' Act, and referred to 2, Story Eq Jur., Sections 798-99: and as to the forfeiture of the deposit, he contended that as the agreement contained no clause authorising the forfeiture, but provided a general penalty for its breach, no forfeiture would be allowed, and referred to *Casson* v. *Roberts*, 32 L.J. Ch. [N.S.] 105; *Hinton* v. *Sparks*, 37 L. J. C. P. [N. S.] 81; and *Palmer* v. *Temple*, 9 Ad. & E. 508.

Van Someren replied, contending Lord CAIRNS' Act would have been useless, if the Court prior thereto, could have awarded damages; and as to the forfeiture, that *Casson* v. *Roberts* was

[*a*.] *Unreported*:—5th May, 1882. *Ung Ah Chin* v. *Cheah Tek Soon*. Action to recover $1,400, paid as a deposit to the defendant, the plaintiff declining of his own accord to carry out the purchase. The plaintiff had paid the defendant the $1,400 as a deposit, and to account of the purchase-money of certain lands in Penang. The defendant signed and gave the plaintiff a receipt for the amount so received, which stated the amount was to account of purchase-money for his lands at Campbell Street in Penang. The plaintiff had signed no contract, and there had been no part performance. Neither the receipt nor from the evidence did it appear that anything was agreed as to forfeiture of the deposit on breach, nor anything as a general penalty for such breach. The defendant counter-claimed for specific performance.

Van Someren, for plaintiff contended, that as there was no contract to bind the plaintiff at law or equity, by reason of the Statute of Frauds, there was nothing on which the defendant could claim to forfeit the deposit, although the plaintiff himself had abandoned the purchase—and referred to *Casson* v. *Roberts*, 31 Beav. 613, *s. c.* 32 L. J. Ch. [N. S.] 105; that as to the counter-claim, the plaintiff was entitled to judgment, as there was neither a contract in writing, nor part performance.

Ross, [*Thomas* with him] for defendant contended, that as the defendant was bound to the plaintiff by reason of there being the receipt, which was a sufficient contract in writing signed by him, *Casson* v. *Roberts* did not apply; further that *Casson* v. *Roberts* had been questioned in *Thomas* v. *Brown*, 1 L. R. Q. B. Div. 714; and was inconsistent with *ex-parte* Barrell, 10 L. R. Ch. Ap. 512, where it was held there need be no clause empowering a forfeiture.

Van Someren, in reply, contended that this case was in fact a middle case, it differed from *Casson* v. *Roberts* inasmuch as *here* the defendant *was* bound to plaintiff, if the plaintiff chose to claim it,—and also from *ex-parte* Barrell, as there, there *was* a contract in writing, binding *both* parties, though it contained no clause authorising a forfeiture. But the defendant could not insist on his being bound, when the plaintiff refused to consider him so; and the plaintiff being admittedly free, that fact could make no difference, because the forfeiture would only be bad on the hypothesis of the plaintiff having contracted and committed a breach. Here there was *no* such contract, or breach, in law or equity.

Ford, J. said it had been properly remarked by Counsel for the plaintiff, that this case was distinguishable on the facts from both classes of cases which had been cited—but in that state of things, and in absence of authority, he could only decide according to what he considered would be the law, consistently with justice and right, he could not help seeing that the plaintiff had in fact made a promise to purchase, and subsequently having changed his mind and made a breach of that promise. Unless the Court was bound by *Casson* v. *Roberts*, it certainly would not lend itself to such a claim, as it enabled the plaintiff to take advantage of his own wrong—his *own* breach. That case was not applicable, as *neither* party there was bound to the other. Here, the defendant was bound to the plaintiff, and although the plaintiff did not insist on it, yet the Court could not overlook the fact—there was therefore a contract of some kind, and the plaintiff could not recover his deposit, although, according to *ex-parte* Barrell, there was no clause empowering a forfeiture. Judgment would be for the defendant in the original action—and for the plaintiff on the counter-claim,—and the costs to be apportioned accordingly.

PELLEREAU, J. 1887.

TAN SENG QUI v. PALMER.

questioned in *Thomas* v. *Brown*, and that *Hinton* v. *Sparks*, and *Temple* v. *Palmer*, were cited and considered both in that case as well as in *Ex-parte* Barrell.

Cur. Adv. Vult.

April 18th. *Pellereau*, J. In this matter I have noticed that the statement of claim is not in accordance with the deposition of the plaintiff. His evidence is, that the defendant wrote the agreement which contained something different from the actual agreement between them, and which was more favorable to the defendant. The plaintiff in fact in his deposition charged the defendant with deceit, the statement of claim however is as follows:—

Sections 2 and 3.—"That at the time of such purchase, an agreement was made by the defendant, and executed by the plaintiff, and which agreement is now in the possession of the defendant; and thereafter the plaintiff paid the defendant the sum of $500 being the sum agreed upon, to account of such purchase-money, and for which sum the defendant gave the plaintiff a receipt; that the effect of the said agreement, as translated and explained by the defendant to the plaintiff was, *inter alia*, that the deposit to be paid as earnest of the said purchase, was a sum of $500—that the balance or remainder of the purchase-money should be paid within 6 months [the date agreed on for completing the same] and that the sum of $5,000 should be paid as damages by the party delinquent to the party observant."

In that statement, there is no mention that the parcelling of the land into lots was one of the terms of the contract. The statement of claim continues, thus:

Section 4.—"That after making the said agreement, the plaintiff incurred great expense in building a house or a part of the land so purchased by him, and also incurred other expenses with the object of re-selling the land in lots to other parties, who, to the knowledge of the plaintiff, were desirous of buying the same."

He there says his intention was to parcel out the lands, but he does not say it was a term in the contract that he could do so. Para. 5 continues, "All conditions were fulfilled, and all things happened, necessary to entitle the plaintiff to have the agreement performed by the defendant." There is nothing whatever therefore, alleged in the whole statement of claim, as to the parcelling out of the land, being any part of the contract. I must of course give judgment in a case, as a plaintiff represents it in his statement of claim. The first question I have to decide is, whether there was any contract different from the written contract A. It is for the plaintiff to shew there was a variation. Was there then a variation with regard to the earnest-money? I think the plaintiff's case on this point is unsatisfactory. He says the earnest-money was arranged to be only $500. The defendant denies this, and says it was agreed to be $1,000. The evidence of Smith confirms the defendant's version. The evidence of Mahomed Jusoh does not confirm the plaintiff's—his evidence leaves in doubt what the amount of the earnest-money was to be. Now, this part of the case is connected with the Promissory-note. The

plaintiff denies he gave the note. Mahomed Jusoh, says he does not remember whether one or two documents were made at the time, but Smith distinctly speaks to the note and as to its being given for the earnest-money. I have looked at the signature to the note, and I incline to think the signature is similar to the signature to the contract A. and is the plaintiff's. At all events, it is for the plaintiff to make out the variation he alleges, but the evidence is against him. I consider therefore that the earnest-money was the amount mentioned in the contract A. and was $1,000. Then as regards the further variation the plaintiff swears to, that the parcelling out of the land was a term of the contract. Here again, we have the same conflict of evidence. The plaintiff and defendant do not agree on the subject. Smith agrees with the defendant. Mahomed Jusoh slightly supports the plaintiff's case, but he says he had a very indistinct recollection of the whole transaction; so it is possible that the conversation as to the parcelling out of the land which he refers to, was the conversation which occurred at a later date. The defendant and Smith positively contradict the evidence of the plaintiff on the point. The contract is in writing signed by the plaintiff, and as he alleges it was different from what it now is, it is for him to make out his case. The weight of his evidence is in favour of the defendant, and I cannot hold the plaintiff has proved any variation of the written contract. I am confirmed in this view by the statement of claim which I have referred to. The matters he now alleges were important, and could not have been omitted through forgetfulness. The defendant says he afterwards agreed to the plaintiff parcelling out the land on the condition that he sold over $2,000 worth at a time; this agrees with the allegations in the statement of claim and not with plaintiff's deposition. On the facts, I hold there was no contract for anything beyond what appears in the contract A. The question next arises who committed a breach of that contract? The plaintiff by the contract agrees to pay $1,000 as earnest-money, and a further $1,000 on 1st November following. He gives the defendant a Promissory-note for the $1,000 earnest-money, and on its due date only pays $500 to account. After this he wished to parcel out the land into lots and the defendant objected unless he paid the instalments that were due of the purchase-money. The plaintiff should then have tendered the purchase-money or the instalments due or done something to shew he was ready and willing to do so. Instead of this, he insists on a conveyance from the defendant without paying him for the land as agreed upon. The breach I hold was on the part of the plaintiff; and what confirms me in this belief is that the defendant offered in writing, as soon as this suit was begun to carry out his part by executing a conveyance if the plaintiff would pay up. The plaintiff refused the offer saying he had not the means then to pay the purchase-money as his prospects had been ruined by the defendant. On the facts, I give judgment for the defendant against the plaintiff's claim. Now, as to the defendant's counter-claim. He claims to retain the $500 paid to account of the earnest-money as being a deposit, besides damages for the loss

PELLERAU, J. 1887.

TAN SENG QUI v. PALMER.

he has sustained by the plaintiff's breach. There is nothing said in the contract A. as to the $500 or $1,000 being a *deposit*. The contract A. is as follows:—

"I hereby agree to purchase from Mr. F. A. Palmer for the sum of dollars thirty-five thousand [$35,000], his plantation at Bagan Najam in Province Wellesley, the sum of dollars one thousand [1,000] to be paid down at once. and on the 1st November a further sum of $1,000 to be paid, and the remainder viz., $33,000, within 6 weeks from this date, failing which a penalty of $5.000 to be paid by me and the plantation to revert back to Mr. Palmer."

But let us consider that the amount which had to be paid cash on the signing of the agreement was in the nature of a *deposit*. Authorities have been cited to shew that a vendor is entitled on breach of the contract by the purchaser to retain the deposit. The first case was *Thomas* v. *Brown*, but there, there was a special clause expressly empowering the vendor to forfeit the deposit. In the other case, *ex-parte* Barrell *re* Parnell, it is quite true there was no specific clause for a forfeiture, yet the deposit was held to be forfeited; there however there was no clause providing for a general penalty in case of breach, but penalties for certain specific breaches for delay. The report says—"it was also stipulated that the purchase should be completed on the 24th June, 1874, and that if from any cause whatever the purchase should not be completed on that day, the purchaser should pay to the vendor interest on the residue of the purchase-money and on the valuation of the fixtures after the rate of £5 per cent. from that day till the completion of the purchase." That was no doubt a penal clause, but only as to delay in completing the purchase; there was no general penalty imposed for any breach, the Court of Appeal there decided the deposit was forfeited. Another case cited is against the defendant. I refer to *Hinton* v. *Sparks*. It was no doubt an earlier case than the other two, but *Bovill*, C.J. there held that there could be no forfeiture unless there was a clause empowering it. That case rested on an earlier case of *Palmer* v. *Temple* which was a case exactly like this. There was no ferfeiture clause there, but there was a general clause providing damages for any breach. Forfeiture of deposit was not allowed, but damages were allowed up to the extent the plaintiff proved damage. Here there is no clause for forfeiture of deposit, but there is a general clause providing a penalty. This penal clause covers the whole contract and any breach thereof. I hold therefore, the defendant is not entitled to retain the deposit as being forfeited, but he is entitled to damages to the extent he has proved them. What damage then has he proved? In the first place the plaintiff himself proves he took away a first crop of cocoanut worth $92—this amount he must refund. The defendant swears and I believe him, that plaintiff took part of the second crop also; the defendant is entitled to have the value of this too. Then there is the manuring of the plantation the cost of which the defendant puts at a large figure. I believe the land was not cultivated by the plaintiff—he bought it for the purpose of parcelling it out and not for cultivation. I believe the defendant therefore when he says

the plaintiff so neglected the trees that he the defendant had to manure them heavily. The plaintiff it is true made a road through the land and built a shed with a view to his carrying out the object of parcelling, but these were no improvements to it and certainly not such as to compensate the defendant. It is difficult for me to fix the exact amount of the defendant's losses, but all things considered I think I shall meet the justice of the case by assessing his damages at $500 including all claims, and in satisfaction of these $500 he can retain the instalment of $500 paid to him by the plaontiff. The plaintiff must pay the defendant his costs of the while suit. It will be noticed that I have not alluded to the legal point which was argued in the case, as to whether the Statute of Frauds was a bar to the plaintiff's claim for *damages*. I incline to think it was not as the part performance took the case out of the Statute. I incline to think that the damages that this Court can award are the same as in England under Lord CAIRNS' Act where it was provided that in every case where specific performance co uld have been granted the Court of Chancery could in addition to, or substitution for, decreeing specific performance, award damages for any breach of the contract. That Act has been repealed, but the jurisdiction conferred by it is saved; the High Court of Justice in England therefore had and still has that power. Our Ordinance 3 of 1878, Section 10, confers on this Court the same jurisdiction as was possessed at that time by the High Court of Justice in England and as that Court can give damages, it would seem that this Court can do so too. The cases of *Sayers* v. *Collyer* and *Lewers* v. *Earl of Shaftesbury* I think shew this. If part performance takes a case out of the Statute of Frauds for purposes of specific performance, I can see no reason why this Court when there is a part performance, may not award damages in lieu of that specific performance; the more so when not only has there been a fusion of law and equity, but when we have a section which enacts that if there is a conflict between the rules of law and equity, the rules of equity are to prevail. The Statute of Frauds I think therefore can be no bar to a claim for damages in this Court when there has been as here a part performance. Two instances were referred to in the argument to shew that the jurisdiction of this Court was not the same as of the High Court of Justice in England. In one instance the practice—in spite of Section 14 of the Courts Ordinance giving this Court the same powers as are vested in the High Court of Justice—of considering that this Court possesses no jurisdiction in Divorce cases [*a.*]; but that may well be owing to a special provision of our law [Section 13] as to jurisdiction in matrimonial cases which may limit that jurisdiction to the jurisdiction this Court had under the Charter of 1855, so that the attributes of jurisdiction of the High Court of Justice in such cases were excluded. The other case was a decision of Mr. Justice WOOD, [*b.*] and I now know a like decision was arrived at by Mr. Justice

[*a.*] See *Lim Chye Peow* v. *Wee Boon Tek*, 1 Kyshe, 236, and *Allee* v. *Saman*, 1 Kyshe, 480.

[*b.*] *Allee* v. *Saman*, suprà.

PEL-LEREAU, J. 1887.

TAN SENG QUI v. PALMER.

SHERIFF [*a.*] that Section 14, as the jurisdiction of this Court for granting of Probate and Administration, did not go the full length of conferring the jurisdiction and powers under the Probate Act of 1857 for the purpose of ordering the assigment of an Administration Bond; but here again that may well be, for Section 493 of the Civil Procedure Ordinance provides that in cases of administration and of the security to be given the Court may make rules for regulating these matters; those rules might be different from those of the High Court in England. In the present case however, no such restrictions are to be found in Section 10; the fulness of jurisdiction of the High Court of Justice in England in civil and criminal actions and suits would seem by that section to be vested in this Court. I do not however, decide this point as it becomes unnecessary to do so, owing to my finding on the facts; nor do I express any opinion on the questions of Divorce and Probate; I only intimate what the inclination of my mind is on the point of law which has been argued touching the Statute of Frauds.

Judgment for defendant with costs.

REGINA *v.* SUPRAYEN.

PENANG.

PEL-LEREAU, J. 1887.

April 21.

A Judge has power under Section 55 of the Criminal Procedure Ordinance 6 of 1873 on amending a charge, to order the Jury to be discharged, and a new trial had.

The words "new trial" in the section mean a new trial in its ordinary legal acceptation; and is not bound to be had before the same Jury.

Case stated by *Pellereau*, J. as follows:—

"Suprayen was put on his trial at the last Assizes in 1886, on a charge of giving false evidence under Section 193 of the Penal Code, by swearing a false affidavit. At the close of the evidence for the prosecution, *Ross*, for the defendant argued that there were fatal variances between the affidavit given in evidence and the charge; that no amendment could be made, and that the Jury should be directed to acquit the prisoner. *Gottlieb*, for the prosecution contended, that the charge reproduced in substance and effect the affidavit given in evidence; and moved if necessary for an amendment with immediate continuation of the trial. *Ross*, was heard in reply, and stated that if the amendment were granted, the trial should be begun over again.

The Court adjudged that the variances between the charge and the affidavit were material,—ordered the amendment of the charge by inserting therein instead of the statements on which perjury was assigned, those in the Magistrate's order of commitment with the substitution of the name of Mutusamy for Armootasamy in a certain part,—found that the charge might prejudice the prisoner who was therefore entitled to time,—adjourned the case to the next Session,—ordered a new trial and discharged the Jury.

Suprayen was put on his trial on the charge as amended during the first Assizes of 1887, when *Ross*, his Counsel, contended as a preliminary point that the Judge had no power to discharge the Jury on the former trial, and that no new trial could now take place. I ruled against the prisoner who subsequently pleaded "not guilty," and was convicted unanimously. I then reserved the point taken by the prisoner and mentioned in the present paragraph of this case, for the consideration of the Court of Appeal."

The point reserved now came on for argument before the Court of Appeal, consisting of *Ford*, C.J., *Pellereau* and *Goldney* J.J.

[*a.*] *In the goods of* Ismail, *anté* p. 187.

Ross, for prisoner. The question turns on Section 55 of the Criminal Procedure Ordinance 6 of 1873, which is as follows:—

"If the amendment or alteration is such that proceeding immediately with the trial is likely in the opinion of the Court to prejudice the accused person in his defence, the Court may either direct a new trial or suspend the trial for such period as may be necessary to enable the accused person to make his defence to the amended or altered charge; and after hearing his defence the Court may further adjourn the trial to admit of the appearance of any witness whose evidence the Court may consider to be material to the case, or whom the accused person may wish to be summoned in his defence."

[*Ford*, C.J. You say "new trial" does not mean a new trial?]

Yes, because the learned Judge had no power to discharge the Jury.

[*Goldney*, J. There can be no new trial before the same Jury?]

That is what I say. We contend that as there was no power to discharge the Jury the words "new trial" in this section cannot mean a new trial according to its ordinary technical meaning. It means a trial *de novo* before the same Jury.

[*Pellereau*, J. In *Murphy's Case*, 2 L. R. P. C. 535, a trial *de novo* was held to be a new trial.]

That is so; but it is submitted that under Section 55 it does not. On reference to Sections 38 and 42 we find a new trial is spoken of, but then the sections distinctly say before a new Jury. Section 55 is silent on that point. These are the only two instances in the Ordinance, apart from Section 55, by which the Court is enabled to grant a new trial.

[*Ford*, C.J. Do you mean that because the Legislature has in the Ordinance, named two or three instances, that the Court has therefore, no power to order of its own inherent right a new trial?]

There may be some cases in which it could, and if this case had occurred at home, I admit I could not contend the present point: but here the Court is confined to the powers under this section.

[*Ford*, C.J. I have frequently held that the Court is not confined to the powers conferred by the Ordinance.]

[*Pellereau*, J. The Ordinance was probably intended to extend rather than limit the powers of the Court.]

In some cases no doubt; but what was done in the present case was done under Section 55 before the case concluded. A new trial in its technical meaning is a fresh trial before a fresh Jury, and after a verdict. This section contemplates a fresh trial after an amendment, and before a verdict is given. The idea was, as the Jury had not given a verdict, to proceed with the case before them, but to begin it all afresh after the amendment. The words "new trial" in that section therefore do not mean technically a new trial. The amendment having been made, the case might have been adjourned to be begun afresh, and the Jury should not therefore have been discharged without giving a verdict.

G. S. H. *Gottlieb*, for the prosecution was not called on.

Ford, C.J. None of us have the slightest doubt on the point. The conviction is affirmed. The prisoner must be brought up for sentence the first day of next Assizes.

Conviction affirmed.

PENANG.

FORD, C.J.
PELLEREAU & GOLDNEY, J.J.
1887.

April 21.

REGINA *v.* MAHOMED.

The Crown is not bound in a charge of giving false evidence on two contradictory statements under Section 63 of the Criminal Procedure Ordinance 6 of 1873 to prove that both or either of such statements are or is false.

The proviso at the end of that section requiring that *both* statements must be within Section 191 of the Penal Code does not refer to the falsity of the statements, but only to their being on oath.

Case stated by *Sheriff*, J. as follows :—

" The prisoner was tried before me and a Common Jury at the Assizes holden at Penang in December last, for perjury on two contradictory statements and was convicted.

An objection was taken at the trial that Section 63 of Ordinance 6 of 1873 and Section 191 of the Penal Code rendered it imperative that *both* the contradictory statements should be false, and that in this case the fact was not established. I over-ruled the objection, and the Jury by a verdict of six to one found the prisoner guilty.

On the following day, Mr. Ross moved pursuant to leave, to have the point raised by him, reserved for the consideration of the Court of Appeal.

The point reserved is, whether the contention of Mr. Ross as abovestated is sound or not ?

The prisoner was remitted to Gaol, but bail sanctioned.

No sentence has been pronounced."

The point reserved now came on for argument before the Court of Appeal, consisting of *Ford*, C.J., *Pellereau* and *Goldney*, J.J.

Ross, for prisoner. Section 63 on which the question turns is as follows :—

" A person charged with an offence under Section 193 of the Penal Code on two contradictory statements may be convicted in the alternative without evidence to contradict either statement, if the Jury are satisfied that the statements are of such a nature that when the accused made them, he must have known or believed that one or other of them was false, or did not believe it to be true, and if both statements are within the meaning of the definition of the offence of giving false evidence in Section 191 of the Penal Code."

By the section then, we are referred to Section 191 of the Penal Code. That section is as follows :—

" Whoever being legally bound by an oath or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false and which he either knows or believes to be false or does not believe to be true is said to give false evidence.

Explanation 1. A statement is within the meaning of this section whether it is made verbally or otherwise.

Explanation 2. A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe as well as by stating that he knows a thing which he does not know."

In construing Section 63 we have no precedents to guide us. At home, if a prisoner has made two contradictory statements on oath, the prosecution has to elect on which statement it will prove, and must adduce evidence to prove its falsity. In India, they have no such section as this, though there is a form of a

charge in the alternative for giving false evidence. Most of the sections of our Ordinance 6 of 1873 are taken from the Indian Act X. of 1862. Section 62 corresponds to Section 406 of the Indian Act and Section 64 to Section 407; our Section 63 is entirely an enactment of our own Legislature and this is the first time its construction has been sought. Now, referring back to Section 63 we find that it provides that *both* statements must be within the definition of Section 191 of the Penal Code. On turning to Section 191 we find one of the things necessary to constitute giving of false evidence, is that the evidence be *false*. It therefore follows that both statements must be proved to be false under Section 63.

[*Goldney*, J. Section 63 requires both "*statements*" be within the definition of Section 191. On referring to Section 191 we find in explanation 1 thereof, what a "statement" is. A "statement" is there said to be a statement "whether it be in writing or verbal." Falsity forms no part of the definition of a "statement."]

Section 63 refers us generally to Section 191 and not to any particular part of it. If that construction be the correct one, then neither statement need be false.

[*Goldney*, J. Section 63 requires that one be false.]

[*Ford*, C.J. The wording of the proviso in Section 63 is peculiar; it is "within the *meaning* of the definition" of Section 191.]

[*Pellereau*, J. It is not that the whole offence must be within Section 191, but only the statement. Both must be on oath and in that sense within Section 191. Not the falsity or the belief, but the *sworn* character of the statements.]

The section does not limit the statement to any particular essential of Section 191 but the whole.

[*Pellereau*, J. Your construction would necessitate a proof of two perjured statements in order to obtain a conviction, whereas the section was intended to be in advance of the English law which did not permit of a prosecution on two contradictory statements.]

The section itself requires it; there is no reason why its language should be construed as excluding the first part of Section 191.

[*Goldney*, J. You say the proviso in Section 63 repeals the previous part of it?]

Yes. [*a*.]

[*Pellereau*, J. If both statements are required to be false, but at the same time by the section no evidence *aliunde* is to be adduced, how is it possible to prove the statements to be false?]

My contention is that the prosecution is not forbidden by the section from adducing evidence *aliunde*, but only enacts that it should not be necessary to do so.

[*Pellereau*, J. But if you are right, there *always will be* the necessity to adduce evidence *aliunde* in order to prove both state-

[*a*.] But see *Salmon* v. *Duncombe*, 11 L. R. App. Cas. 627.

FORD, C.J. PELLEREAU & GOLDNEY. J.J. 1887.

REGINA v. MAHOMED.

ments false. What then becomes of that part of the section which says "without evidence to contradict either statement"?]

Those words are stultified by the proviso which requires both statements to be within Section 191, one of the essentials of which is, the falsity of the statement.

[*Ford*, C.J. Your construction would destroy the section.] [*a*.]

No, I submit not, to give an illustration that it would not: Suppose a man on oath charges another with having assaulted him with a *stick*—afterwards on oath he says it was *not* with a stick, but with his *fist*. Suppose the accused to be acquitted and he prosecutes the other for giving false evidence, inasmuch as he *never assaulted* him *at all*. He might charge the other under this section and prove both his contradictory statements to be false. That is the kind of a case I submit the section is meant to apply to.

[*Ford*, C.J. You shew a possible case, but is that the only class of cases Section 63 is meant for?]

The section can only refer to such a class, when by requiring both statements to be within Section 191 the falsity of each is required. These are not alternative charges under Section 61 as they are both of the same kind—perjury. The Jury find under this section a general verdict of guilty or not guilty without specifying which statement is false, or both are false.

[*Pellereau*, J. Under Section 72 the Courts in India have held that there may be a charge of perjury in two contradictory statements.]

I am aware of that, but then they have not such a section as our 63.

[*Pellereau*, J. Does not that make it all the worse for you?]

I submit not, as it is Section 63 which requires both statements to be false. It is a canon of construction that the words of an Act should be given their plain meaning—apply that canon to this section and the language of the proviso is clear and simple, and so is the meaning.

[*Pellereau*, J. I agree with you as to the canon of construction—but does not the word "definition" in the proviso only mean explanation 1 of Section 191. If it meant the whole of Section 191, the requirement as to a knowledge or belief—which is one of the essentials in Section 191—would not have been mentioned in the first part of Section 63.]

[*Ford*, C.J. Section 63 does not say, provided *all* the essentials of Section 191 exist as to both statements.]

I submit the Legislature has in effect said so by referring generally to Section 191. Section 63 it must be remembered is a penal clause. Previous to its enactment, every prisoner was entitled to have the case proved against him by evidence. The section deprives him of this right, and it should be construed strictly, and not given a bit more latitude than its express words enact.

[*Ford*, C.J. But your construction reduces the section to an absurdity—and it is also a rule of construction that a construction which leads to an absurdity is to be avoided.]

[*a*.] See note [*a*.] previous page.

My construction, I submit does not reduce the section to an absurdity—I have shewn the class of cases which will still fall within it.

[*Ford*, C.J. But it entirely does away with the provision which says it shall not be necessary to call any evidence to prove either statement to be false.]

The effect of the proviso itself is to do away with those words.

[*Pellereau*, J. The proviso does not say, the full definition, but only if it be "*within*" the definition of Section 191.]

No doubt a part is "within" the whole—but "within the definition" means the whole definition—Culpable homicide not amounting to murder is within the definition of murder; but would any Court sentence a person who had been found guilty of culpable homicide not amounting to murder to death, simply because it was "within" the definition of murder? The words "within the meaning of the definition of Section 191" must be given their ordinary meaning. The words of the proviso are not dubious. I admit the latter half is inconsistent with the former, but they are not dubious.

[*Ford*, C.J. You are in the conflict of two principles—the one to give words their ordinary meaning, and the other to avoid a construction which leads to an absurdity. An absurdity would be avoided in the present case by limiting the word "definition" as my learned brothers suggest.]

In a remedial section, such a construction would be proper, but here we have a penal section which seeks to abridge a prisoner's right to have the charge laid, *proved* against him. Such a section should be differently construed. If a proviso be inconsistent with the previous part of a section the proviso prevails. *Max. on Statutes*, [2nd Ed.] 187. Here the proviso is repugnant to the first part of the section, the proviso should therefore prevail.

[*Goldney*, J. It does not say one proviso prevails over another repugnant proviso?]

No, it does not.

[*Goldney*, J. Well then here the first part of Section 63 provides the falsity need not be proved.]

[*Pellereau*, J. Does not the phrase "without evidence to contradict either statement" shew that falsity and belief in falsity is provided for—and the proviso is intended only to refer to the sworn character of the statement?]

If that is the construction put on Section 63, the effect is to interpolate the word "otherwise" after the words "both statements"; but there is no right to put in words not found in the section.

[*Ford*, C.J. We do not interpolate, but we give a meaning to the whole section.]

[*Pellereau*, J. The section is made for the express purpose of doing away with the necessity of evidence.]

The Legislature may have so intended, but by the proviso they have enacted otherwise.

Gottlieb, for the prosecution was not called on.

FORD, C. J. PELLEREAU & GOLDNEY. J.J. 1887

REGINA v. MAHOMED.

Ford, C.J. I am far from thinking the argument of the learned Counsel is irrelevant—there is something in it, if you take the last two and a half lines by themselves and obliterate the first part of the section. But if the section is taken as a whole, the meaning of it I think, is perfectly clear. The proviso at the end of the section requiring both statements to be within Section 191 of the Penal Code refers to the statement being on oath simply, and not to its falsity or the prisoner's knowledge or belief. I also think it is not necessary to read the words "within the meaning of the definition of Section 191" as meaning, with all the terms of the definition. Such a reading would make the proviso repugnant with the first part of the section and would reduce the section to an absurdity. That construction ought not therefore to be adopted. Construing the proviso as I have suggested, obviates all difficulty. The conviction in my opinion should be affirmed.

Pellereau, J. Section 63 when it relates to the statements, reads thus "if both statements are within the meaning of the definition of the offence of giving false evidence in Section 191 of the Penal Code." We must therefore refer to Section 191 to see what "statement" there means. On looking at Section 191 we find three ingredients necessary to constitute the giving of false evidence—firstly, the statement must be on oath or solemn declaration; secondly, the evidence must be false; thirdly, the prisoner must have known it to be false or did not believe it to be true. To which of these ingredients then does the proviso in Section 63 refer, or does it refer to all three? I am of opinion it refers only to the first—the statement being one on oath or solemn declaration. So read there is no inconsistency in Section 63. Another reason for so construing the section is the illogical consequence of another reading. The section says there shall be no necessity to prove the falsity of either of the statement by evidence *aliunde*, but such a reading would always require evidence *aliunde* to prove both statements to be false. It was in order to get over the difficulty in English law, which required evidence to be adduced of the falsity of the statement, that this section was doubtless passed. It was intended that if two irreconcileable statements were made on oath, the one was to prove the falsity of the other. If the proviso is read as contended for, the result would be to convict a man of one perjury under this section, you are bound to prove him to be guilty of two. That is an absurdity, and such a reading would defeat the plain object of the section. I hold that the proviso in Section 63 refers only to the statement being on oath, and not to its falsity or the prisoner's knowledge or belief. The ruling of Mr. Justice SHERIFF I consider was right, and the conviction should be affirmed.

Goldney, J. I agree with the rest of the Court and Mr. Justice SHERIFF in over-ruling the objection.

Conviction affirmed.

TENGAH CHEE NACHIAR *v.* NACODAH MERICAN & ORS.

PENANG.

PELLEREAU, J.

1887.

April 28.

A testator [a Mahomedan] after bequeathing certain specific personalty, directed that "the rest" and "remainder" of his personalty should be divided into five equal shares among certain persons whom he named. In another portion of the same Will, after devising certain specific realty, he directed that "the rest and residue" of his real estate should be held in trust by his Executors for twenty-one years, who during that time were to divide the income thereof into six equal shares among the same persons as above, and another; and after that period his Executors, were to realise and sell the said "rest and residue" of the real estate and divide the proceeds thereof into six equal shares among the same persons. There was no general residuary clause. One of the persons [the wife of the testator] who was to have a fifth of the residue of the personalty and a sixth of the income and proceeds of the residue of the realty, died in the testator's lifetime.

Held, that her one-fifth and one-sixth shares in the residuary, personalty, and realty respectively, did not go to the survivors of the persons aforesaid, but had lapsed and was undisposed of, and was distributable among the testator's next-of-kin according to the Statute of Distributions, as modified by the Mahomedan Marriage Ordinance 3 of 1880.

This was a Special Case stated by the parties in order to obtain the decision of the Court on a point of construction of the Will of the late Vapoo Merican Noordin deceased. The facts stated in the case so far as material to this report, were as follows:—

The testator who was a Mahomedan, died in Penang on 24th July, 1884, having left a Will, dated 28th April, 1882, by which certain of the defendants were his Executors and Trustees. The executors obtained Probate of the Will on 18th August, 1884. The deceased having in and by paragraph three of his Will bequeathed to his first wife one Fatimah, otherwise called Che Mah, and her daughter the plaintiff, certain specific personalty such as jewellery, plates, linen, carriages, horses, &c., proceeded in and by the fourth paragraph as follows: "I direct that out of the rest of my personal estate all my just debts and funeral expenses, &c., shall be paid and also a legacy of $500 shall be paid to my second wife Moonah for her own personal use, and that thereafter the remainder shall be divided into five equal shares and paid and disposed of as follows"—then followed the names of certain persons who were to have those five shares the proportion each of them was to take; among these the plaintiff had two shares and the said first wife Fatimah, otherwise called Che Mah, one share. The testator left a Codicil which however, in no way bore on the question here raised. The testator having in paragraph seven of his Will specifically devised certain of his real estate, proceeded in the ninth paragraph as follows: "I devise and bequeath to my executors all the rest and residue of my real estate in Penang, Province Wellesley, and elsewhere, upon trust to hold and be possessed of the rest and residue of my real estate for the term of twenty years from the date of my death, and during such term of years, to divide the net income thereof [after deduction for repairs, collection and management] into six equal shares, and shall pay and dispose of the said net income monthly in the following manner"—then followed the names of the same persons as above [with that of certain others who between them were to have one share] with the shares they

PELLEREAU, J. 1887.

TENGAH CHEE NACHIAR v. NACODAH MERICAN & ORS.

were each to take: among these the plaintiff was to have two shares, and the said Fatimah, otherwise called Che Mah, one share. The testator, in the same paragraph, further proceeded as follows: "Upon the determination of the said term of twenty-one years, my executors and trustees shall realise, sell, and dispose of, all the rest and residue of my real estate as aforesaid, and divide the same into six equal shares, and pay and dispose of the proceeds of such sale in manner following"—then followed the names of the same persons as were to share in the monthly income and in the like shares and proportions. The fifth, sixth, and fourteenth paragraphs of the Will were as follows—[5] "I direct that the one-fifth share of my residuary personal estate bequeathed to my grand-daughter M. H. H." [one of the persons sharing under paragraph four] "shall be held by my executors who shall not pay the same until she shall marry or attain the age of 21 years, but they shall until she shall marry or attain her majority invest the same upon landed security only." [6] "I also direct that the one-fifth share of my residuary personal estate bequeathed to my sons M. H. M. and M. J. M." [two of the persons having one share between them under parargraph four] "shall be held by my executors who shall not pay over the same until they shall respectively attain the age of twenty-one years, and my executors shall invest the same upon landed security only"—[14] "I hereby declare that if either the said M. H. M. and M. J. M." [who between them were also to have one share of the monthly income and proceeds under paragraph nine] "shall die under the age of 21 years, leaving issue, then such issue shall take the said trust, premises, and accumulations, in substitution of their said deceased father as tenants in common, in equal shares if more than one. And if in default or failure of such issue as aforesaid, I direct that my said trustees shall hold the said trust, premises, and accumulations upon trust to pay the income thereof to my daughter Tengah Chee Nachiar [plaintiff] during her life, and after her death to her children." The said Fatimah, otherwise called Che Mah died in the lifetime of the testator, but the executors had regularly set apart her one-sixth share of the monthly income, and one-fifth share of the personalty; and at this time the same had amounted to a large sum. There was no general residuary clause in the Will. The defendant Moonah was the second wife of the deceased and claimed to share with her children in the money so set apart. The question submitted for the opinion of the Court was—"What, under the circumstances narrated, became of,—or who were entitled to the shares which the testator's first wife, the said Fatimah, otherwise called Che Mah, would have got had she not predeceased the testator?"

Ross, [*Van Someren* with him] for the plaintiff, contended her one-fifth and one-sixth shares in the residuary, personalty, and realty, passed to the survivors of the persons named in the fourth and ninth clauses respectively; that those clauses in effect were separate general residuary clauses of personal and real estate respectively, and the intention of the testator was that those persons and they only should have the residue—the division into

shares was only to shew how *among themselves* they were to take—and it would have been surplusage for the testator to have said that any of the residuary shares should go into the residue in case any of the legatees dying before him, because the law said it should. They contended that cases like *Skrymsher* v. *Northcote*, 1 Swan, 570; and *Humble* v. *Shore*, 7 Beav. 247, were distinguishable—as the intention there, judging from the language of the testator, was clear that the legatees were to take in certain proportions *and not otherwise*. Here the testator had provided for his second wife, and did not intend that she for one should have anything in the residue. There was therefore, no lapse, and the shares were not undisposed of. They referred to *Sykes* v. *Sykes*, 4 L. R. Eq. 200, on Appeal 3 L. R. Ch. App. 301; *Wilkinson* v. *Schneider*, 9 L. R. Eq. 423; *Springett* v. *Jennings*, 10 L. R. Eq. 488, on App. 6 L. R. Ch. App. 333; *Ramsay* v. *Shelmerdine*, 1 L. R. Eq. 129; *Browne* v. *Hope*, 14 L. R. Eq. 343; *Crawshaw* v. *Crawshaw*, 14 L. R. Ch. Div. 817; *Re* Barker's Estate, 15 L. R. Ch. Div. 635; *Re* Spiller, 18 L. R. Ch. Div. 614; *Blight* v. *Hartnoll*, 23 L. R. Ch. Div. 218; *Re* Rhoades, 29 L. R. Ch. Div. 142; *Re* Roberts, 27 L. R. Ch. Div. 346, on App. 30 L. R. Ch. Div, 234, and the Wills Act XXV. of 1838, Section 21.

Clutton, for defendant Moonah, the second wife contended, the shares of Fatimah, otherwise called Che Mah, were only aliquot parts of the residue; that the fourth and ninth paragraphs were not general residuary clauses so as to carry lapsed legacies; that her shares had lapsed and were undisposed of, and this case could not in principle be distinguished from *Skrymsher* v. *Northcote*, and *Humble* v. *Shore*.

The Executor-defendants appeared in person, and left the matter with the Court.

Pellereau, J. Mr. Ross contends that the principle that decides this case is Section 21 of the Indian Wills Act which is similar to the corresponding section in the English Wills Act which applies to realty what was formerly the law in regard to personalty. I agree with him so far; but by that section the residuary is to carry everything *unless a contrary intention appears* from the Will. He also contends that it would be surplusage to say part of the residue is to fall into the residue, for that he says is the law. In all these cases, the duty of the Court is to try and ascertain the intention of the testator, and that intention is to be gathered from the words he has used, whether the legacy is for distinct persons or to a class. It will be found that in all cases in which *jus accrescendi* has been allowed as to the residue, there was a *general* residuary clause. Can the legacies in these fourth and ninth clauses then be looked on as general residuary legacies? I think not. The testator does not in terms give *the whole* of the residue to the persons mentioned, but directs that the residue is to be divided into five shares in one case, and six shares in the other. If he gave *the whole* to the five persons, it might well have been said that the whole was to be divided among the survivors, in case any of those persons were dead; but here, all the testator gives is a *share* to each different person. Each

PELLERAU, J. 1887.

TENGAH CHEE NACHIAR v. NACODAH MERICAN & ORS.

legatee gets only an aliquot part. I hold therefore that far from these persons being general residuary legatees, there is a contrary intention to be found in this Will, limiting the legacy of each person to the share given. If corroborative evidence of intention were required, I think clauses five, six, and fourteen shew clearly that each legatee was to have only an aliquot part, quite independently of the other persons. As to clause three, it is clear the plaintiff is entitled to the whole of the property comprised therein by right of survivorship—the Court accordingly finds that she is entitled to the bequest therein made [to all the subjects of that bequest] by joint tenancy; but in regard to the fourth and ninth clauses submitted for the consideration of the Court, the Court finds the shares [in both realty and personalty] to Fatimah, are left undisposed of by the Will, she having predeceased the testator—these bequests have lapsed and have now to be distributed among the testator's next-of-kin according to the Statute of Distributions, as modified by the Mahomedan Marriage Ordinance 3 of 1880. The costs of all parties must come out of that part of the estate disposed under clauses four and nine as between Solicitor and client.

Decree accordingly.

BROWN *v.* TAYNAPPA CHETTY.

SINGAPORE.

FORD, C. J. 1887.

May 7.

The general provisions up to trial of the Civil Procedure Ordinance 5 of 1878, are not applicable to Small Causes under Section 31 of the Ordinance as amended by Ordinance 8 of 1880, except those specially applied by Clause 4 of the section. A party to a Small Cause cannot therefore obtain under Section 289 of the former Ordinance, discovery from his opponent of documents in his possession.

This was a Small Cause. The defendant took out a summons in Chambers for an order under Section 289 of the Civil Procedure Ordinance 5 of 1878, directing the plaintiff to make discovery on oath of all documents which were or had been in his possession or power relating to the matter in question in the case. The question was, whether that section applied to a Small Cause.

Donaldson, for the plaintiff, referred to Section 31 of the Ordinance, 1878, as amended by Ordinance 8 of 1880, and contended that such causes were to be tried summarily subject to the clauses in that and the following Sections 31A to 31I; that by Clause 4 the provisions of Section 36 and of Chapter V of the Ordinance, 1878, were declared applicable to Small Causes; the inference therefore was that the general provisions of the Ordinance, 1878, were excluded: the proceedings in a Small Cause were to be summary, but if the general provisions applied, interrogatories and other expensive procedure would be introduced, and the name "summary" would be a misnomer; that Section 31G provided for any difficulties, and empowered the Court to strike out Small Causes, and place them on the general list, and after that they could be proceeded with as ordinary suits with all the procedure of the Ordinance of 1878.

Drew, for defendant, contended that all the powers in the Ordinance, 1878, were applicable to Small Causes unless expressly negatived, and were incorporated by Section 28 of the Ordinance, 1880.

[*Ford*, C.J., said there was a strong inference to the contrary.]

It was true, it was provided that there should be no pleadings in Small Causes, but whether the case was one for $100 or for a very large amount, there should be the same facilities for getting up the case.

[*Ford*, C.J., said that was so, but under certain circumstances a party could get the case transferred under Section 31G, and he thought the idea of the Ordinance of 1880, was that parties were to come into Court on a summons and statement of defence.]

The Registrar referred to Clause 16, Section 31 of the Ordinance of 1880.

[*Ford*, C.J., said that clause distinctly stated the cause was to go to trial on the summons and endorsements and notices thereon—but here the defendant wanted discovery in a Small Cause.]

The right to discovery had not been taken away.

Ford, C.J. The Ordinance, 1880, says that certain parts of the Civil Procedure Ordinance, 1878, are to apply to Small Causes. The expression of one is the exclusion of the other; and looking at the provisions for trying cases not suitable for trial on a mere summons and statement of defence [*vide* Section 31G.], I cannot but think that the general intention of the Ordinance, 1880, was to exclude all other procedure under the Ordinance of 1878, except that specially applied to it. Under Section 31F. you can even have a rule made to meet any difficulty arising from this limitation. The summons is dismissed, the costs to be plaintiff's in any event.

Summons dismissed with costs.

FRASER & CO. *v.* NETHERSOLE.

The Court will not grant an *interim* injunction to restrain a person from using a trade-mark, unless the plaintiff by affidavit, establishes an exclusive right to the mark, as well-known to the public—*per Ford*, C.J.

The Trade Marks Act, 1883 [46 & 47 Vic. Cap. 57] is not in force in this Colony by virtue of Section 6 of Ordinance 4 of 1878; and no authority exists here from whom an exclusive right to a particular trade-mark can be obtained,—but such right is wholly dependant on the general principles of Commercial Law—*per Goldney*, J.

By the principles of that law as soon as a trade-mark has been employed in the market so as to indicate to purchasers that the goods to which it is attached, is the manufacture of a particular firm, it becomes to that extent the exclusive property of that firm, and no one else has a right to copy it, if by so doing unwary purchasers may be induced to believe that they are getting the goods of the particular firm—*per Goldney*, J.

The question how far the plaintiffs' exclusive right has been infringed depends upon how far the defendant's trade-mark bears such a resemblance to that of the plaintiffs', as to be calculated to deceive incautious purchasers: the introducing of one or two colourable variations will not make the copy the less an infringement—*per Goldney*, J.

In such a state of facts, it is not necessary to the plaintiffs' success that the defendant should have intended to mislead—*per Goldney*, J.

This was an application by the plaintiffs for an order that the defendant, his servants and agents, might be restrained by injunction, from selling or exposing for sale or procuring to be

FORD, C.J.
GOLDNEY, J.
1887.

FRASER & Co. v. NETHERSOLE.

sold any Soda-water in bottles stamped or moulded in the manufacture with the words "Singapore and Straits Aërated Water Co.," and the plaintiffs' trade-mark of a lion rampant between two shields, or in any other bottles having affixed thereto such labels as in the said affidavit mentioned, or any other labels so contrived or expressed as by colourable imitation or otherwise to represent or lend to the belief that the Soda-water sold by the defendant is Soda-water manufactured by the plaintiffs.

It appeared from the affidavits that the plaintiffs among the many empty bottles returned in the usual course of their business, had found some of their own bottles had been used with the defendant's label which was alleged to be a colourable imitation of that of the plaintiffs.

W. *Nanson*, for the plaintiffs contended, that in Singapore where the native community could not read English, the use of a name in Roman characters did not prevent deception. He referred to *Henderson* v. *Forss*, in Sebastian's Digest of the Law of Trade Marks, 36, before V. C. *Wood*, cited also in *Lloyd on Trade Marks*, and in the 4th Edition of *Seton on Decrees*, 236, 294. *Hennessy* v. *White*, decided in the Supreme Court of Victoria in 1869, *Abbot* v. *Baker's Tea Association Limited*, in W. N. 1871, p. 207, and 1872, p. 31; and Sebastian, 236. He contended that user at Common Law, established a trade-mark; that the article was in the market as a vendible commodity, with the label affixed to it, was enough. The English Act of 1875 referred to registration and the registration was made by the second section equivalent to user. Here by beginning to use the mark, a right of property was acquired in it. It was not necessary to advertise it; as long as it was used, length of user was not necessary, *McAndrew* v. *Bassett*, 33 L. J. Ch. 566, s.c. 4 De G. J. & S. 380. The plaintiffs had established a user by course of time—the defendant had until quite lately his own label, and he changed it to one at the least infinitely more like the plaintiffs' label and without reason for alteration—the necessary inference, as said in *Taylor* v. *Taylor*, 2 L. R. Eq. 290 was, that it was done for the purpose of misleading. *Orr Ewing and Co.* v. *Johnston*, 7 L. R. App. Ca. 219, and *Stephens* v. *Peel*, 16 L. T. [N. S.] 145, were also referred to. In an early case in 1843, *Croft* v. *Day*, 7 Beav. 84, the Master of the Rolls spoke of general resemblance and the elements of fraud, such as similarity of colour, size, and shape—*Welch* v. *Knott*, 4 K. & J. 747, a Soda-water case where unintentional resemblance was held to be wrong. Here the defendant had used the plaintiffs' bottles with his imitation label which helped to mislead. He asked for an *interim* injunction.

Drew, for the defendant said that it was not necessary to refer to the bottles as it was understood that the application was now confined to the labels. All the defendant's lables were of the same shape. The plaintiffs said they had used their label for over two years. The defendant's labels had been used since 1st April last for all his mineral waters. The labels of the plaintiffs, for all other kinds than Soda-water, were of a different shape. As to the label, the plaintiffs did not ask for

protection of a trade-mark, they could scarcely ask that no one should use a label of a similar size and colour. The essential feature of their mark was a lion rampant.

[*Ford*, C. J. You have same shape, size, and colour and same general design.]

We have a number of labels and only one happens to resemble the plaintiffs'.

[*Ford*, C.J. They have a right to object to the use of any mark so made as to deceive an ordinary intelligent purchaser.]

They should register in London. By the Civil Law Procedure Ordinance of 1878, Mercantile law applies here. They should give public notice.

[*Ford*, C.J. They could still rely on Common law rights. They could prove exclusive user and a known mark.]

They have not shewn that any person has been deceived.

[*Ford*, C.J. This is not necessary, but they might have shewn that the mark has a special value in the market.]

The plaintiffs have not shewn an exclusive user to establish his case at Common law, and that it is known in the market by the label.

[*Ford*, C.J. Alter the colour of your lable from red to yellow and you can settle it between you. I think plaintiffs should shew more than a user, it must be shewn that it is known by the public, who cannot be deceived, unless they know the mark. No great damage can occur between this and the hearing, and this is an application for an *interim* injunction. It is so easy to change the colour.]

The defendant had altered his labels because a Chinaman had copied all his labels, and he had ordered a new label from Bristol and this pattern had been sent. If the plaintiffs paid him what his labels cost, about £10, he would change his.

Ford, C.J. I cannot allow the *interim* injunction that has been asked for—first because plaintiffs have not so far as is before the Court established an exclusive right to this label, as well-known to the public. At present it is only stated in the affidavit that they have manufactured and sold with this label for over two years. And also in this case no serious injury can be done by the matter standing over to be tried at the hearing. Defendant's costs of this application to be paid by the plaintiffs if they fail in the action. No costs of this application in any event.

The case was subsequently tried before *Goldney*, J. The facts and arguments sufficiently appear in the judgment.

W. *Nanson*, for plaintiffs.

Drew, for defendant.

Cur. Adv. Vult.

October, 25. *Goldney*, J. In this action the plaintiffs claim an injunction against the defendant, restraining him from selling Soda-water in bottles having affixed thereto, labels designed by colourable imitation or otherwise, to represent or lead to the belief that the Soda-water sold by the defendant is manufactured

FORD, C. J.
GOLDNEY, J.
1887.

FRASER & Co.
v.
NETHERSOLE.

by the plaintiffs. The plaintiffs and the defendant are rival manufacturers of Soda-water in Singapore. The plaintiffs, whose business in Singapore is one of considerable standing, are also exporters of Soda-water to Penang, the Native States, Sumatra, and other places.

Some two years ago the plaintiffs adopted a crescent shaped red label for their bottles, with the words "soda-water" printed on it in large white capital letters and having between the two words "soda" and "water" a round white shield or disc upon which there is the figure of a lion rampant encircled by the words "Singapore and Straits Aërated Water Co." The lion and these letters are printed in red. Beneath the words "soda" and "water" some directions are printed in small white letters. At the time that the plaintiffs adopted this label, the defendant was using and continued to use up to April this year long oblong labels with the words "Nethersole and Co.," in large black letters on a red ground. This label was not similar to the plaintiffs' label and could be easily distinguished from it. In April, the defendant affixed to the bottles containing Soda-water manufactured by him a label in every respect similar to the label the plaintiffs had in use, with the exception that instead of the shield or disc containing a monogram and in place of the directions printed in small white letters on the plaintiffs' label there are the words "Manufactured by Nethersole and Co., 23, High Street, Singapore." These words are of the same size and arranged in the same way as the directions on the plaintiffs' label. On the defendant adopting this new label, these proceedings were instituted by the plaintiffs.

The defendant maintains in defence to this action—first, that Section 6 of Ordinance 4 of 1878 [Civil Law] incorporates the Patents, Designs and Trade Marks Act, 1883, Section 77 [46 & 47 Vic. c. 57] and that as the plaintiffs have not registered their trade-mark they are not entitled to institute any proceedings to prevent the infringement of it; secondly, that the plaintiffs had not acquired any exclusive right to the label; thirdly, that the label was not similar in shape, colour, and design to the plaintiffs' label.

As to the 1st point, in this Colony there is no law or Ordinance establishing the registration of trade-marks and no authority exists from whom an exclusive right to a particular trade-mark can be obtained. The rights of the parties in actions which have reference to trade-marks are therefore dependant upon the general principles of the Commercial Law. This I understand to be the meaning of Section 6 of Ordinance 4 of 1878. Before I could say that the provisions of the English Trades Marks Act were incorporated among the Ordinances of this Colony in the wholesale way suggested on the part of the defendant, I should require words more specific than those used in the section referred to above.

As to the 2nd point, the law is clearly laid down in the last reported case decided on trade-marks—*Somerville* v. *Schembri*, 12

L. R. App. Ca. 456. Lord *Watson* in giving the judgment of the Privy Council, says:

"These principles have been very fully illustrated and explained by the House of Lords in *The Leather Cloth Co., Ld.* v. *American Leather Cloth Co., Ld.*, 2 H. L. C. 538; *Wotherspoon* v. *Currie*, 5 L. R. H. L. 508; *Johnston & Co.* v. *Orr Ewing & Co.* 7 L. R. App. Cas. 219, all of which cases arose before the passing of the first British Trade Marks Regulation Act in the year 1875. In the first of these cases the interest which a merchant or manufacturer has in a trade-mark which he uses was thus defined by Lord CRANWORTH: 'The right which a manufacturer has in his trade-mark is the exclusive right to use it for the purpose of indicating where or by whom or at what manufactory the article to which it is affixed was manufactured. As soon therefore as a trade-mark has been so employed in this market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent, the exclusive property of the firm and no one else has a right to copy it or even to appropriate any part of it if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the trade-mark belongs'."

In the present case I find that the plaintiffs' label is employed by them in the market to indicate to purchasers that the Soda-water to which it is attached is the manufacture of their firm and that it was so employed some two years before the defendant commenced to use his present label. By such usage the label has become to that extent the exclusive property of the plaintiffs.

The real question therefore, is that contained in the 3rd point raised by the defendant, viz., has the defendant infringed the plaintiffs' exclusive right? and that question as Lord KINGSDOWN said in the *Leather Cloth Company Case* depends upon how far the defendant's trade-mark bears such a resemblance to that of the plaintiffs as to be calculated to deceive incautious purchasers. Upon this part of the case I entertain no doubt. I think on the facts it is impossible to say that the defendant adopted his present trade-mark for the purpose of indicating by whom the Soda-water to which it is affixed was manufactured,—did away with his existing trade-mark which was quite dissimilar to the plaintiffs and adopted a new one of the same size and shape and colour with those used in their trade by the plaintiffs' firm—and the device or lettering on the label is an exact copy of the plaintiffs' label with one or two colourable variations. Again to use the words of Lord WATSON in *Somerville* v. *Schembri*, "whilst retaining all the essential features of the label the defendant has introduced certain differences which may very fairly be described in the language used by Lord BLACKBURN in *Johnston and Co.* v. *Orr Ewing and Co.*, 7 L. R. App. Ca. 230. These are differences which might prevent purchasers being deceived. I do not think they are such as to prevent its being likely that they would be deceived." In that state of the facts it is not necessary to the plaintiffs' success that the defendant should have intended to mislead; but I think that it is impossible to acquit the defendant of that intention.

Judgment will be for the plaintiffs with costs and an injunction will be awarded to restrain the defendant in the terms of the plaintiffs' claim.

MARRABLE *v.* SATOW.

SINGAPORE.

FORD, C. J. 1887.

August 8.

Though the Supreme Court is a Superior Court to the Consular Court at Bangkok, in the sense that it is a Court of Appeal under the Order in Council of 1856, yet it does not possess in relation to that Court all the powers of the Court of Queen's Bench in England. It has therefore no jurisdiction to issue a Writ of *Mandamus* to that Court.

A poll-tax of $2 was imposed by H. B. M. Consul at Bangkok on all registered British subjects in Siam. The plaintiff, Marrable was called on to pay the tax, but deeming the tax illegal, he did so under protest and applied to the Consular Court at Bangkok for a summons against the defendant Satow, the British Minister, and one Stringer, one of his employés, for the refund of the said sum. The Consular Court refused to issue the summons on the ground presumably that cases could not be entertained against Consulate Officers in Siam, for matters done under orders.

Davidson, for the plaintiff thereupon on a former day applied to this Court by way of appeal.

Ford, C.J. held that no appeal could be heard against a case which had not been tried, and which in fact had not been commenced. He however granted a Rule *Nisi* calling upon the Judges of the Consular Court at Bangkok to shew cause why a *Mandamus* should not issue directing that that Court should hear and determine the action. The Rule now came on for argument.

Bonser, [*Attorney-General*] shewed cause—he contended that the applicant had not substantiated his complaint by oath. He had gone to the Consular Court with a statement he had desired to swear to, but the oath was refused to him. Thereupon he had gone to the American Consul and made the statement which he affirmed to. This however was not sufficient—statements in the form of affidavits must originate from the authority of the Court which is to receive them, it should at least have been made in Singapore—that affidavits in other countries than England were taken either by a Commissioner sent for the purpose, or by a Commission from the Court of Queen's Bench; that an indictment for perjury could not be laid before a Court on the evidence of an affidavit sworn before a party not under the jurisdiction of the Court, because that party could not be summoned to appear; and that declarations are only admissible in certain cases of perpetuating evidence as to the title of land, &c. On the question of the jurisdiction of this Court over that of Siam, he argued that there was appellate as well as concurrent jurisdiction, given to this Court by the Order in Council of 1856, but that this Court had not the special power to issue a *Mandamus* which was the high prerogative writ, the right to issue which was solely in the Queen's Bench Division of the High Court of Justice even in England, and that this Court could only issue that writ to its own Inferior Courts directly under its jurisdiction. He must admit this Court to be a Superior Court to the Court at Bangkok, but only in the sense that it was constituted a Court of Appeal from that Court by the Order in Council of 1856.

Davidson, in support of the Rule contended, that it was not necessary to have an affidavit especially as the Consul had refused

to allow the plaintiff to swear, but that it was in the discretion of this Court to decide whether the facts alleged were sufficient to call for a *Mandamus*. The plaintiff took the best step he could after the Consul had decided not to accept his affidavit, and that was sufficient to justify the Court in issuing a rule.

[*Ford*, C.J. said that it appeared to be made before a person qualified to receive it by the law of the land.]

As regarded jurisdiction, this Court had certainly the power to hear cases of appeal and to issue Writs of *Certiorari* as well as to stay proceedings under Section 24 of the Order in Council of 1856, and therefore it would be inferred that it had power to enforce them. Section 4 of the Order in Council of 1886 also supported that inference.

Ford, C.J. I am glad this matter has been brought up as the question at issue is somewhat important, but I must confess I do not feel much doubt on the subject. That this Court is in a sense a Superior Court to the Consular Court at Bangkok is, it seems to me, beyond doubt; it has an appellate jurisdiction, and in so far this constitutes it so, but it seems to me that it is only a Superior Court to the extent in which it is so constituted by the Order in Council of 1856. It is not invested with *all* the powers of a Superior Court, and still less do I think that it is invested with all the powers of the Court of Queen's Bench over the Inferior Courts, one of which is the sole right to issue a Writ of *Mandamus*. It is invested by Statute with these rights no doubt over its own Courts in its own jurisdiction, but it seems to me that in dealing with Courts outside it, of which Bangkok is one, its jurisdiction is strictly confined to the powers given to it by the Order in Council. The only section which seems to my mind to have any real application is Section 24 of the original Order in Council, which, after giving it a co-ordinate jurisdiction in Civil Cases, goes on to say, "The Supreme Court shall not be bound, unless in a fit case it shall deem it right so to do, by Writ of *Certiorari* or otherwise, to debar or prohibit the Court from hearing or determining, pursuant to the provisions of the several Articles of this Order, any suit of a civil nature between British subjects." This language is so strong as to bear the inference that it can only apply to an Inferior Court. The Court was to have powers to proceed by *Certiorari*, [*a*.] if it was such a case where it deemed right to allow it. This strengthens the proposition that this Court is Superior to the Bangkok Court; this Court can stay their proceedings [*a*.] when it is obvious it could not stay ours. But it seems to me to require a step further than this to empower this Court to grant a *Mandamus*. It has not only to be a Superior Court, but a Superior Court in relation to the Court at Bangkok, exercising all the powers of the Court of Queen's Bench. This Order in Council does not seem to me directly, or by implication, [*a*.] of sufficient strength to make this a Superior

[*a*] The Writ of *Certiorari* is a writ which can only be issued out of the Court of Queen's Bench in England. *Re* Allison, 10 Exch. 561; *Paley on Convictions*, 402 [5th ed.] n. [e]—See also as to inferences to be drawn from the language of a Statute by the known powers of certain of the Superior Courts of Law. *Clarke* v. *Bradlaugh*, 8 L. R. App. Ca. 354.—J. W. N. K.

FORD, C. J. 1887.

MARRABLE v. SATOW.

Court in that fulness which is required, and I do not think we are entitled to travel out of the Order in Council to find powers which are not clearly given therein.

As to the effect of section 4 of the Order in Council of 1886, the words do not seem really to carry the contention further. If read alone, the words "with the powers vested in and according to the principles of procedure and justice observed by and before the Courts of Justice, and Justices of the Peace, in England," might do so, but when read with the whole clause, this language is cut down by the introductory words of the section,—"subject to the provisions of the aforesaid Order," so we are still bound by the provisions of the Order of 1856.

It might be convenient if this Court had the power, although I speak in some ignorance perhaps of the facts. I do not know why the Consular Court could not have heard this suit, but notwithstanding my desire to fulfil the behests of the old maxim that "it is a good Judge who amplifies his jurisdiction" I do not see my way to do so in this case. The Rule will be discharged.

Bonser, applied for costs.

Ford, C.J. The applicant can have leave to appeal if he wishes it, but if no appeal is entered within two months—or the case taken before the Court of Appeal [if it should sit, as is possible] within two months—the order for costs will go. I express no opinion as to the right of the applicant to come here for a writ of summons under the concurrent jurisdiction clause.

Rule discharged with costs as above.

HAJEE MAT ALLEE *v.* MANAH & ANOR.

PENANG.

GOLDNEY, J. 1887.

September 5.

Where a Magistrate binds over a person to keep the peace and that person appeals against the order, the proper mode for the Magistrate to adopt in sending up the papers is to send with them a formal order of his order binding over the appellant and not to send it up in the form of a conviction, as the binding over is not a "conviction" but an "order."

A Magistrate has power where a person is charged with an offence, to dispense with a summons to shew cause under Ordinance 13 of 1872, Section 61, Clause 5, and on the evidence before him if threats of violence appear therein, to bind the accused over to keep the peace under Section 61.

But before a Magistrate can bind a person over under Section 61, there must be evidence that that person is likely to commit a breach of the peace or to do some act that may probably occasion such a breach: otherwise he has no jurisdiction and his order will be discharged.

Actual words of threat are not necessary; but looks, gestures and conduct may express them if testified to.

Regina v. *Dunn*, 12 Ad. & E. 617, 619, followed.

The appellant had been charged before A. W. O'Sullivan, Esquire, Magistrate at Ralau, with criminal trespass under Section 447 of the Penal Code. The evidence before the Magistrate was to the effect that the appellant, respondents and another, were jointly possessed of a piece of land at Teloh Kumbar which they had for several months enjoyed peaceable possession of, each of them having his allotted portion thereof; that lately the appellant had refused to recognise this allotment and had taken

cocoanuts from the portion of the others against their will and consent; that on the day he was said to have committed criminal trespass as aforesaid he had gone to a pile of some 2,000 cocoanuts belonging to the two respondents and carried away 555 of them against their will. There was not a word in the evidence as to threats of personal violence being used or of looks, gestures, or conduct on the part of the appellant, from which the respondents inferred danger of personal violence. The Magistrate, on the close of the evidence for prosecution and defence on the charge of criminal trespass, without any summons having been served on the appellant to shew cause why he should not be bound over under Ordinance 13 of 1872, Section 61, to keep the peace, ordered the appellant to be bound over to keep the peace for three months in $150. The appellant appealed. With the papers sent up [in the form of a stated case under the Appeals' Ordinance 12 of 1879, Section 18] the Magistrate sent a formal record of "conviction" which stated the appellant had been "convicted" before him of "trespass into the premises of Manah and Seekim .....under Section 447 of the Penal Code," and was "adjudged.....to be bound over to keep the peace for three months in $150."

G. S. H. *Gottlieb*, for the appellant.

D. *Logan*, [*Solicitor-General*] for the Crown.

Cur. Adv. Vult.

September 12th. *Goldney*, J. This is an appeal on the part of the defendant from the decision of the Magistrate on the above case. The defendant was charged under Section 447 of the Penal Code with having committed criminal trespass. Evidence was taken by the Magistrate both on behalf of the complainants and on behalf of the defendant. At the conclusion of the evidence the Magistrate bound over the defendant to keep the peace for 3 months in the sum of $150. From the decision of the Magistrate the defendant has appealed.

Counsel on behalf of the defendant argued that the conviction was bad on the face of it, and that there was no evidence to support a conviction under Section 447 of the Penal Code; secondly, that the Magistrate had no jurisdiction to bind over the defendant to keep the peace. I am not satisfied that the appeal is quite in the proper form; whether it should not rather have been in the nature of a motion to discharge the defendant's recognizance. As the defendant's recognizance only, is before the Court, there having been no conviction under Section 447 of the Penal Code, I do not express my opinion as to what would or would not be evidence sufficient to support a conviction under this section. As the point has been raised, I think it right to say that I think it would have been better to have returned the formal order binding over the defendant to keep the peace, and not to have returned it as a conviction under Section 447 of the Penal Code. There was no conviction, the binding over the defendant was an order not a conviction.

GOLDNEY, J. 1887.

HAJEE MAT ALLEE v. MANAH & ANOR.

The real question is, had the Magistrate on the charge that was before him jurisdiction to bind over the defendant to keep the peace? It was urged that his recognizance should be discharged because the defendant was not summoned to appear and shew cause, and that no articles of peace had been exhibited against him; and secondly, that even if the depositions [taken in the charge against the defendant under Section 447] can be said to stand in the place of articles of peace, and that under Section 61, Sub-section 5 of Ordinance 13 of 1872, no summons was necessary, the defendant's conduct as shewn by such depositions did not amount to a threat of personal violence and consequently that the Magistrate had no jurisdiction.

In this case the Magistrate, under Section 61, Sub-section 5 of Ordinance 13 of 1872, as I think he had a right to do, dispensed with a summons, and as the parties were present and before him, acted on the evidence taken upon the charge of criminal trespass. Although Section 61, Sub-section 5 of Ordinance 13 of 1872 dispenses with the necessity of a summons when the parties are present in Court, it does not dispense with that which is necessary to give a Magistrate jurisdiction—namely, "the information" that a person is likely to commit a breach of the peace, or to do some act that may probably occasion a breach of the peace. In *Regina* v. *Dunn*, 12 Ad. & E. 617, Lord DUNMAN C.J. referring to the jurisdiction of Justices on this behalf, says:

> "They cannot go beyond the terms and fair meaning of the commission. The fair meaning is that if one informs the Court, or a Justice of the Peace that he goes in fear and danger of personal violence from another by reason of threats employed by him, and prays the protection of sureties of the peace, that protection may be granted unless such a case appear, no jurisdiction appears nor can we infer facts necessary to give jurisdiction from the mere circumstance of an inferior Court assuming to act as if they possessed it."

On examining the evidence taken upon the charge of criminal trespass, no threat of personal violence is alleged to have been made by the defendant. It is true no doubt that threats need not be by word of mouth directed against the exhibitant or informer, but looks, gestures, and conduct may express them with equal force. See *Dennis* v. *Lane*, 6 Mod. 131. But the invariable rule is that where reliance is placed on a general fact which may be inferred from particular facts, but does not flow from them by necessary implication, the party shall draw that inference himself and swear to his belief of its correctness and not leave the Court to draw the inference instead of him. *Regina* v. *Dunn*, 12 Ad. & E. 619.

As I have already stated there appears to have been no evidence that the defendant used any threatening words towards either of the complainants, nor is there any evidence that either of the complainants inferred from the defendant's conduct that he was likely to commit a breach of the peace, or to do any act that might probably occasion a breach of the peace. If the defendant did not use any threat and if his conduct did not amount to the threat of personal violence, the Magistrate had no power to bind him over; but if his conduct did, it should have

been so stated in the evidence. In arriving at this conclusion, to adopt the words of Lord DUNMAN in the case cited above, I do not decide that the conduct of the defendant as described may not have been an actual menace of violence. On the contrary, if it should be repeated and then brought before the Magistrate in a proper form and so as to fall within the rules that have always prevailed, I might probably feel but little doubt of the propriety of the conclusion that menaces had been used.

Having come to the conclusion, that the evidence before the Magistrate was not sufficient to give him power to bind over the defendant to keep the peace, I am bound to decide that the defendant's recognizance must be discharged.

Recognizance discharged.

In re McALISTER & Co.

Ignorance of law may amount to negligence; and negligence is included in the term "inadvertence" in Section 16 of the Bills of Sale Ordinance 12 of 1886.

The Court in exercise of its discretion under that section ordered the time for the renewal of the registration of a Bill of Sale to be extended, but without prejudice to the rights of a subsequent Bill of Sale holder.

This was a summons under Section 16 of the Bills of Sale Ordinance 12 of 1886 for the rectification of the registration of a Bill of Sale, by extending the time for the renewal thereof. Messrs. McAlister & Co. were the holders of a Bill of Sale made more than twelve months before 1st January, 1887, but omitted to renew the registration thereof by that date as required by Section 14 of the Ordinance. The ground of the application was that Messrs. McAlister & Co. were not aware that registration had to be renewed until it was too late. The summons was adjourned into Court for argument. Sections 14 and 16 aforesaid, are as follows:—

"14.—[1.] The registration of a Bill of Sale whether executed or registered before or after the commencement of this Ordinance, must be renewed once at least every twelve calendar months, and if a period of twelve calendar months elapses from the registration or renewed registration of a Bill of Sale without a renewal or further renewal [as the case may be] the registration shall become void, provided that where a period of twelve calendar months from the original registration of any Bill of Sale has expired before the first day of January, 1887, the registration of such Bill of Sale shall be deemed to be duly renewed if such registration be renewed as in this section is mentioned at any time before the first day of January, 1887.

[2.] The renewal of a registration shall be effected by filing with the Registrar a statutory declaration in the form set forth in the second schedule hereto, stating the date of the Bill of Sale, and of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein, and that the Bill of Sale is still a subsisting security."

"16.—[1.] Any Judge of the Supreme Court on being satisfied that the omission to register a Bill of Sale or a declaration of renewal, or transfer or assignment thereof, within the time prescribed by this Ordinance or the omission or mis-statement of the name, residence, or occupation of any person was accidental or due to inadvertence or to absence from the Colony, may in his discretion order such omission or mis-statement to be rectified by the inser-

FORD, C. J. 1887. — *In re* MCALISTER & Co.

tion in the register of the time, name, residence or occupation, or by extending the time for such registration on such terms and conditions [if any] as to security, notice by advertisement or otherwise, or as to any other matter as he thinks fit to direct.

[2.] Any application for the rectification of the register under this section shall be made in Chambers in a summary way."

W. *Nanson*, for McAlister & Co. in support of the summons contended, that ignorance of law was a specie of negligence, and negligence was covered by the term "inadvertence" in Section 16, and cited *Campbell on Negligence* and *Austin on Jurisprudence.*

Drew, for the New Harbour Dock Company, the holders of a subsequent Bill of Sale on the same property, opposed the application: he contended the omission to re-register was due not to "inadvertence," but to ignorance of the law, which was not covered by the term.

Nanson, replied.

Cur. Adv. Vult.

September 8th. *Ford*, C.J. I need not refer to the facts of this case; they are within the recollection of all parties, and I do not propose to re-consider the decision of the other day. The only question for the Court now to consider, in construing the section, is whether the Bill of Sale has not been re-registered from accident or inadvertence, such accident or inadvertence as comes within the Act, and over the character of which the Judge exercises a discretionary jurisdiction. Taking that view, what do the facts of the case amount to, as set out in the affidavits filed? I am clearly of opinion that those facts shew negligence on the part of McAlister & Co. Mr. Drew contended, that the facts did not shew the same state of things in respect of all the parties. I do not think that is a material point in the case. I am of opinion that negligence may extend to a want of knowledge of the law as well as the neglect of the duty of re-registration under the law. It is clear that the partners were negligent, so that together the firm seems to me to be guilty of that error.

The question is then reduced to this—does or does not the term "inadvertence" include negligence. I am of opinion that it does. If you look to the origin of the word, its meaning is, the failure to turn the mind towards something. Mr. Drew asked, "How can you turn your mind towards a thing you do not know?" That is not what you are asked to do. The evil you have to repair is, not the turning your mind to something you don't know, but the not turning your mind to something you ought to or do know. That is In-ad-ver-tence or negligence. But the Court cannot construe the word simply by considerations of its derivation. It is not a question only of philology, but of usage.

If you come to authority there is very strong authority that the word is used in the sense of negligence. Mr. Campbell's book on negligence expresses a strong opinion to that effect and Mr. Austin's book on jurisprudence, in the passages cited, strongly supports the same conclusion; and looking for authority for a popular construction, I find that Mr. Webster in his Dictionary

gives "negligence" as a synonym for "inadvertence." Mr. Nanson's contention therefore has the support not only of legal writers, but also of popular use. Then the question is whether on the facts of this case the Court will remedy the actual negligence which has been committed. I am far from saying that the Court in all cases will remedy negligence, there might be cases of negligence so gross as actually to imply intention; in such cases the Court will stay its hand. But where the facts of the case shew an absence of intention and no gross negligence, it is the duty of the Court to interfere and rectify the error. In this case the facts seem to me to be of that class, and constitute one of those cases of negligence falling within the definition of inadvertence which the Court can rectify. The Act by its terms supports the view that this is the right course to take. It leaves the Court in its discretion to determine what amounts to such an act of "inadvertence" as should be rectified or not. I order that the time be extended to the 10th of this month.

The Act gives the Court power to make such terms or granting such leave both as to security, notice by advertisement, or otherwise, or as to any other matter which the Court thinks fit to direct. I direct therefore that the re-registration be without prejudice to any rights which the subsequent Bill of Sale holder had, under the old Act [*a.*] to contest its validity. I think as this decision is an act of favour to the holder of the Bill of Sale each party should pay their own costs. [*b.*]

Order accordingly.

In re LIM TIANG WAH.
Ex-parte CHARTERED MERCANTILE BANK, &c.

SINGAPORE.

FORD, C. J. 1887.

September 6.

The C. M. Bank had branch houses in both Calcutta and Singapore. A. purchased a draft in Calcutta of the Bank and endorsed it to the Bankrupts in payment of his debt to them. The Bankrupts received the draft before their Bankruptcy, but never presented it for payment: they were at the time of Bankruptcy the holders of the draft. On the adjudication of Bankruptcy, the Bank claimed to set-off the amount of the draft in reduction of their claim against the Bankrupts.

Held, [reversing the judgment of the Court below] that the above facts constituted a "mutual dealing" between the Bankrupts and the Bank, within Section 41 of the Bankruptcy Ordinance, 1870, and the Bank was entitled to make the set-off.

Special case, which set out the following facts:—

The Chartered Mercantile Bank of India, London, and China is a Corporation incorporated by Royal Charter having its principal place of business in London, and having branches in Calcutta, Singapore, and other places. On the 20th April, 1886, the Agent or Manager of the Calcutta Branch drew a Bill of Exchange on the Singapore Branch for $968.25 payable on demand to the order of Messrs. Lim Tiang Wah & Co. Such bill was delivered in Calcutta to a person who applied for, and gave value for the same, and was forwarded by him to Messrs. Lim Tiang Wah and Co.,

[*a.*] Ordinance 22 of 1870, Section 18 *et seq.*

[*b.*] See *Meyappa Chetty* v. *Ong Hong Pee & anor., In re* Ong Ah Poh, 19th July, 1888, *infrà*.

FORD, C. J. 1887.

In re LIM TIANG WAH. *Ex-parte* CHARTERED MERCANTILE BANK &c.

in Singapore, to pay an amount which he owed Messrs. Lim Tiang Wah and Co. The draft was received a few days before the act of Bankruptcy upon which they were subsequently adjudicated bankrupts had been committed. On the 10th day of May, 1886, Messrs. Lim Tiang Wah and Co., were adjudicated bankrupts.

At the date of the Bankruptcy, the bill had not been presented for acceptance or payment and was held by the bankrupts. On the 21st May, 1886, the bill was presented at the Chartered Mercantile Bank in Singapore by the Trustees in the Bankruptcy, when payment was refused on the ground that the over-draft on the bankrupts' current account with the Bank exceeded the amount due on the bill, and that the Bank was entitled to set-off a part of such over-draft against what was due on the bill. On the 14th May, 1888, the Bank filed a proof of debt for $9,575.04, with accounts annexed, in which the bankrupts were credited with $968.25, the amount of the said bill, and this proof the Trustee had refused to admit on the ground that he was entitled to be paid the said sum of $968.25 by the Bank, and that no part of the debt provable by the Bank in the Bankruptcy can be set-off against the claim of the Trustee on the bill.

The question for the decision of the Court was, whether the Bank was entitled to set-off the amount of the draft in reduction of their claim against the bankrupt estate.

The case was heard on the 6th and 7th September.

W. *Nanson*, for the Bank.

Donaldson, [*Drew* with him] for the Trustee in Bankruptcy.

Cur. Adv. Vult.

14th September. *Ford*, C.J. This not very simple question which, upon the authorities, the Court has in this case to determine is, did the purchase of the note at Calcutta constitute a credit to the Bank and a debt to Lim Tiang Wah. It could not be a debt of the Bank to Lim Tiang Wah until one or the other of these events, or both, took place. Before one or other of these events happened, it was a mere liability by the Bank which might or might not end in a debt, and in my opinion the reasoning of the Court in *Young* v. *The Bank of Bengal*, 1 Moo. P. C. C. 150, goes far to negative the statement in *Robson on Bankruptcy* that a mere tendency to become a debt is enough to make a liability a debt to a particular person; nor do the authorities cited in *Robson*, quite, I think, support that proposition,—see the facts in *Easum and others* v. *Cato*, 5 B. and Ald. 861. But *Young* v. *The Bank of Bengal*, 1 Moore's P. C. C. 150, is a more recent case than those cited by Robson, and of greater authority. This case establishes, I think, the proposition that the dealing must be one which must end in a debt.

This was not the case here, as the draft might at any time have been negotiated, and nothing was done either by the Bank or Lim Tiang Wah to make the transaction one which must have ended in a debt from the Bank to him. I think, therefore, that in accordance with the general principle laid down in *re* Gillespie, 14 Q. B. Div. L. R. 963, the line as to set-off has to be drawn at

the date of this Bankruptcy, and that, as before that act, there was not a dealing which must have ended in a debt by the Bank to Lim Tiang Wah, it is not now entitled to set-off this claim of the Trustee against the bankrupt's debt to the Bank. This decision may appear, at first sight, opposed to the decision in *Hankey* v. *Smith*, 3 T. R. 507, but on a closer inspection it will be found, I think not so. *Hankey* v. *Smith* is rightly dealt with, I think, in *Young* v. *Bank of Bengal*, 1 Moo. P. C. C. 150. As pointed out, the dealing in that case was, on the facts, complete, in the sense of the transaction necessarily ending in a debt. There was, in that case, no uncertainty as to the party said to receive the credit becoming sooner or later debtor, *in presenti*, to the other. In the present case, there was. The language of one of the Judges in *Hankey* v. *Smith* to the effect that acceptance of a bill creates a debt to every holder of it, is also not inconsistent with the view that the date at which the acceptor's general liability becomes a debt to the particular holder, is determined when the holder's power to further negotiate the bill ceases.

In this case that date would be the adjudication in Bankruptcy, and too late to create the set-off, unless special circumstances can be shewn to take it out of Gillespie's case before cited.

I do not think there are such special circumstances, and I am not prepared to extend the case of *Hankey* v. *Smith* to a note drawn on oneself, payable to another or his order, *on demand*, although I admit the great logical force of Mr. Nanson's argument, having regard to the curious state of the law which says, a note payable *on demand* needs no demand—a state of matters the Judges have commented on by saying that if such a note were sued on, without demand, they would express their opinion of the practice by considering the question of costs, [*Byles on Bills*, 10th Ed. 215.]

Judgment for the Trustee. Estate to pay costs of Trustee.

The Bank appealed.

15th December. The appeal now came on for hearing before the Court of Appeal, consisting of *Ford*, C.J., *Wood* and *Goldney*, J.J.

W. *Nanson*, for the appellant.

Donaldson, [*Drew* with him] for the respondent.

Cur. Adv. Vult.

18th December. *Ford*, C.J. Having in the Court below referred to what seemed to me to be the difficulty of this case and suggested taking the decision of this Court, I am desirous of expressing clearly but concisely the reasons why I still incline to the correctness of my previous decision.

Whilst the form of the transactions in this case is similar if not quite the same as in many of the cases cited, the substance of it seems to me very different. The Bank in this instance was not transacting customary business between itself and a customer in advancing, receiving, or paying moneys upon mutual dealings between itself and the respondent or his agent. The payment into the Bank at Calcutta was not a payment to respondents'

FORD, C. J. WOOD & GOLDNEY. J.J. 1887.

In re LIM TIANG WAH. *Ex-parte* CHARTERED MERCANTILE BANK, &c.

account or credit as evidenced by the sale by the Bank for commission of the draft given to the sender for transmission and no credit being carried in fact to the respondents' account, and the Bank was I think a mere agent or conduit-pipe through whom to remit money delivered by a stranger at Calcutta to the respondent or his order at Singapore. Its position was analogous to that of a mere carrier. No voluntary act or any state of things altered the character of this transaction so as to constitute it a mutual debt, credit, or dealing between the parties. The form of the transaction, that of a Bill of Exchange or Promissory-note should not, I think, change the character of the real transaction. The cases also do not go further than to give the right of set-off where the transaction would materially end in a debt, credit, or dealing, and the draft to order being up to date of Bankruptcy liable to endorsement, the liability is as naturally not likely to terminate in a debt, credit, or dealing between the parties as to do so.

I am now, as in the Court below, averse to taking the cases any further than they strictly go, or altering them to cover a state of facts which differs from that upon which they were decided, and thus give to the appellant-Bank a preference over other creditors to which I think they are not in justice entitled.

Wood, J. In this case I think on the authority of *Collins* v. *Jones*, 10 B. & C. 777, and *Hankey* v. *Smith*, 3 T. R. 507, cited in argument, that at the moment of the holding the document in question by the bankrupts, a mutual credit, or, at all events, a mutual dealing was established between the bankrupts and the Bank. This credit or dealing would naturally result in a debt by the simple act of presentment for payment, and that the bankrupts take by the law of merchants a right to transfer that prospective debt to another cannot affect the question.

The bankrupts are holden at the moment of the incidence of Bankruptcy; and it seem to me the right to set-off properly arises.

Goldney, J. I agree with the judgment of Mr. Justice WOOD. The Trustee was wrong in my opinion in rejecting this proof. The 41st section of the Bankruptcy Ordinance, 1870, to use the words of Lord C. SELBOURNE in *ex-parte* Barnett *re* Deveze, L. R. 9 Ch. App. 295, provides that where there have been mutual credits, debts, or mutual dealings, and a proof is to be made in Bankruptcy, there is to be a rule of set-off, not at the option of either party, but an absolute statutory rule. The balance of such account and no more shall be claimed or paid on either side, respectively.

In this case, at the time of the Bankruptcy, on the one hand there was a large debt due from the bankrupts to the Bank, and a small debt actually due from the Bank to the bankrupts, as the holders and payees of a Bank bill drawn by the Calcutta Branch of the Bank upon their Singapore Branch, for which Bank bill the Bank had received full value. That being so, the Bank come in to prove, and do that which the Ordinance expressly says shall be done, viz., they ascertain the amount of their proof by writing off the small debt from the larger. I cannot distinguish this case

from *ex-parte* Barnett, in *re* Devcze, L. R. 9 Ch. App. 295. It was argued, that at the time of the Bankruptcy, the fact of the bankrupts being the holders and payees of this Bill of Exchange, did not bring them within the provisions of Section 41 of the Bankruptcy Ordinance. I cannot accept this argument. Quoting from Van Der Linden's *Institutes of Holland*, p. 470 [Jute's translation] a well-known authority upon Mercantile Law:

"By a contract of a Bill of Exchange is meant a transaction by which I give you, or bind myself to give you, a certain sum, at a certain place, for and in exchange of a sum of money which you bind yourself to pay me at another place. In order to carry out this contract and to bring it into operation, a 'Bill of Exchange' is drawn, *i.e.*, a letter framed in a certain form defined by law, by which you request your correspondent at a certain place to pay me or my order, at that place, a certain sum of money in exchange for a sum of money or the value thereof, which you have received from me here either in cash or account."

The owner of the bill has the power to assign his right therein to another person by nominating another person in his stead to receive payment for him. The owner of this bill in Calcutta assigned his rights therein to the bankrupts or their orders as the persons to receive the money. On a Bill of Exchange being drawn a mandate arises between the parties to it; which mandate in this case could not be revoked, and required no further acceptance by any party to the contract, as the Bank, the drawer, had received the value, and was itself the person upon whom it was drawn. Without deciding whether or not the obligations which arise from this mandate are "mutual credits," in my opinion they are "mutual dealings," within Section 41 of the Bankruptcy Ordinance, and require that an account be taken of what is due from the one party to the other, in respect of such mutual dealings; and that the sum due from one party be set-off against any sum due from the other party, and that the balance of such account and no more be claimed or paid on either side, respectively. See *Peat* v. *Jones*, 8 Q. B. Div. L. R. 147; *McKinnon* v. *Armstrong & Co.*, 2 L. R. App. Cases 531; *Jack* v. *Kipping*, 9 Q. B. Div. L. R. 113; *Mersey Steel and Iron Co.* v. *Naylor*, 9 L. R. App. Ca. 434; and *Eberle's Hotel Co.* v. *Jonas*, 18 Q. B. Div. L. R. 459. This view of the law is I think in accordance with every case that has been decided upon Section 39 of the English Bankruptcy Act, 1869, and Section 38 of the English Bankruptcy Act, 1883, which sections are identical with the 41st section of the Bankruptcy Ordinance.

The attention of the Court below does not seem to have been called to the most recent decisions upon mutual credit and set-off in Bankruptcy cases as to the effect which the provisions as to "mutual dealings" and taking on account—first introduced in the Act of 1869—have upon the authorities which were then cited. For these reasons I think the appeal must be allowed.

Judgment reversed.

VAUGHAN *v.* D'SILVA.

MALACCA.

FORD, C. J. 1887.

Sept. 20.

The terms "Conveyance" and "Conveyancer" in Section 26 of the Civil Procedure Ordinance 5 of 1878 has a larger meaning than its more strictly professional sense.

Where therefore the defendant in expectation of a fee or reward drew a Will relating to real or personal estate for another,

Held, he was liable to a penalty under Section 26.

This was a *qui tam* action under Section 27 of the Civil Procedure Ordinance, 1878, to recover a penalty of $250 from the defendant an employé of the Government for drawing and engrossing a Will for one Permal Pillay. The defendant had received a small sum in payment for drawing the Will which related to real as well as personal estate.

Plaintiff, in person.

Defendant, in person.

Cur. Adv. Vult.

October 10th. *Ford*, C.J. This was an action brought by Mr. Vaughan against the defendant to obtain a sum of $250 by way of fine for acting in expectation of a fee or reward as a "Conveyancer" or legal adviser, or directly or indirectly drawing or preparing a "Conveyance" or deed relating to real or personal estate under the provisions of Section 26 of Ordinance 5 of 1878.

The facts of the case as I found them at the trial were, that the defendant did draw a Will relative to either real or personal estate in hope of a fee or reward. The question is, does the drawing of such a Will, for fee or reward, by a person other than an Advocate or Solicitor of the Court, come within the offences provided by that section.

Having regard to the exception in Section 28, excepting from the operation of Section 26 [*a.*], persons drawing simple contracts not relating to lands, or to any interest in lands, or any letter of attorney, or any will, or other testamentary paper *without* fee or reward, I think the Legislature used the term "conveyancer" and "conveyance" in Section 26 in a larger than its more strictly professional sense, and intended to include the drawer of a Will, and the Will, within the terms "conveyancer" and "conveyance" when he drew the Will in expectation of a fee or reward. There will therefore be judgment for the plaintiff, damages $30. I have fixed the damages at a low figure as this is a first trangression, and the construction of the Ordinance is opened to some doubt. The verdict of course carries costs.

Judgment for plaintiff.

[*a.*] Sections 26 and 28 are as follows:—

"26. Every person other than an Advocate and Solicitor of the Court enrolled as such ...at any Settlement who for, or in expectation of any fee, gain or reward, shall act as a *Conveyancer* or legal adviser, or directly or indirectly draw or prepare any *Conveyance* of, or deed relating to any real or personal estate.....shall forfeit and pay for every such offence a sum not exceeding $250."

"28. Nothing contained in Sections 25 and 26 shall be held to apply .....to persons drawing or preparing *without fee or reward* any simple contract not relating to lands or to any interest *in lands* or any letter of attorney *or any will or other testamentary paper.*"

In re KOH AH POW & ORS.

SINGAPORE.
FORD, C. J.
1887.
Sept. 24.

This Court has jurisdiction to issue a Writ of *Habeas Corpus* and discharge a prisoner thereon either absolutely or on bail as the facts might warrant, where the charge pending against him before a Magistrate, is adjourned from time to time over such a period of time, combined with the absence of evidence, as would make it a serious wrong to him to be longer detained, but the exercise of this jurisdiction is entirely in the discretion of the Court and will not be exercised except in cases of an unusual nature.

Where prisoners were arrested and charged before a Magistrate with conspiracy, and with the exception of formal evidence are remanded into custody from time to time for a period of three weeks without any further evidence being adduced against them—but it was shewn that the case was of a peculiar nature, and evidence was being collected, even from a Foreign country, and that such evidence, if obtained, would certainly implicate the prisoners, but their discharge might possibly hinder the obtaining of such evidence and frustrate the ends of justice,

Held, though the period of detention without proof being adduced was unusually long, yet it was not a case in which this Court would exercise its jurisdiction and discharge the prisoners whether on bail or otherwise.

Rule *Nisi* calling upon N. B. Dennys, Esquire, Magistrate, to shew cause why a *Certiorari* should not issue to bring up certain proceedings then pending before him and why a writ of *Habeas Corpus* should not issue for the discharge of the accused. The prisoners were charged with conspiring to murder certain persons in the Government service, and having been arrested and arraigned on the said charge, were remanded after the adducing of formal evidence merely, from time to time, for something like three weeks. The Magistrate, for reasons of public policy, had made an order that the charge be inquired into, *in camerâ*. In shewing cause against the Rule, the following affidavits were read:—

I.—"I, Francis Powell, Acting Protector of Chinese and Registrar of Secret Societies at Singapore, make oath and say as follows:—

1. I have read the two joint and several affidavits of the five accused persons, Koh Ah Pow, Lee Hong Kang, Lee Ah Hoey, Choa Ah Lee and Lim Ah Siang, filed respectively in this Court, on the 16th and 22nd of September current.

2. As to paragraph 9 of the affidavit filed on the 16th September, I say that I did state how I obtained possession of the documents mentioned in that paragraph, and that I did connect them with the Ghi Hok Kongsi, of which all the prisoners are headmen, and that I did more especially connect them with prisoner No. 3, Lee Ah Hoey, who is the President of the Ghi Hok Kongsi.

3. I further make oath and say that I heard Tan Tian, one of the witnesses called for the prosecution, give his evidence before N. B. Dennys, Justice of the Peace, and that the account given in said affidavit of the five abovenamed prisoners in respect of his evidence is insufficient and misleading.

4. In respect of the affidavit of the prisoners filed on the 22nd September, I say that the acccount given of Teo Ah Wah's evidence is insufficient and misleading, and that the account of Goh Ah Pang's evidence is incorrect.

5. I further make oath and say that these prisoners aforesaid are all headmen of the Ghi Hok Kongsi, of which Cho Ah Siok, the man who attempted to murder Mr. Pickering, is a member, also that I have experienced very great difficulty in inducing witnesses to come forward owing to their fear of this particular Kongsi and of these headmen, also that one witness for the prosecution escaped from the Police Court before his evidence could be taken and that I have not been able to find him since, also that witnesses have told me that if these prisoners be discharged or admitted to bail while the case is before the Magistrate the said witnesses will be in fear of their lives, and I believe it to be true that their lives would be in danger.

FORD, C. J. 1887. —— *In re* KOH AH POW & ORS.

6. It is my belief that if these prisoners are released on bail that the evidence I propose to place before the Magistrate will not be forthcoming, and that the prisoners, if set at liberty, will take steps to stop those channels in China with which I am in communication.

7. From day to day I am receiving information concerning this charge, and have to carefully test it before placing the same before the Magistrate.

8. The Ghi Hok Society consists of more than twelve thousand members, a large portion of whom are known as *Samsengs*. They are under the direction and control of the prisoners and would implicitly obey their orders and probably deter by violence or other means probable witnesses from giving their evidence."

II.—"I, Ernest Woodford Birch, Second Assistant Colonial Secretary, make oath and say—

1. That I have read the second affidavit made by the five prisoners Koh Ah Pow, Lee Hong Kang, Lee Ah Hoey, Choa Ah Lee and Lim Ah Siang, and that I heard the evidence given before Nicholas Belfield Dennys, Esq., Justice of the Peace, on the 21st day of September current, on which day I also give evidence.

2. The account given in the said affidavit of the evidence given by Toeh Ah Wah and Goh Ah Pang is insufficient, incorrect, and misleading; the evidence given by me referred to a correspondence between the Government and H. B. M. Consul at Swatow. I have reason to expect a further communication from the said Consul which has been asked for by this Government both by letter and telegram.

3. A further telegram was sent yesterday to the said Consul requesting him to make a full enquiry. If the result of the enquiry to be made by the Consul confirms the evidence already adduced, it will tend to shew the guilt of all the prisoners and more particularly of the prisoner Lee Ah Hoey.

4. With reference to the conversation alleged to have taken place between myself and Lee Ah Hoey in the 9th paragraph of the second affidavit, I say that the account given of such conversation is untrue. I did not promise that Lee Ah Hoey should be released if he would give evidence against the other prisoners nor did I say 'very well, if you like to hang yourself do so,' or any words to that effect. I did no more than urge him to tell the whole truth respecting this matter."

Bonser, [*Attorney-General*], shewed cause, after taking certain technical objections which are not material to this report, he contended, to make the Rule absolute would be to stop the whole proceedings on the criminal charge, that no precedent could be found for such an application either to stop the proceedings or to admit the prisoners to bail, when those proceedings were still pending. The nearest approach to it was *ex-parte* Krans, 1 B. & C. 258, but there the proceedings had not been begun. The Court in fact had no jurisdiction to interfere. *Ex-parte* Krans [suprà] and *re* Ternan, 33 L. J. M. C. 201. The inconvenience that would be caused to proceedings before Magistrates, were such a jurisdiction exercised, would be enormous—in almost every case the prisoner would come to this Court to ask for his discharge. The evidence was being collected and but for the peculiar nature of the case, and the difficulties to be met with, would have long before been obtained and adduced,—adjournments extending for about three weeks only, to procure such evidence was not unreasonably long; in order to avoid such obstacles, by the evidence so far as is in hand being made public, the Magistrate had ordered the enquiry to proceed *in camerâ*, which he had the right to do [*a.*]—*Cox* v. *Coleridge*, 1 B. & C. 54. He relied on the affidavits above set out as shewing

[*a.*] See *Regina* v. *Chin Ah Chi*, infrà, 20th March, 1890.

the difficulties in the case to obtain the necessary evidence, and the continued efforts to get it, and the expectation of the authorities that it was forthcoming.

Donaldson, in support of the rule contended that the case, shewed that extraordinary steps had been taken in order to procure a conviction of the prisoners, and that they had not been fairly and properly treated in preparing their defence. This Court had jurisdiction to entertain this application, otherwise any number of persons might be arrested and brought before a Magistrate from time to time with no evidence it may be for a year or more. What would be the value of a writ of *Habeas Corpus* and the supervision of this Court over Magistrates if the Government had power to confine prisoners without this Court having power to interfere. The affidavits filed against the rule were general and vague, —the prisoners' friends were allowed access to them in Jail, and by that means they could seek to frustrate justice, if so disposed—they would have no greater opportunity to do so by being released on bail. Practically what was being done here was an attempt to suspend the *Habeas Corpus* Act for an indefinite time, while enquiries were being made for evidence. The Court had jurisdiction and this was a case in which that jurisdiction should be exercised.

Bonser, replied.

Ford, C.J. With regard to the technical objections which have been raised to this proceeding, I may at once say that I do not think there is anything in them. The inconvenience which would arise on the issuing by the Court of a *Certiorari*, and the inconvenience which occurred to me as being likely, in making public, proceedings which were originally private, could be avoided by the Court not allowing the proceedings before the Police Court to come before the public. I could keep them confined to the knowledge of the Court and those who are engaged in the case, if I were so disposed. With reference to the formal objection to something being wrong in the affidavit, I need not say that such an objection as this has no permanent hold upon this Court and if there were anything in it I should allow a formal amendment to be made. Then as regards jurisdiction, I have no doubt as to the jurisdiction of this Court. I quite agree with the Attorney-General that it is not a usual thing to interfere with the discretion exercised by the Magistrate in the lower Court, as to charges of this kind at this stage, and that the Court will only interfere with cases of an unusual nature, that is, where the adjournments extend over such a period of time, combined with the absence of evidence, as would make it a serious wrong to the subject to be longer detained. And when a case of that kind is presented to this Court, I have no hesitation in saying that the Court would exercise that jurisdiction and discharge the prisoner or admit him to bail as the case might warrant. Of course this is a general principle which is as clear as noon-day. The question is—is this a case in which the Court ought to apply the principle?—and I have reluctantly come to the conclusion that at this time and stage it ought not to apply it. Every case must be considered on its own special grounds and features and this is one which has

FORD, C.J. 1887.

In re KOH AH POW & ORS.

its own. The original charge of attempt to murder is found upon the statement of the accused, that he had been employed by others to make this attack upon Mr. Pickering and in the information which has been laid by Mr. Powell in this case, he says he has documents and other evidence to place before the Magistrate to sustain a charge of abetting against the present prisoners. Upon that the five men were arrested and there were four adjournments, occupying altogether a period of nearly three weeks. On some of these occasions there was no evidence brought forward. On the first merely formal evidence and the men were remanded for five days. On the 8th there was more formal evidence as to the arrest. One occasion was occupied entirely by the consideration of the question as to whether the examination should be private. On another occasion evidence was taken which, if true, seriously affects two of the prisoners for whom this application was made, and in respect of whom it was refused. With regard to the other three the rule was granted on affidavits, which were to the effect that there was absolutely no evidence against them, on which to found the charge or to connect them with the other prisoners. Now, other affidavits have been filed in reply to these statements, and I need hardly say they go a long way to modify them. In the first place, in respect of two of the witnesses who were called, both Mr. Birch, who was in Court at the time, and the prosecutor say, that their statements do not give the proper effect of the evidence taken—that the account is insufficient and misleading and in one case incorrect. They also say, and I lay stress upon it, that these documents which in the absence of information as to their contents from the other side, I must assume are material, were not read, Mr. Powell says that he did state how he got possession of the documents and that they do connect the three prisoners with the Ghee Hok Society, of which all the prisoners are headmen, and No. 3 is the President. I need hardly say that if these material documents do connect them with a society, in which they hold important positions, in a charge of conspiracy where there is evidence against other prisoners, I am bound to assume that there is some connection between them. There is another point in the case also. Mr. Powell substantially states that he has further evidence and that he has examined it, and, as he somewhat unfortunately expresses it, has had difficulty in inducing witnesses to come forward, because of their fear of these particular headmen of the society; and he goes on to say that he is in communication with China and is afraid that if these men are let out on bail they will take steps to stop his enquiries. There is also the evidence of Mr. Birch, which confirms the statement of the prosecution, that the Government is in communication with China on the subject of the case, and that they have written and telegraphed to the Consul at Swatow to make full enquiry into the matter. Doubtless, these affidavits are very general in their terms, and were I considering them in an ordinary case, I am bound to say I should describe them as unsatisfactory, but in this particular case I am equally bound to qualify this by the remark that for some reason or other

unknown to me, it has been thought desirable to hold the enquiry before the Magistrate in private [*a.*], and it is obvious that the persons making these affidavits cannot speak with that clearness and directness if they wish to maintain privacy, which, under other circumstances, they would undoubtedly have to. So that having regard to the extraordinary character of the case, its being an alleged conspiracy by the members of a Secret Society, those who are engaged in the prosecution do substantially say that they have evidence to bring forward, a part of which they are now negotiating about with persons in China. Three weeks is not sufficient for full information of this kind, and it is reasonable to suppose that this further information may touch these three men, because Mr. Birch says that if the result of the enquiry to be made by the Consul should confirm the evidence to hand, it will connect all the prisoners and especially Lee Ah Hoey. I am also bound to recognise the fact that enquiry of this kind against a Secret Society must be to some extent carried on in the dark. Therefore I am of opinion that at this time and this stage, the Court should not make the rule absolute. At the same time, I need hardly say that if the adjournments continue indefinitely and there should be no further evidence before me than now, in affidavits of this very general description, there must and will be a time when the Court will say that the enquiry has been sufficiently prolonged, and it may be obliged to exercise its power either in the release of the men or in holding them to bail. I am not without doubt whether I ought not to allow the men out on bail now, but looking at the statement of Mr. Powell, that he believes that if it were done it would stop his communications with China, and knowing also the exceptional power and ramification of these Secret Societies, I think this rule must be discharged, but without costs.

Rule discharged without costs.

In re TAN TUA KOW.

SINGAPORE.

FORD, C. J. 1887.

October 11.

The expression "the Chief Police Officer" in the Preservation of the Peace Ordinance 6 of 1872, Section 15 [as amended by Ordinances 5 of 1877 and 6 of 1885] might mean according to circumstances the Inspector-General of Police of this Colony, but is not confined to that officer, and includes the Principal Officer of Police of whatever rank for the time being in the Settlement from which the information proceeds.

Drew, had on the previous day obtained a Rule calling on the Superintendent of Prisons, Singapore, to shew cause why the prisoner abovenamed should not be set at liberty. The prisoner it appeared had been arrested for complicity in the murder of the Lieutenant China at the Carimon Islands, but was now detained in custody with a view to his deportation under Ordinance 6 of 1872 [as amended by Ordinance 5 of 1877 and 6 of 1885] and the Order of His Excellency the Governer made in pursuance of Sec-

[*a.*] See *Regina* v. *Dorasamy Pillay*, infrà, 26th March, 1888, and *Regina* v. *Chin Ah Chi*, infrà, 20th March, 1890.

FORD, C. J. 1887.

In re TAN TUA KOW.

tion 15 of the Ordinance [as amended], and on the written information of Superintendent Bell, who at the time was the Principal Police Officer in the Settlement; the Inspector-General of Police being absent in Malacca for a few days. Section 15 of the Ordinance [as amended], is as follows:—

"And whereas it is expedient to make better provision for putting into force the law relating to foreigners, it is further enacted—Whenever it shall be represented by *the Chief Police Officer* to the Governor in Council, on written information, that the removal from the Colony of any person not a natural born subject of Her Majesty, whether such person shall have been naturalised under the provisions of any Indian or Colonial Act or Ordinance for conferring the privileges of a naturalised British subject or not, is necessary for the public safety, it shall be lawful for the Governor in Council, if it shall appear to him, after making such inquiry as to him may seem sufficient to be necessary for the public safety that such person should be banished from the Colony, to issue an order banishing such person from the Colony, in such manner as to the Governor may seem expedient.....and any person so ordered to be banished may be detained by order of the Governor, or in his absence, of the Colonial Secretary at Singapore, and of Lieutenant-Governors at Penang and Malacca, respectively, in any place or on board any ship at the Settlement, pending the carrying into effect of the order of banishment.....

Bonser, [*Attorney-General*] shewed cause. He said as far as he knew the only point to be argued was whether the order of the Governor was bad, because the written information had been made by the Superintendent of Police, and not by the Inspector-General. It would be contended by the other side that the words "the Chief Police Officer" in Section 15 of the Ordinance 6 of 1872 [as amended] meant the Inspector-General—but he would submit this was not so. He contended the words "Chief Police Officer" were used in a technical sense, and invariably through the Ordinances designated a class, and that in no case did they mean the Inspector-General. By Ordinance 6 of 1872, Section 15 [as amended] there was no longer any necessity for a Proclamation, it was sufficient if the Governor in Council had the written information of the Chief Police Officer. By Section 3 the Inspector-General was expressly named, and then others as Chief Police Officers, so that when the Legislature meant the former officer they named him by his office. Again, these officers were persons whose duties were defined by the Police Force Ordinance 1 of 1872, and by Section 3 of that Ordinance, certain expressions were to have a given meaning, unless there was anything in the subject or context repugnant to that meaning. It defined the term "Inspector-General" to be the "Inspector-General of the Police of the Colony"—"Chief Police Officer" to mean "the Police Officer of highest rank after the Inspector-General, available for duty at the time at any Settlement," and was to include the Assistant Superintendent of Police, Province Wellesley. It would be said no doubt that these definitions only applied to the Police Force Ordinance, but in the last para. of Sections 3 it was enacted that the expressions "Chief Police Officer ..... *when used as descriptive of a class of persons* in the Police Force of the Colony, *in any Ordinance passed after 19th day*

of October, 1871, shall, when not repugnant to the context of such Ordinance, have *the same meaning as herein provided.*" By Section 4 it was said "All powers granted to, and duties imposed on, Chief Police Officers in this Ordinance may be exercised and performed by the Inspector-General at any Settlement where he may be in the exercise of his duties." He also referred to Sections 38 and 39, and submitted the words "Chief Police Officer" therein, although *unaccompanied* by the word "of the Settlement" and the like, could not mean the Inspector-General who for such trifling matters as therein provided could not be here, there, and everywhere, in this Colony. He also referred to Sections 32 and 41 where, he submitted, the "Inspector-General" was named by his title when he was the officer intended. Again, in Section 18, the "Inspector-General" or "Chief Police Officer" were mentioned consecutively. Ordinance 6 of 1872, Section 14 used the words "the Chief Police Officer" for further trifling matters, as to Pawnbrokers' signboards, &c., which could not require the Inspector-General. In Ordinance 13 of 1872, Section 19, Clause 3 "Inspector-General" and "Chief Police Officer" were mentioned consecutively. He therefore submitted that the Court could not construe the words "the Chief Police Officer" in Section 15 of the present Ordinance to mean anything outside their statutory meaning, and to mean an officer who, when intended, was invariably named by his office. He also contended, that even if the words meant the Inspector-General, yet as that officer was absent from the Settlement, and Superintendent Bell was the next highest Police Officer in the place, he had power to do what the Inspector-General might have done, and cited the Interpretation Ordinance 14 of 1867, Sections 4 and 6, and referred to some precedents of orders of deportation in the time of the late Attorney-General.

Drew, supported the Rule. He contended that the Interpretation Ordinance did not apply, as the Inspector-General's position was one which did not require anybody "to act" for him, and the expression "authorised to act," in Section 4 meant specially appointed to act. As to the main point he contended, that the Ordinance 6 of 1872 in its original condition did not require any written information from a Chief Police Officer, but a Proclamation was necessary. By the amended Ordinance of 1877, the necessity for a proclamation was done away with, and it was thought right that it should be defined by whom the written information required should be given. That person, the Ordinance said, was to be the "Chief Police Officer." The original safeguard for the people at large was the proclamation, that having been done away with, the safeguard substituted was the written information of the "Chief Police Officer." The definitions in the Police Ordinance, even if they were to be applied to more recent enactments, only applied if there was nothing in the subject or context of the later enactment repugnant to them. There was no reason to give the words in the section any technical meaning; and the subject of this part of the section was the protection and safeguard to the people, and it could not be intended to leave this

FORD, C. J. 1887.

In re TAN TUA KOW.

in the hands of any Police Officer of whatsoever rank. The requirement of the case, the necessity of the safeguard *was* repugnant to such an idea. Again, the words here were not "descriptive of a class"—they pointed to the officer who was in communication with the Government, "the Chief Police Officer to the Governor in Council"—the officer in communication with Government was the Inspector-General, he was the channel of all communication between his subordinates and the Government. In most of the various Ordinances referred to, the words "Chief Police Officer" were followed by the words "of the Settlement" and the like. This section omitted these words, and there must have been some reason for their omission. In the case of Pawnbrokers' signboards and the like, these were such trifling matters that the Legislature knew no mistake could be made as to who was meant by "Chief Police Officer" and the words "of the Settlement" would be understood or implied. Here was a case where the liberty and safety of the citizens of the Colony were concerned. The Inspector-General was the officer responsible for the peace and safety of the inhabitants—he was the trusted servant of the Government in making representations as to such peace and safety. If subordinate officers were allowed to make such a representation as this section requires, it was possible they might do so against the wish of their superior officer. The written information did not mean information from any Settlement or part of the Colony; it meant a written information to the Governor in Council which was of course in Singapore, the seat of Government and the place where the head office of the Inspector-General was. The words "*the* Chief Police Officer" pointed to a particular officer. The words were clear and free from ambiguity and should receive their natural meaning, outside of all technicalities. The severity of this Ordinance required it to be construed strictly—*Maxwell on Statutes*, Chap. X., p. 345, and where the indispensable foundation for the proceeding fails—in this case the written information of the Chief Police Officer who would naturally be the Inspector-General—jurisdiction failed, and the order of deportation was bad.

Bonser, replied; he contended the words "Chief Police Officer" were used in a distributive sense. As to the words "descriptive of a class" in the last paragraph of Section 3 of the Police Force Ordinance there could be no difficulty as there might be only one person in a class, and he instanced a case of the kind. Supposing, it was said that for a certain offence a man was to be taken to the Chief Police Station, it would not mean he should be taken from Penang to the Chief Police Station at Singapore. The use of the words was a very apt and compendious way of expressing what was meant. It was a recognised term in the various Ordinances he had referred to, and his learned friend could not point to the case of a single Ordinance where the words were used in *his* sense. It suited his purpose here to contend for that sense and that was the sole foundation for his arguments. The words being invariably used in the sense he had pointed out, the *onus* lay on his learned friend to prove they were used in a different sense in the

present Ordinance. If the Legislature meant the Inspector-General, they would have said so plainly as they always did.

FORD, C. J. 1887.

In re TAN TUA KOW.

Ford, C.J. said that it was not for the Court to advert upon the question whether or not it was fitting for the security of aliens that the written information to the Governor in Council should be made by the Inspector-General of Police, or by an Officer of Police of a lower grade. Of course, people could view that question according to their own political ideas. The Court must construe in the best way it could the words which were used in the Ordinance. He must say at the outset that it was a matter of regret that in an Ordinance dealing with a matter of such importance there should be so much ambiguity as to afford so much doubt as to what was meant. He confessed he had much doubt; and it was obvious from the several precedents of orders referred to that others had felt the difficulty he felt in construing the expression "Chief Police Officer." It would have been much more easy [and he thought it was what the draftsman meant] to say "Chief Police Officer *of the Settlement*." It would then have been plain who was meant to give the information to advise the Government—or if he meant the Inspector-General of Police, nothing could have been easier than to say so in so many words. He was at a loss to see why the ambiguous expression was used, unless it was through a somewhat unwise reliance upon the definition of "Chief Police Officer" given in the Police Force Ordinance 1 of 1872. He might probably have had in mind that part of the definitive clause which spoke of "the Officer of highest rank next after the Inspector-General of Police available for duty at any Settlement." If so, he would have been quite safe, but still obscure. But the embarrassment was worse when they came to the last clause. That confined the meaning of the expression in all enactments passed after October 19th, 1871, to such occasions, as it was used "descriptive of a class." As to the construction of the word "class," it would, if taken with literal exactness, refer to a body of more than one only; but he considered the language used not to be so strictly read as to confine him to that construction. As the Attorney-General illustrated, there might be a class of only one. He thought it was the designation of rank rather than number that the draftsman of the Ordinance had in view. If he meant the Inspector-General of Police he could not see why he did not say so. The matter would easily have been remedied by saying the Inspector-General of Police was to give the written information, and who was to give it in his absence. It was not by any means plain to him that because the draftsman used the words "the Chief Police Officer," the Chief Police Officer "of the Settlement" was the same person. He presumed that *that* was the intention in the Ordinance in question. It might or might not be as Counsel for the prisoner wished him to hold that "the Chief Police Officer" meant the Inspector-General of Police, but it did not follow necessarily from the usage of the expression in the Ordinance, and he could only construe the expression from its usage in other Ordinances having a bearing upon the subject. He regretted

FORD, C. J. 1887. — *In re* TAN TUA KOW.

very much the obscurity of the Ordinance, and thought it was one which the Legislature in the public interest should take the earliest opportunity to remove, and so let it be known clearly whether this power of deportation should be exercised upon the written information of the Inspector-General of Police, or one of those subordinates styled "Chief Police Officer." He must discharge the Rule, but owing to the vagueness of the Ordinance he would do so without costs.

Rule discharged.

UNG AH MOI & ORS. *v.* HAMPSHIRE.

PENANG. — PELLEREAU, J. 1887. — October 22.

The plaintiffs had contracted to build certain houses for the defendant and the contract provided *inter alia* [Clauses 2 and 3] that the houses should be completed by a given date, and that if they were not so completed then for each day's delay, they would pay the defendant $3 for each house as liquidated damages. By a further Clause [8] it was provided that if the plaintiffs did not continue to execute and advance the works to the satisfaction of the architect or should delay the same from any other cause than the default of the defendant and should continue such default six days or more after notice in writing thereof given to them under the hand of the architect, then in any of those cases the defendant might if he thought fit determine the contract and in that case all money then due to the plaintiffs and all penalties for non-fulfilment of contract and all materials, &c., should be forfeited to the defendant. By a subsequent Clause [9] it was provided that in case of any breach of the contract on the part of the plaintiffs, it should be lawful for the defendant by writing under his hand to determine the contract without any previous notice to the plaintiffs. The plaintiffs did not complete the houses by the date named, but the defendant consented to allow him twenty days further time by reason of there having been an error in the plans and delay in pointing out the sites of the intended houses. On the evidence the Court held the plaintiffs were entitled to further time for certain alterations in the plans and otherwise. After the date named in the contract for the completion of the houses, but before the expiration of the twenty days given by the defendant and the further time allowed by the Court, the architect gave the plaintiffs notice in writing notifying to them that they were not executing and advancing the works to his satisfaction, and for six days thereafter the plaintiffs still continuing to progress slowly and not to the satisfaction of the architect, the defendant on the date of the expiration of the twenty days' extension given by him, by notice in writing determined the contract and stated that he required the plaintiffs to have forty men a day at work on the buildings. The defendant then proceeded to complete the buildings which cost him more than he would have had to pay the plaintiffs under the contract. The plaintiffs thereupon sued the defendant for wrongfully determining the contract, but the Court found on the evidence it would not have been possible for the plaintiffs, progressing as they had done, to have completed the buildings even within the further time allowed them by the Court. Under the circumstances—

Held, 1stly, Clause 9 did not apply to the case of delay in advancing the works which was specially provided for by Clause 8; but even if it did it could only do so after there was a "breach" of the contract, but there could be no "breach" on the score of delay until the requirements of Section 8 had been complied with.

Held, 2ndly, that if the first part of Clause 8 had stood alone it would have been sufficient for the Court to have before it the certificate of the architect expressing dissatisfaction with the unadvancement of the works, but as it also provided for delay caused otherwise than by the fault of the defendant, which was a provision unclogged with the expression of satisfaction or dissatisfaction by the architect,—and the six days' default after notice applied to both parts—it was necessary that there should be a notice from the architect expressing dissatisfaction, but it was the duty of the Court to determine whether the delay had not been caused by the defendant and whether the notice from the architect was under all the circumstances of the case a reasonable one.

Held, 3rdly, that the Court being satisfied there was no delay on the part of the defendant and the architect's notice was a reasonable one, that the defendant had a right by reason of such extension of time to determine under Clause 8 the contract

after the date named in the contract and *within* the extended time; and the requiring of 40 men to be at work was no waiver of the determination.

Walker v. *L. & N. W. Railway Co.*, 1 L. R. C. P. Div. 518, distinguished.

Held, 4thly, that under the peculiar wording of the whole contract, Clause 8, which provided for the forfeiture of "penalties" on the contract being determined, could only have reference, by the use of the word "penalties" to Clause 3, which was the only clause in the whole contract which provided for a penalty, and as that penalty could only accrue *after* the date named in the contract for completion, Clause 8 itself implied that it could be enforced *after* that date, even independently of the extension of time.

Held, 5thly, that the defendant having determined the contract prior to the expiration of the extended time, he could not at the same time claim the penalty of $3 per house per day, under Clause 3, which only applied to default to complete beyond the given and the extended date; but he was entitled to damages against the plaintiffs for all moneys spent by him in completing the houses according to the contract beyond the amount to be paid to the plaintiffs under the contract.

On appeal this judgment was affirmed.

The nature, facts, and arguments in this case sufficiently appear from the judgment.

The case was heard on the 13th, 14th, 18th, 19th, 20th, 21st October, and on this day,

Thomas, for plaintiff relied on *Walker* v. *L. & N. W. Railway Co.*, 1 L. R. C. P. Div. 518.

Ross, for defendant.

Cur. Adv. Vult.

21st November. *Pellereau*, J. In this matter, Ung Ah Moi and others claim a certain sum from Doctor Hampshire as damages resulting from his having wrongfully determined a contract for work and labour done by them. They say that he was not entitled to determine it and by determining it, he has caused them to sustain a loss to the amount which they claim. On the other hand, he denies that he acted wrongfully and states that he was entitled under his contract to put an end to it, and he enters a counterclaim for two items of damages, one under Clause 3 of the contract for a penalty at the rate of $3 per day, and the other for $1,400 or thereabouts, which he says he had to spend in order to complete the bungalows himself.

The first question which I have to decide concerns the construction to be put upon the contract. There are four clauses in it which are of importance to this case. The Clauses 2 and 3 combined state that—

"The said bungalows with their respective out-buildings shall be completely finished, painted, colour-washed and ready for immediate occupation on or before the 30th day of September next, and if the said bungalows and out-buildings be not completed by the respective dates hereinbefore fixed, then for every day's delay after the said respective dates in the completion of the said bungalows and their respective out-buildings, the said contractors will on demand pay the said Doctor Hampshire as and for liquidated damages, the sum of $3 for each bungalow and its out-buildings."

These two clauses may be read as one for the purposes of the case. The next clause is Clause 8 which reads thus:

"In case the contractors shall not continue to execute and advance the works to the satisfaction of the said architect, or shall delay the same from any other cause than the default of the said Doctor Hampshire and continue

PELLERAU, J. 1887. UNG AH MOI & ORS. v. HAMPSHIRE.

such default six days or more after notice in writing thereof given to them under the hand of the said architect, then and in any of these cases, the said Doctor Hampshire may if he think fit [and without prejudice and in addition to any other remedy he may have in the premises] determine this contract, and in that case all moneys then due to the contractors and all penalties and sums for non-fulfilment of contract, and all materials, buildings, huts, tools, implements, plants and powers provided by the contractors shall be forfeited to, and become the property of, the said Doctor Hampshire."

Clause 9 runs thus:

"In case of any breach of this contract on the part of the contractors, it shall be lawful for the said Doctor Hampshire by writing under his hand to determine the contract without any previous notice to the contractors nor shall they be entitled to any compensation in consequence of such determination."

It is argued by the plaintiffs that Doctor Hampshire determined the contract under Clause 8, and that he had no right to do so. It is answered on the other side that he had the right to do so under this clause, and that if this clause does not apply he had the right to do so under Clause 9. The first point which I am going to decide is whether he can benefit by Clause 9. I have to come to the conclusion upon comparing the two clauses together that Doctor Hampshire has not the right in this case under Clause 9 to determine the contract. True it is, as it is argued for him, the words are "In case of any breach of this contract," but then whether there is a breach of the contract or not is a question which must be determined by the whole agreement read together, now it seems to me that Clause 8 specially provides for the case of the slow advancement of the works and for the cause of delay, and it specially states that in any case of delay or slow advancement there must be a notice sent by the architect six days before, that is, a continuation of the delay during six days and that after that the contract may be determined. Clause 9 is one which does not require any notice at all, it simply states that without any previous notice, Dr. Hampshire can determine the contract. It is evident that these two clauses cannot apply to the same case, for if Clause 9 applies to delay and slow advancement, it would be needless to have required that there should be a notice for the architect and six days' grace, when Clause 9 does not require any notice, but specifically says that without any such previous notice, Dr. Hampshire can determine the contract. It is quite evident that the breach mentioned in Clause 9, is not the same fact as is contemplated and provided for in Clause 8. Besides supposing Clause 9 should apply at all, it would be only in case of a breach. Clause 8 goes to shew that there is a breach in case of delay or slow progress, only when notice has been given by the architect and there has been a continuation of it for six days. Supposing Clause 9 applied, it would be I think as far as the delay in the execution of the work and the non-advancement of the work is concerned, only after the provisions of Clause 8 have been fulfilled—and if these have not been fulfilled, there would not be a breach under Clause 9. I hold therefore that the defendant cannot in this case take the

benefit of Clause 9. Dr. Hampshire must therefore stand or fall by the construction of Clause 8 to which I now come. This clause begins thus: "In case the contractors shall not continue to execute and advance the works to the satisfaction of the architect"—it seems clear to me that the advancement and continuation of the work must be to the satisfaction of the architect; there must be a notice given by the architect expressing his dissatisfaction with the progress of the work and there must be a continuation of the neglect, such as satisfies the architect that for over six days such neglect has existed. If I were to stop there, I should have to rule that it is sufficient that the architect is dissatisfied and the moment he is dissatisfied, as he is, as it were, the arbitrator or referee to whom the case has been entirely left, I should hold it was sufficient for me to have before me a note from the architect expressing dissatisfaction. But there is another part of the same clause connected with the first one, which is not at all clogged by this sufficiency of satisfaction or dissatisfaction—viz., "or shall delay the same from any other cause than the default of the said Dr. Hampshire." Now, this does not at all bear the same restriction as the former and is not expressly left to the satisfaction of the architect. This leads me to infer that it is the duty of this Court to see whether there has been delay other than that caused by the default of Dr. Hampshire; this is no longer left to the mere decision of the architect; and if it is so, as I think it is, I do not see how it is possible for the Court to go into the question of delay without at the same time going into the question of the execution and advancement of the works. If the contractors did not continue to execute and advance the works properly, that is a cause of delay, and as both delay and the non-advancement of the works are to be found in the same clause, where the words "to the satisfaction of the architect," also occur, I have come to the conclusion that it is necessary, before the contract can be determined, for the architect to express his dissatisfaction, but on the other hand that the Court has the right and the duty under this clause to say whether the delay caused by the non-advancement of the works is other than that caused by the default of Dr. Hampshire. I rule therefore that there must be under this clause a notice from the architect expressing his dissatisfaction for six days, but the whole of it subject to the control of the Court which shall be entitled, and whose duty it will be, to decide whether the notice was a reasonable one under the circumstances.

I pass on now to deal with a point raised by Mr. Thomas for the plaintiffs and it was this—that this clause can be enforced only within the period which has been limited by the contract, and cannot apply after the expiration of that time. In regard to this point I must refer back to Clauses 2 and 3 which fixed the period at which the contract should be performed. "The said bungalows with their respective out-buildings shall be completely finished, painted, colour-washed and ready for immediate occupation on or before the 30th day of September next." If I take the words of the contract, it is clear the last day would be the

PELLERAU, J. 1887.

UNG AH MOI & ORS. v. HAMPSHIRE.

30th September. It has been alleged by the plaintiffs and it has not been denied by the other side, that by consent of parties [it is admitted to a certain extent by Dr. Hampshire] extra time was allowed for the completion of the contract. The defendant has admitted that in case of inundation he said he would make allowance for extra time. Again, his Counsel has admitted that there was some delay in the delivery of the designs and also in the marking out of the site, and in fact, Mr. Ross for defendant has admitted that Dr. Hampshire allowed twenty days extra, and it is for that reason that he waited till the 20th October to determine the contract. But it is alleged by Mr. Thomas that a further period should be allowed, that there are other reasons why extra time must be granted, because the contract was deviated from—six pillars had been put up under the houses which were not provided for in the contract, and this must have caused about two days more delay. Of course, as has been admitted by Mr. Ross, this is an increase of work and something must be allowed; there is a Clause 11 in the contract which states that when the architect makes a certificate he shall make allowance for any deviation from the contract—it is as follows: "The architect shall, in making the certificates of the amount and value of work done, take into consideration any deviation, or extra, or additional work done in accordance with this contract, any liquidated damages or other sums to be paid or done by the said contractors, and shall charge or allow for the same accordingly." If there is any deviation, or extra, or additional work done, it stands to reason that the contractors are entitled to some more time. I think therefore with regard to the last mentioned two days that the plaintiffs are entitled to claim them, but there is more than this. There must have been some inundation that prevented the work last year, for it was a rainy year. The contractor who was heard here, Ung Ah Tip, says there was a deal of rain—I do not believe that there was continual rain for so long a period as he says, and that there was for this and other causes delay amounting to three months, but I think there was for all causes more than twenty days. Mr. Ross has admitted twenty days for certain causes and said that he does not allow anything for rainy days or days of inundation in those days. His admissions are these, viz., delay in the delivery of the designs, fourteen days for the basement on account of an error made by the architect, and delay in the marking out of the sites. As to marking of the foundation there were discrepancies in the evidence, but I am satisfied that something like three days should be allowed for the marking out of the sites, three days should be allowed for the non-delivery of designs, fourteen days for the difference in the basement which I consider to be fixed by contract at seven feet and not five feet as alleged by the plaintiffs. That makes up the twenty days, which the defendant thought he should allow, so there is no time at all allowed for the rain and for the pillars and for the dispute about the tiles. I am satisfied that besides the twenty days something should be allowed for the rain and the pillars. As to the bricks I am not at all satisfied that,

as alleged by the plaintiffs, when the bricks were on the jetty there was any delay from the defendant because it was known to the contractors that the bricks had been sent—[as a matter of fact they had been taken from the jetty]—and I find that Dr. Hampshire had procured them in order to help the contractors and not as a departure from his right under the contract, and it was not his duty to bring them to the contractors. As a matter of fact the Police complained to the contractors of their non-removal in time, and I think the bricks remained too long on the jetty by the fault of the contractors. Therefore I do not think any more time should be allowed for bricks. But there was a difficulty with respect to the tiles: the defendant did not at first accept them. But the tiles procured afterwards came from the same shop and as is shewn by the man who came from the shop and whose evidence there is no reason to doubt, the tiles at first rejected were afterwards accepted; the defendant must be responsible therefore for the delay. There are therefore the rain, the pillars and the time allowed for the tiles to be added to the twenty days admitted by the other side. With regard to the walls, the centre walls being diminished, the outer walls heightened, it has been admitted that the plaintiffs can make nothing out of these. It is impossible for me to say with precision what length of time they would be entitled to, beyond the twenty days, I think another twenty days would be a reasonable period to allow them. This would make forty days, and bring the expiration of the contract under its terms to the 9th or 10th November instead of the 30th September. I hold they were entitled up to that time to fulfil their contract. This extra time allowed for additions to the contract is part of the time during which it has to be performed. The contract that was running to the 10th November was not another contract, but simply the same extended with all its incidents. If the plaintiffs on the one hand are entitled to rely on this extension to justify their progress, and say that they were entitled to the 10th November,—they cannot on the other hand by blowing hot and cold, say that the contract expired on the 30th September, for the purpose of Clause 8. Either it expired on the 30th September if they were not entitled to extra time, and then it would be a question whether Clause 8, was enforced when it was too late, or the contract lasted to the 10th November, and surely putting a stop to it under Clause 8, on the 20th October, was to stop it during the period in which it was running. Therefore I come to the conclusion that the contractors had up to the 10th November, and that on the 20th October, when the notice was given, Clause 8, was in force as well as the other incidents of the contract. But to proceed further with regard to Clause 8; supposing it was only to be construed in reference to the 30th September, is its wording such that I must come to the conclusion that it could be enforced only before that time. Mr. Thomas has argued that it was a very stringent clause, and that by virtue of the case of *Walker* v. *The L. & N. W. Railway Company*, it should be enforced only within the time fixed. Now, I have read the contract carefully, and I have come

PELLERAU, J. 1887.

UNG AH MOI & ORS. v. HAMPSHIRE.

to the conclusion that the decision given in the case of Walker is certainly in favour of Mr. Thomas as based on the contract in that case, but all the words of the contract are not given, and I do not exactly know whether that contract was on a par with the one I have to construe. There is however, one fact which distinguishes it from this, viz., that in the contract before that Court, no further time had been granted. In the clauses, similar to Clauses 2 and 3 of this contract, I read the following words:—"the whole of the works are to be entirely completed on or before the 30th August, 1873, and the contractor will be subject to a penalty of £100 a week for every week they remain unfinished." But in this case I have decided that further time was allowed for certain items, and therefore the fixed period of the 30th September, was not the one finally binding on the parties, but subject to prorogation according to circumstances of the case. The English contract is very different, for it is laid down in the authority that there was no extension of time, and though the contract might involve an impossibility, the contractor would be bound to perform it or make compensation for any damages. The architect had in the English case, a right to grant further time and did not do so and therefore the time fixed in spite of any deviation was the 31st August, and therefore the clause, similar to Clause 8, was to be construed in reference to a fixed period which was that day: the Court ruled that the clause must be put into force before the 31st August, or not at all. Is it so in this case? I think not, here the parties admit that the 30th September was not fixed finally, but was subject to prorogation. Dr. Hampshire admits 20 days, and the plaintiffs have claimed for 3 months on account of rain and so on. I have ruled that the contract would go on to November 10th, and it seems to me that Clause 8 remains in force for the whole time that the contract is in force up to the time which according to the extended contract between the parties should be the final day. But there is something else in the clause itself which shews that it contemplates being enforced after the 30th September; it is that defendant "may determine this contract, and in that case all moneys due to the contractors and all penalties and sums for non-fulfilment, and all materials, buildings, &c., shall be forfeited to him." What does that shew? Clause 3 is the only one in which a penalty can be incurred after the 30th September; Clause 2 says that everything shall be finished by that date, the 30th September; but if the contractors delay they shall pay $3 for each bungalow as liquidated damages for each day's delay. It is clear that Clause 8 must have regard to this penalty, the only one mentioned in the contract, and as these penalties for breach of contract are to accrue to Dr. Hampshire, they can necessarily be enforced only after they are due, and they can only be due after the 30th of September, that is after the date fixed for the expiration of the contract. For these reasons I come to the conclusion that Clause 8 of the contract could have been enforced after the 30th September if this were the final date for the completion of the works; but as I have said already, on the facts of the case, I consider that the contract was

extended till the 10th November, therefore both on the construction of the contract and the facts of the case, Dr. Hampshire had a right to take the benefit of Clause 8 at the time he did.

Now comes the question whether he took advantage of it in a proper form. There was a certain notice sent by the architect to the plaintiffs; this notice was dated the 8th of October and reads thus: "Take notice that as the time for the completion of the works contracted to be executed by you for Dr. Hampshire has expired and you have been, and are still, proceeding in the execution of the said contract with an insufficient number of artificers, I now hereby require you to proceed to my satisfaction with the execution and advance of the said works, and that if you fail to do so or continue such default six days or more after the service of this notice on you, your contract will be determined." This was signed by the architect Mr. Scharenguivel. On the 14th October, six days later, Mr. Scharenguivel sent another notice saying that the default had gone on six days, and they had to enforce Clause 8. We have therefore notices which express the dissatisfaction of the referee, and the continuation of that dissatisfaction for six days. After this Dr. Hampshire determined the contract, and I find that he acted in accordance with his contract.

I have further to decide whether by the second notice there has been a waiver of the right accruing under the first notice. Clause 8 says the default is to be for 6 days or more. Is there anything in the notice of the 14th October which may be construed as a waiver of right? I think not; so far from waiving the previous notice he insists on it; he says—I found you negligent and dilatory and I insist on your continuing the work according to the contract. By the contract, negligence must continue six days, and in the notice of the 14th October the architect expresses his dissatisfaction for the period of six days, an expression of opinion which he had to give under the contract. In his evidence he says that that notice was disregarded and that it was then that Dr. Hampshire determined the contract.

Now, was this notice given by him reasonable under the circumstances and one which the slow progress of the work and the contractor's delay justified? I have ruled at the outset that the Court can control the decision of the architect, and I have now to enquire whether that was reasonable. The progress of the work under Clause 8 is to be measured of course not absolutely in regard to the work going on but in regard to the time the contractors had; if they had a long time to go on with their contract, they were entitled to progress more slowly than if they had less time. I have found as a fact that they had till the 10th November to complete the contract and the question now is, whether they could have performed the contract with the workmen they already had, by the 10th November. I have come to the conclusion on the facts of the case that they were progressing too slowly to be able to finish by the 10th of November. Dr. Hampshire took more time than the 10th November to complete the contract; but of course we cannot measure the rapidity of work which the contractors might have done with the slownes of the work done by Dr. Hampshire, therefore I

PELLEREAU, J. 1887.

UNG AH MOI & ORS. v. HAMPSHIRE.

must lay aside as a test the long period taken by him. The architect in his evidence says how long the houses would have taken, and the periods which he mentions in his evidence are the following: No. 1, would take 2½ months, No. 2, would take 2 months, and the other 1½ months. But of course I cannot take 2½ months as the period; some of the artificers having finished in the 1½ months' house, would be able to work at the other houses, and instead of 2½ months very probably less time would be taken for No. 1 than 2½ months. The architect has said that two months would be necessary from the time of the determination of the contract, which would bring us to the 20th December. Now, I have looked at the evidence of Williams and the architect as to the state in which the bungalows were when work ceased and the contract was determined. A great deal remained to be done, not only the roofs and out-houses, but painting and all those fittings which were necessary to make a house tenantable. I have come to the conclusion that by the 10th November progressing as the contractors were at the time when the architect gave them notice, they could not have completed the contract; therefore the notice sent by the architect was a reasonable one under the circumstances, and Dr. Hampshire was fully entitled to determine and complete the contract. It struck me from the amount of work that had to be done, from the amount fixed $10,600, and from expenditure which Dr. Hampshire had to make afterwards, that it was a losing bargain for the contractors and that may perhaps account for the slowness shewn by them, but however strict and severe the contract was, they should have known better, and they were bound to adhere to Clause 8 as undoubtedly in a strict contract it is for the party which is benefitted by it to carry it out liberally and generously if he chooses. I cannot say that Dr. Hampshire has not carried it out liberally and generously. Strict clauses are often introduced, because it may happen that a builder, eager to obtain work, will unwisely offer to carry out any contract work, and therefore these stringent conditions are introduced. But whatever may be said of all this, I rule and find that under the circumstances of the present case, Dr. Hampshire was entitled to determine the contract, and that therefore the plaintiffs are not entitled to claim any damages for wrongfully determining of their contract. On the claim of the plaintiffs, judgment is for the defendant.

Now, as to the counterclaim; that contains two items of damages, the first one is for liquidated damages for the delay in the completion of the four bungalows, a penalty of $3 per day being claimed per bungalow. I do not think the defendant is entitled to this. He put an end to the contract before the 10th November, but the penalty was not incurred until after the time fixed for the completion of the contract, and as the contract had not expired, the penalty was not incurred. Having determined the contract, Doctor Hampshire cannot claim a penalty which was only to run pending the performance of the contract; on this head, judgment must go for the plaintiffs. There remains the indemnity of $1,400. Doctor Hampshire has produced his accounts shewing that he had spent about $12,000, but this point has not

been fully opened; he has been examined on it, and Mr. Thomas has put a few questions on it generally, but the accounts have not been strictly examined, and Mr. Thomas in his reply asks that the accounts should be referred to the Registrar for computation. I am ready to appoint a day for this computation if they insist on it, because I think that the parties did not go fully into this, being under the impression that it would be referred to the Registrar. I shall not refer it to the Registrar on account of the pressure of work in the Registry. If plaintiffs wish the accounts to be computed, I am ready to fix a day to hear the matter. The defendant will be entitled to judgment for any sum he has spent in excess of the $10,600 stipulated in the contract.

23rd April, 1888. Judgment was given for $1,108.87 on the defendant's second counterclaim. Plaintiffs were ordered to pay all costs.

The plaintiffs appealed against this judgment, and the Appeal was now [21st and 22nd August, 1888,] heard before the Full Court of Appeal, consisting of *Ford* C.J., *Wood*, *Pellereau* and *Goldney*, J.J. The notices referred to in the argument and judgments, were as follows:—

EXHIBIT E. 7 A.

To

UNG AH MOI, WONG AH TEK AND UNG AH SEE.

Take notice that as the term for completion of the works contracted to be executed by you for Dr. Hampshire has expired and you have been, and are still, proceeding in the execution of the said contract with great dilatoriness and an insufficient number of artificers, I now require you to proceed to my satisfaction with the execution and advance of the said works, and that if you fail to do so or continue such default six days or more after the service of this notice on you, your contract will be determined.

[*Signed*] SCHARENGUIVEL,
Architect in charge of the Works.

PENANG,
8th October, 1886.

EXHIBIT E. 7.

To

UNG AH MOI, WONG AH TEK AND UNG AH SEE.

I forward you a notice from the Architect in charge of the Works now being executed by you for me, and I hereby give you notice that if you make default in progressing with the said works as therein required, I shall without further notice to you determine the said contract and shall in terms thereof forfeit for my use all sums which may then be due to you and all materials, buildings, huts, tools, implements, and plant which you may have provided and lying on the premises as per terms of contract.

[*Signed*] F. K. HAMPSHIRE.

PENANG,
8th October, 1886.

Delivered to contractor UNG AH MOI, this 8th day of October, 1886, by me.

[*Signed*] F. K. HAMPSHIRE.

FORD, C.J.
WOOD, PELLERAU & GOLDNEY. } J.J.
1888.

UNG AH MOI & ORS. v. HAMPSHIRE.

EXHIBIT E. 6.

To

UNG AH MOI, WONG AH TEK AND UNG AH SEE.

I find you have taken no action to my notice served on you——instant, to employ more artificers to finish the bungalows you have contracted to build. I must insist on your employing at once 40 carpenters and 20 bricklayers daily with their attending labour so as to expedite the work and cause no further delay.

[*Signed*] SCHARENGUIVEL.

PENANG,
14th October, 1886.

Delivered to UNG AH MOI at 7.30 A.M. on 15th of October.

EXHIBIT E. 3.

To

UNG AH MOI, WONG AH TEK AND UNG AH SEE.

Take notice that in pursuance of the powers thereto reserved in your contract with me, dated 1st April, 1886, and in consequence of your wilful default in progressing with the works therein by your contract to be executed, I do hereby determine the said contract.

[*Signed*] F. K. HAMPSHIRE.

PENANG,
20th October, 1886.

Thomas, for appellants contended, that there was not in this case any *agreement* for time; the plaintiffs had gone beyond their time by reason of extra works and the defendant's laches, and the defendants had said he would give further time after September 30th for rain and inundation. There was no *consensus* of minds as to the period or nature of the extension, no more than there was in *Walker* v. *London & N. W. Railway Co.* [suprà]. In that case the plaintiff had exceeded by several months his contract time, he claimed an extension by reason of extra work and the defendants did not only consider the plaintiff entitled thereto, but actually *offered* the plaintiff a year's extension. The parties both there and here were indifferent by mutual consent to the period named in the contract, and yet there it was held too late to determine the contract after the date named therein. If there was an agreement for an extension it was only one the law could infer and that for a reasonable time; but the defendant could not of his own wish suddenly put an end to the contract, for otherwise it would bring about the evil pointed out, and ought to be avoided, in *Walker's Case*, viz., allowing the defendant to be judge in his own cause. It was true the Court below had fixed a time, but that was not the time agreed to by the parties and the Court below admitted the difficulty in so fixing a time. So far from the defendants admitting there was an agreement for time, his Counsel in the Court below had contended that the contract being by deed could not be varied by parol; the evidence of the defendant himself shewed if there was any such agreement that it was limited to rain; it was only towards the end of the trial his Counsel was bound to admit the plaintiffs were entitled to

fourteen extra days for the basement, but even then, not that it was *agreed* to be given, but only the plaintiffs were entitled to the extra days. That was exactly *Walker's Case*. The defendant's notice of October 8th, shewed his idea that the contract terminated on the 30th September and there was no agreement for extension. The case was undistinguishable from *Walker's Case*. Then again, if there was an agreement for an extension it was a new contract and did not carry the incedents of the present contract. Then again, if there was an agreement for an extension, the notice of October 20th was bad as it was prematurely given; if the plaintiffs were entitled to time to November 10th, the defendant could not deprive him of the contract before that date. [*a*.] The notice was also bad as it did not give six days as required by Clause 8. The 2nd notice was served on October 15th and the notice terminating the contract given on October 20th. The first notice of October 8th was waived by the second notice of October 14th. The second notice shifted the reasons from objecting to the plaintiff's work, altered and narrowed the grounds of objection and required 40 men more to be employed on the buildings.

Ross, for the respondent contended, the notice of 14th October did not waive that of the 8th. The 2nd notice was more specific than the first, but in the second the architect "insists" on the first. How then could he be said to have waived it. The question of waiver was also one of fact and had been found by the Court below in his favour. The principle applicable to waiver or renunciation of notices to quit was applicable; and on that principle the second was not a waiver of the first unless clearly shewn or expressed—*Doe* v. *Humphreys*, 2 East 237; *Doe* v. *Steel*, 3 Camp. 116. The defendant had acquired a right under the first notice, and could not be presumed to have given it up—the notices themselves shewed the second was a confirmation of the first. The plaintiffs had next relied on *Walker* v. *London & N. W. Railway Co.*, but that case was distinguishable, 1stly, because it was a special case stated by an arbitrator, of facts found by him [45 L. J. C. P. 787]: and the facts being found and stated, the Court could not draw any inferences of fact as the Court below was here at liberty to do and had done. The arbitrator there had found as a fact no agreement for an extension had been come to, the Court was bound by that finding. Here there were facts shewn in evidence and the Court thereon found there was an agreement for an extension; this Court was bound by that finding. It had been said by the other side that the agreement was for rain only and indefinite in duration, but *quid cestum est, quod certum reddi potest*: the Court below, all things considered, had found a definite period; 2ndly, *Walker's Case* was not well considered as the Judges who decided it took the trouble to distinguish *Roberts* v. *Bury Commissioners*, 4 L. R. C. P. 755, which they need not have done had they looked up the cases, as they would have found it had been reversed on Appeal, 5 L. R. C. P. 310; also as their reasoning as to the construction of their clause corresponding to our Clause 8 was inconsistent with their

[*a*.] See *Mohan* v. *Dundalk Ry. Co.*, 6 L. R. [Ir.] 477.

FORD, C. J. WOOD, PELLEREAU & GOLDNEY, JJ. 1888.

UNG AH MOI & ORS. v. HAMPSHIRE.

reasoning on the preceding clause of their contract, which they admitted applied to a time after as well as before the expiration of the contract [1 L. R. C. P. Div. 522, 530-531]. The *ratio decidendi* of that case was therefore absurd and this Court being a Court of Appeal was not bound by that case which was only the decision of a Divisional Court [*a.*] The ground pointed out in the Court below as to the use in Clause 8 of the word "penalties" which could only have reference to that word in Clause 3 which could only apply after September 30th was also a reason for distinguishing this case from Walker's. There was nothing in the report of that case to shew there were not other clauses in the contract there, which used the word penalty, to which their clause corresponding to our Clause 8 might not have applied. The extension of time carried the provisions of this contract with it, including Clause 8—*Bury Commissioners' Case*, 5 L. R. C. P. Div. 318, 19. But if there was no agreement for an extension, and Clause 8 did not apply on the authority of *Walker's Case*, then Clause 9 which was clear and unambiguous applied, and the defendant had authority to determine the contract by reason of the plaintiffs' breach.

Thomas, in reply contended, as to the use of the word "penalties" in Clause 8, the case was identical with Walker's as it was limited to penalties for "non-fulfilment of contract" and not penalties generally. As to the notice the test was, if the workmen had been employed by the plaintiffs under it, was not the defendant *bound* to let them go on? If so, the first notice was at an end. The defendant had not given the plaintiffs their full time to see if they would employ the men, as he determined the contract on the fifth day. *Walker's Case* could not be distinguished; there was no more "agreement" here for an extension than there was then: in both cases the parties had gone beyond the time, but not by *agreement*.

Cur. Adv. Vult.

August 23rd. *Ford*, C.J. I agree with the decision of the Court below and for the reasons therein given. I had for some time difficulties [1] on the effect of the notice of the 14th October [served on the 15th] and [2] with the bearing which *Walker* v. *The L. & N. W. R. Company* had on the case. I think however, in addition to what has been said on this subject by the Court below that the notice of the 14th may fairly be said to have operated only as a prolongation of the time necessary before determining the contract under the notice of the 8th,—a prolongation of the time until the carpenters and workmen were supplied—but terminable at any time the defendant had reasonable ground to think these could not be forthcoming. He certainly had such reasonable ground by the 20th, the date when he puts a termination to the contract.

The case of *Walker* v. *L. & N. W. R. Company* is I think certainly distinguishable in this, that there was in that case no

[*a.*] Walker *v.* L. & N. W. Ry. Co. was affirmed on appeal—See 36 L. T. [N. S.] 53, 58 note.

definite understanding as to an extension of time. In this case there was clearly such an understanding, and in some particulars, *e.g.*, that for wet weather and 14 days for other matters, a good parol agreement. Had there been a definite agreement for an extension in *Walker's Case*, I apprehend the decision of the Court would have been the reverse of that which it was, although the language of the judgment is perhaps open to exception. The Court seems there certainly to have overlooked the effect of the double set of clauses, one having reference to breaches before and the other to those after the expiration of the day for completion of the contract; and there is, I think, some ambiguity in the summary of facts, and the reasoning based on them. I apprehend, however, that the Court would have come to a decision contrary to that which it did, if there had been, as in this case, an arrangement for extension on some definite basis—that in such case the contract would have gone on with all its other incidents. I do not certainly understand the Judges in *Walker's Case* to have held that an extension of time vitiates any other part of the contract than that with which such extension has connection; and I do not see any sound reason for holding that such extension should vitiate the terms of a contract as to proper progress being made. This can be made during the original and extended time; and even could the extension of time operate to create a new contract, generally such a condition would be an implied term of it. I am, however, of opinion that the extension of time varies the original contract only in that particular, and in incidentals dependent upon such extension. Such rate of progress as the architect shall think proper is not, I think, one of such incidentals.

Wood, J. In this case two difficulties have presented themselves to my mind, the question of notice and the authority of the case of *Walker* v. *The L. & N. W. Railway Co.* with which questions I now proceed to deal.

The first notice of the 8th October I consider good, for it is expressed fairly in the terms mentioned in the agreement; but then it becomes a question whether the 2nd notice, if notice it can be called, of October 14th delivered on Octoher 15th, five days and not six, before the notice putting an end to the contract is or is not a waiver of the first notice. This I take to be a matter of fact and of law. The facts have been found by the Court below in favour of the defendant, and the only law in the matter is the construction of the meaning of this 2nd notice. This 2nd notice is given, not by Dr. Hampshire, but by the architect, and does not necessarily bind the defendant unless he was cognizant of it at the time it was given, and of this there is no evidence. While looking at the terms of this 2nd notice, it by no means follows that it was in terms a waiver of the first notice, but rather the reverse—[Exhibit E. 6 read]. The language of this letter which does not purport to be a notice at all, I look upon as consistent with the fact that no waiver was intended.

The case of *Walker* v. *L. & N. W. Railway Co.* is apparently a case which does not favour the defendant, but I think it is

FORD, C.J. WOOD, PELLERAU & GOLDNEY. J.J. 1888.

UNG AH MOI & ORS. v. HAMPSHIRE.

fairly distinguishable from this case for the reason given in the judgment of His Honour the Chief Justice Here, as I apprehend the facts of the case shew that although the original contract was under seal, yet the parties have from the first agreed to waive the completion of the works on the 30th September. At first by an absolute pledge on the part of Dr. Hampshire to allow time for rainy weather aud incidentally by the imposition of fresh work to which the plaintiffs make no objection. I understand them to have varied the contract as to the time of completion, but to have acted on the terms of the contract in all other particulars, and the contract is finally determined by Dr. Hampshire consistently with the provisions of Clause 8 of the original contract. If the case of *Walker* v. *L. & N. W. Railway Co.* is opposed to this view, I am sorry to be obliged to express an opinion contrary to its authority [*a*]. I fail to see how in that case time could have been considered as the essence of the contract when the parties had agreed to waive it—but at least so far as the facts of this case are concerned I think it abundantly clear that the parties had not only waived, but actually come to an understanding by which the time for the completion of the contract was to be extended under certain circumstances, but consenting to follow its provisions in all other particulars.

Pellereau, J. I am confirmed in the view I took of this case in the Court below. I think it is clearly shewn from the facts that there was an extension of time agreed upon. After the 30th September, it was not a different but the same contract unmodified in any respect except the date for completion. In fact, what was the contract going on? The same contract of course, though the circumstances shew it had been modified as to time. I am bound to come to the conclusion that except as to the time, the contract was in force with all its incidents including Clause 8. That clause I consider was in force up to the final period agreed upon—not the 30th September, but the deferred period, the 10th November. Then with regard to the second notice being a waiver of the first, Dr. Hampshire encloses in his letter Scharenguivel's first notice. By that notice he had acquired a right. Has he done anything from which it may be fairly argued he had renounced his right? Such renunciation must be proved, it is not to be lightly presumed. I find nothing on the facts that shews a renunciation. On the contrary, Scharenguivel by his second notice insists on the first notice and Dr. Hampshire adopts his acts. I can see no reason why the second notice should be considered a waiver of the first. I am, as I said, confirmed in my view, and in my opinion the judgment should be affirmed.

Goldney, J. I concur in the judgment delivered by the Chief Justice.

Judgment affirmed. Appeal dismissed with costs. [*b*.]

[*a*.] See note [*a*.] antè p. 308.

[*b*.] Leave was given to the plaintiffs to appeal to Her Majesty in Her Privy Council, but the appeal was not prosecuted.—J. W. N. K.

ISMAIL BIN SAVOOSAH *v.* MADINASAH MERICAN & ANOR.

SINGAPORE.

FORD, C. J. 1887.

November 1.

The words "cause of action arose" in the Limitation Act 14 of 1859 imply that there must be a person *in esse* capable of suing before the Act can begin to run.

Where therefore a person takes possession of land *after* the death of the rightful owner and holds the same for *over* twelve years he acquires *no* title under Section 1, Clause 12 of the Act if administration has *not* been taken out, and the Act only begins to run in such a case from the date of the grant of such administration.

The rule is the same in this respect as to pure personalty and chattels real; but such land even in the hands of the person so in possession is of the nature of chattels real under Act XX. of 1837, and the administration of the rightful owner may maintain ejectment for it at any time *within* twelve years of the *grant* of administration.

The Statute 3 & 4 Wm. IV. c. 27, Section 6, has no application to such a case as it is covered by the language of Section 1, Clause 12 of the aforesaid Act 14 of 1859.

Jemalah v. *Mahomed Ali & ors.* 1 Kyshe, 386, over-ruled

The passage and Indian decisions cited in *Thompson on Limitation* [2nd Ed.] 150, to the effect that the plaintiff must shew actual possession within twelve years have no authority here inasmuch as they rest on the provisions of the Procedure Act 8 of 1859, Sections 32, 525, Clause 4, and such Act [Section 385], is expressly confined to Bombay, Bengal and Madras, and is not in force in this Colony.

Those decisions are also no authorities here on the words "cause of action arose," in the Limitation Act 14 of 1859, but the English authorities on Statute 21, Jas. I c. 16, and the old law of Limitation prior to 3 & 4 Wm. IV. c. 27, are.

Query. [*Per Wood*, J.] Whether the rule in England in respect to the Court not acting on the uncorroborated, but uncontradicted statement of a living claimant against the estate of a deceased person is so general, fixed, and inflexible as declared by *Jessel*, M. R. and *Baggallay*, L. J. in *re* Finch, 23 L. R. Ch. Div. 267 ?

Appeal from the judgment of *Ford*, C.J. in favour of the defendant in an action of ejectment. The plaintiff was the administrator of one Noorsah deceased, who at the time of his death was the owner of the lands sought to be recovered in the action. The defendants, the administrators of Syed Merican deceased, were in possession of the land. Under the statutory plea [Section 165, Civil Procedure Ordinance 5 of 1878] of possession, they claimed to set up a title to the land by reason of their own and Syed Merican's continuous possession for a period of time *exceeding* twelve years—in other words that by the operation of the Statute of Limitations, they had acquired a title and the plaintiff had lost his and was barred. The Court below decided in favour of the defendant and from that judgment the plaintiff appealed. The ground of appeal was that the Statute of Limitations did *not* commence to run against the plaintiff's right, *until* and *from* the date of his obtaining from the Court, Letters of Administration. The Court below following the Law of Limitations as it is in England, held that the Statute commenced to run from the date of the intestate's death. No question was raised in this Court as to whether the possession of the defendants under the circumstances of the case was fiduciary or non-adverse. The Court below had found as a fact that the defendant's possession commenced *after* the death of one Inche Bissy the original administrator of the intestate Noorsah deceased. This Court, in the course of the arguments intimated its concurrence with that finding.

The Appeal now came on to be heard before a Full Bench, consisting of *Ford*, C.J., *Wood*, *Pellereau* and *Goldney*, J.J.

FORD, C.J. WOOD, PELLERAU & GOLDNEY. J.J. 1887.

The facts, arguments, and authorities cited so far as is material, are mentioned in the judgments of the learned Judges.

Bonser, [*Attorney-General*] for the appellant.

Davidson, for the respondents.

Cur. Adv. Vult.

ISMAIL BIN SAVOOSAH *v.* MADINASAH MERICAN & ANOR.

November 7th. *Ford*, C.J. The facts of the case are so concisely set out in the judgment of the Court below, and the finding of that Court upon them having been affirmed during the hearing by this Court, that I need not refer to them again. But upon the question of the law which has been argued at such great, but not, I think, unnecessary length, I do not think myself justified in dissenting from the unanimous decision of my colleagues, which is, that my decision in the Court below was erroneous. I should feel less justified in doing so even had I stronger doubts than I have on the question after the admission of that Court of the difficulty of the question submitted to it and the strength of the authorities and arguments brought before us altogether upon somewhat different lines from those taken in the Court below. I give, I confess, my concurrence in this decision with reluctance, because of the great inconveniences which may arise from it, and because I have no doubt the law ought to be that which it *now* is both in England and in India, and I concur in the hope about to be expressed by my brother, Mr. Justice WOOD that the Legislature at an early date will so render it.

All my brother Judges are of opinion, that the words in Clause 12 of Section 1 of the Indian Limitation Act 14 of 1859, still in force in this Colony, when construed in the light of the English authorities [and there is no contrary decision in the Indian Courts] cover the case of an administration of chattels real, and that having by the language used so covered it, no question arises as to the application of the 3 & 4 Wm. IV, c. 27, Section 6, either substantively or by way of analogy. In this view of the effect of those authorities I am bound to concur, although of opinion that the provisions of the Act of 1859, have covered the case of an administration of chattels real, rather by force of language previously somewhat loosely construed in the English Courts than by force of mental intention. The language of the Indian Act, Clause 12, Section 1, is that the period of limitation to suits for the recovery of immoveable property, or of any interest in immoveable property to which no other provision of this Act applies, is the period of twelve years from that time in which the *cause of action arose*, and the authorities which I have collected in the following brackets, without drawing any distinction between pure personalty and chattels real [*Douglas* v. *Forrest* 4 Bing. Rep. 686, 704; *Murray* v. *E. I. Co.* 5 B. & Ald. 204; *Saffiqu* v. *Adams*, Cro. Jac. 61; *Cary* v. *Stephenson*, 2 Salk 420; *Pratt* v. *Swaine*, 8 B. & C. 285; *Perry* v. *Jenkins*, 1 M. & C. 116] have determined that such words as "cause of action" [Statute 21 of James I. c. 16] "cause of action accruing," [form of plea in *Murray* v. *E. I. Co.*] and other words of a similar nature such as "right of action accruing" when used *in pari materia* alike imply that

there must be a person *in esse* capable of suing before the Statute can begin to run—[*Douglas* v. *Forrest*, 4 Bing. 686, 704]. With reference to those cases cited in Mr. Thompson's book on the Indian Statute ruling that the plaintiff must shew actual dispossession within twelve years, this obligation seems to rest on the provisions of a Procedure Act VIII. of 1859, Sections 32 & 525, Sub-section 4, an Act expressly [Section 385] confined to Regulations in Bombay, Bengal and Madras, not in force in this Colony, and are not, I think therefore, decisions as to the construction of the words "cause of action arose." One of these cases indeed, *Bhiloo Mundul and others*, defendants [appellants] v. *Mootu Jall Ghose Mundul*, plaintiff, [respondent] 9 W. R. 252, does seem to draw a distinction between the date on which the plaintiff's "right to sue accrued," and that from which the "cause of action arose" and the distinction is confused from using the expression "cause of action accrued" as synonymous with "cause of action arose." I am compelled therefore upon the English authorities of construction, to concur in the reversal of the decision of the Court below.

The contention of the respondent that this property remained in the nature of freehold in the hands of a possessing owner, and that therefore the Statute would run as in the case of an heir, is, I think disposed of by the language of the Indian Act of 1837 which makes land devolve on executors and administrators as chattels real for purposes of distribution.

Wood, J. In this case referring to the judgment of the Court below, it is found as a fact upon the evidence given by the plaintiff that the defendant entered into possession of the land in question after the death of Inche Bissy, and upon this it is contended on behalf of the defendant, on the authority of *In re* Finch, 23 L. R. Ch. Div. 267, that it is a Rule of Law that a claim upon the estate of a deceased person by a living one cannot be sustained upon the undisputed testimony of the claimant. This rule is certainly propounded in explicit terms by *Jessel*, M. R. and by *Baggallay*, L. J., and in somewhat modified terms by *Lindley*, L. J.

Jessel, M. R., p. 271, says:

"I cannot find that anybody ever laid it down that the law or the doctrine that a claim against a dead man's estate should be supported by something more than the uncorroborated testimony of the claimant, is confined to gifts. It is the first time I ever learned such a doctrine as this.....I have heard it decided over and over again in reference to the payment of a debt, and it is a rule of prudence that sitting as a Jury *we do not give evidence* to the unsupported testimony of the claimant with a view no doubt of preventing perjury, and with a view of protecting a dead man's estate from unfounded claims. It is not a rule of law, but it is a question to be decided by a Jury, although the Judge *must* recommend the Jury *not to trust* the uncorroborated evidence; but still, if they had, I do not know that any one could interfere with their verdict—but *where we are sitting here as a Jury*, we apply that rule to ourselves."

Baggallay, L. J., p. 274:

"The circumstances of the case appear to me to afford a very good illustration of the value of the rule recognised by our Courts in administer-

FORD, C.J. WOOD, PELLEREAU & GOLDNEY. J.J. 1857.

ISMAIL BIN SAVOOSAH v. MADINASAH MERICAN & ANOR.

ing the estate of a deceased person, namely, *not to allow against that estate any claim which is supported only by the parol testimony of the claimant*, without any corroborative evidence whatever."

Lindley, L. J., p. 766, says:

"This is a claim made by a living person against the estate of a person who is dead. It is a rule—and it is a sensible rule—to require, before giving weight to the testimony of the living claimant, that such testimony should be corroborated in some way or another. If this case had been tried before a Jury and the Jury had found in favour of the claimant, I am not prepared to say that there would be any principle of law to enable us to set aside the verdict; but when we have not had the advantage of having 12 men in the box, *the ordinary practice* of the Court is to be *very reluctant* to give effect to the uncorroborated statement of anybody as against the estate of a deceased person."

Whether or no this rule can be taken to hold good in the general terms above quoted I think it hardly necessary to consider, inasmuch as when applied to the circumstances of this case, the assertion of the plaintiff cannot as it appears to me, be held to be uncorroborated. This is a claim in respect of land and if the defendants claim, as I understand they do, to have been in possession by virtue of some sale to their intestate from Noorsah, inasmuch as deeds of sale would necessarily exist when the ownership of land has passed from one person to another, the absence of such deeds is, in my judgment, such corroboration as may be held to take the case out of the rule above extracted from the judgment of the Court in the case of *In re* Finch, even supposing the rule to be so fixed and so inflexible as therein propounded by *Jessel*, M. R. and *Baggallay*, L. J., of the soundness of which I trust I may not be presuming too far when I say that I entertain considerable doubt—a doubt which would preclude the extension of the rule to circumstances, as in this case, so different from the circumstances in *In re* Finch—and in particular where, as in this case, the rule is applied to land and not to a title to goods; and I may add that there is in the case a technical, if not a substantial corroboration in the evidence, of an attempted but not a completed sale of the land in question. The only other point which is in my judgment, material, is that which has been argued at such great length in the case, viz., whether in an action by an administrator for the recovery of land in this Colony,—where, by the Indian Act 20 of 1837, all immoveable property is declared so far as regards transmission on the death of any person, to be of the nature of chattels real and not of freehold,—the Statute of Limitations [applicable here by the Indian Act 14 of 1859] begins to run from the time of the grant of the Letters of Administration, and not from the time of the possession of the land by the defendant, assuming it to be a dispossession in the ordinary sense of the word, and without regard to the special character of the possession alleged by the plaintiff in his evidence, upon the simple ground that for want of a person capable of suing no cause of action can arise.

Upon this point I consider myself bound by the authority of *Murray* v. *E. I. Co.*, 5 B. & Ald. 204, which I understand to be

FORD, C.J. WOOD, PELLEREAU & GOLDNEY. J.J. 1887.

ISMAIL BIN SAVOOSAH v. MADINASAH MERICAN & ANOR.

undisputed law up to the present day with respect to chattels, not chattels real, and with respect to chattels real up to the time of the passing of 3 & 4 Wm. IV. c. 27. By this Act, Section 6, the law is reversed with respect to chattels real in England, so that the period of limitations runs from the death and not from the grant of Letters of Administration, but no similar law has ever been enacted so as to have effect in this Colony, and the language of Sub-section 12 of the Indian Limitation Act 14 of 1859, being similar—to use the words of *Abbot* J., 4 B. & Ald. 215—"notwithstanding any slight variation in phrase, the object and intention being the same"—to those of the Act referred to in that judgment, we are I think, bound by the decision in that case.

It is with much regret, bearing in view the inconveniences which will probably result from our decision, that I am obliged to hold that we can neither import into the case the Act of 3 & 4 Wm. IV. c. 27, Section 6, nor decide in analogy with its provisions, except with respect to what has been called in the Colony the "Ecclesiastical" jurisdiction of the Court and the obligation to exercise it with due regard to the religious opinions and customs of the native races, which is the subject of special mention in the Charters referred to. I have always considered that this Court is bound by the law of the Colony, and that however, we may consider that law to be defective, or even mischievous in its consequences [unless indeed that mischief be in extreme cases productive of such grievous wrong as to be practically inapplicable] our mere sense of the law being unsuitable and inconvenient, and our desire to improve it cannot justify any forced modification of such law. In this case I can see no such grave reason as would make the law which prevailed in England in 1821 productive of such injustice as to justify any deviation from it. The law of the Colony, I take to be the law of England as imported into this Colony by the Charter of 1827, [though even as to this date some doubts may not unreasonably be entertained] modified by the Indian Acts passed since the period of the introduction of the English law, and having reference to this Colony—and by the Ordinances of the Colony of the Straits Settlements—and by English Statute Law in terms, or by reasonable inference, applicable to this Colony, and that the expressions in the various Charters and Ordinances which make it incumbent upon the Court to administer the law so as to secure justice and right, give us no power either to apply new English or any other law to any case which occurs in our Courts or to decide in analogy with it. Many points were raised in the arguments before us, but as the considerations above detailed are, as it seems to me, sufficient for the right determination of the case before us, I do not enter upon them, but I should say in reference to the rule propounded in the Indian cases cited before us, that when an ejectment is brought founded on a dispossession by the defendant, the plaintiff is bound to shew that such dispossession took place within 12 years of the commencement of the action, such cases, arising as they do under Rules of Procedure and by an Act of the Indian Legislature not in force here, have no application to this case.

FORD, C.J. WOOD, PELLEREAU & GOLDNEY. J.J. 1887.

ISMAIL BIN SAVOOSAH v. MADINASAH MERICAN & ANOR.

Another matter to which I desire to refer is, that looking at the nature of land in this Colony which is for purposes of transmission on the death of any person of the nature of chattels real, there can I apprehend, be no doubt that for the purpose of such transmission—or in other words the devolution and distribution of property on the death of any person—the practice of the Colony that the personal representative is the person to collect and recover land, as being in accordance with the law of England as regards chattels real, is so far sound, nor can I see that lands of another person can for the purposes of this suit which is a suit for purposes of ultimate distribution to the next-of-kin, be looked upon as other than chattels real in the hands of the defendants. As the question of the nature of the possession by defendants, whether adverse or not, has not been raised before us, I of course say nothing, though fully agreeing with the language of the Chief Justice as expressed in his judgment that "the circumstances of relationship and dealing between the plaintiff and Syed Merican," alleged by the plaintiff, might perhaps entitle him to some relief against the latter's acts in relation to the property, were that point raised before us. As a practical result flowing from the consideration of this case I may be allowed, speaking only for myself individually, to express a hope that the Legislature may be induced to pass an Ordinance in accordance with the provisions of 3 & 4 Wm. IV., c. 27, Section 6; possibly also another declaring at what exact period of time the law of England was first introduced into this Colony, and, in general, to bear in mind the advisability of enacting in this Colony by specific Ordinances, such modern legislation as tends to modify and improve the existing law in those matters in which for want of uniformity, inconveniences may arise.

Goldney, J. read the joint judgment of himself and *Pellereau*, J. [After stating the facts as above, his Lordship continued.] The only question for the Court to determine, is whether the Statute of Limitations commences to run from the date of the grant by the Court, of Letters of Administration to the plaintiff, or before. We need not go into the question of what power the Courts of this Colony have under the Charters of modifying the law of England when applicable to this Colony, so as to adopt it to local circumstances and institutions. The Statute of Limitations in force in this Colony is the Indian Act No. 14 of 1859. At the time of the passing of that Act, the Governor-General of India in Council was the duly constituted Legislative body of this Colony, and this Act, in terms, applies to this Colony. The case before us comes within Section 1, Sub-section 12, of this Act. The question whether the Statute commences to run from the date of the death or from the date of the Letters of Administration depends upon the construction to be put upon this section.

Upon the authority of the cases decided under the Limitation Act of James I, we hold that the Statute of Limitations in the case of an administrator in this Colony, commences to run only when there is a person in existence capable of suing, and therefore that the cause of action arises in the case when the Letters

of Administration are taken out. As in this case a sufficient number of years have not run from the date of the grant by the Court of the Letters of Administration to the plaintiff to enable the defendants to set up the Statute of Limitations as a defence, the appellant is entitled to possession. We further think that the Indian authorities quoted by the respondent cannot apply to this case and to this Colony. Therefore the decision of the Court below must be reversed.

Judgment of the Court below reversed with costs.

FORD, C. J. WOOD, PELLERAU & GOLDNEY, J.J. 1887.

ISMAIL BIN SAVOOSAH v. MADINASAH MERICAN & ANOR.

REGINA *v.* TEO AH HOO.

All witnesses called before the Magistrate on behalf of the prosecution should as a general rule be called for the prosecution in the trial at the Assizes, but the prosecuting Counsel has a discretion in the matter and the Court will not interfere with such discretion.

In future however, in all cases in which the prosecuting Counsel in exercise of his discretion omits to call such a witness, the witness should be produced in Court and the Counsel for the defence might, if he think proper, call him as his own witness. If he so call the witness, such witness will be subject to cross-examination by the Counsel for the prosecution in the same way as any other witness called for the defence.

SINGAPORE.

FORD, C. J. WOOD, PELLERAU & GOLDNEY, J.J. 1887.

November 3.

Case reserved by *Ford*, C.J., under Section 11 of the Appeals Ordinance 12 of 1879.

1. "At the trial of one Teo Ah Hoo at the Assizes held at Singapore in January, 1887,-the prosecution called and produced a witness whose name was on the back of the indictment, but did not have him sworn or examine him, and

2. The Counsel for prisoner at prisoner's request had the witness sworn and examined him.

3. At the close of such examination the Counsel for the prosecution contended that the prisoner had made such witness his witness, and he was liable to cross-examination and re-examination in the usual course.

4. The Counsel for prisoner contended that if no reasonable notice is given of the prosecutor's intention not to call a witness in the indictment, prosecutor is bound to have witness in Court and the prisoner can cause him to be sworn and cross-examine him subject to prosecutor's right of re-examination only.

5. The Court held the latter the more customary practice.

The question for a Full Bench of Judges is "What is the proper practice under the statement of facts set forth in paragraphs 1 and 2?"

The case now came on for hearing before the Full Court of Appeal, consisting of *Ford*, C.J., *Wood*, *Pellereau*, and *Goldney*, J.J.

Bonser, [*Attorney-General*] said this was not a contentious matter. He desired that a Rule of Practice might be laid down and followed uniformly throughout the Settlements, and for the guidance of the Court he would refer them to the English Cases and Text Books. This Court however, was not bound by the English law. It could make rules for its own guidance. He then cited *Rex* v. *Woodhead*, 2 C. & K. 520; *Regina* v. *Edwards*, 3 Cox C. C. 82; *Regina* v. *Cassidy*, 1 F. & F. 79; 3 Russell on Crimes, 562 [7th Ed.]; Roscoe's Crim. Ev. 139, and Archbold's Pl. & Evid. 345. These Cases and Text Books he contended,

FORD, C. J. WOOD, PELLERAU & GOLDNEY. J.J. 1887.

REGINA v. TEO AH HOO.

shewed that it was fully settled Counsel were not bound to put in the box every witness whose name appeared on the back of the bill.

Groom, for the prisoner said, the case of *Regina* v. *Woodhead*, was considered and not followed in *Regina* v. *Barley*, 2 Cox C. C. 191; and the authority of *Regina* v. *Edwards*, was not recognised in the later case of *Queen* v. *Farrell*, 3 Cox C. C. 139. Cases quoted and Text Books referred to confined themselves to stating that all witnesses or every witness need not be called merely because their names were on the bill. The names must be there properly, the Rule of Practice, perhaps, did not refer to names put on the bill after prisoner's committal, but he contended that every witness whose deposition had been taken by a Magistrate at the instance of the prosecution and bound over to give evidence, must be put in the witness box as a witness for the prosecution, or that in any event the prisoner was entitled to cross-examine. He referred to *Regina* v. *Carpenter*, 1 Cox C. C. 72; *Regina* v. *Barley*, 2 Cox C. C. 191; *Regina* v. *Holden*, 8 C. & P. 606; *Rex* v. *Simmonds*, 1 C. & P. 84; *Regina* v. *Bull*, 9 C. & P. 22; *Regina* v. *Chapman*. 8 C. & P. 558; *Rex* v. *Bodle*, 6 C. & P. 186; *Rex* v. *Beezley*, 4 C. & P. 220; *Rex* v. *Harris & Woods*, 7 C. & P. 582. These and numerous other cases he contended would shew the Rule of Practice for many years, and it was the same now wherever the Criminal Law was administered. If the prisoner had once the right of cross-examination during any stage of a judicial proceeding, it could not be taken from him even if he called prisoner's witness,—*per* Lord KENYON in *Dickinson* v. *Shee*, 4 Esp. 67. An investigation directed by law preliminary to a proceeding before a Court of Justice was said, in Explanation 2 of Section 193, Penal Code, to be a stage in a judicial proceeding, a stage really of the trial. The Magistrate committed on the evidence before him,—the charge was framed by the Registrar on that evidence. Was not the prisoner to be allowed to cross-examine the witnesses on whose evidence he was charged? The authorities cited, he contended, would be sufficient to shew the practice.

Bonser, replied, contending that the result of all the cases cited was to shew that before 1847 the Law and Practice was unsettled, but that since then it had been fully settled in the way contended for by himself.

Ford, C.J., said, the learned Judges were unanimously of opinion that the usual practice should be that all witnesses called before the Magistrate on behalf of the prosecution, should be called for the prosecution on the trial at the Supreme Court. At the same time there might be cases in which the prosecuting Counsel might, in his discretion think it was conducive to the interests of justice not to call a particular witness, and in these cases the Court would not interfere with his discretion, but the witness should be produced in Court so that the Counsel for the defence might call him if he thought proper, as his own witness. The witness, if called by the Counsel for the defence, would be subject to cross-examination by the Counsel for the prosecution in the same way as any other witness for the defence.

QUAIK SIEW SOON *v.* WEE KIM GUAN.

SINGAPORE.

GOLDNEY, J. 1887.

November 7.

An agent under a power of attorney whose power gives him no authority to use his principal's name and credit in financial transactions has no authority to bind his principal though he assumes to act under the power and puts his principal's *chop* on the Note, Bill, or Document he gives.

Query. What if it is shewn that the money was borrowed and used for the purpose of the principal's business, or for his benefit?

There can be no ratification by a principal of the act of his agent, who in doing the act exceeds his authority, until it can be shewn that the principal in doing the act which is relied on as the ratification, acted with full knowledge of the nature of the act committed by his agent and with an intention to adopt that act at all events.

Freeman v. *Rosher*, 13 Q. B. 780, followed.

A "material fact" is one which if communicated to the other of the parties would induce him either to refrain altogether from the contract, or not to enter into it on the same terms: this definition applies equally to the doctrine of subsequent ratification as it does to the Law of Insurance.

The nature, facts, and arguments in this case sufficiently appear from the judgment.

Davidson, [*Koek* with him] for the plaintiff.

Bonser, [*Attorney-General*] and *Drew* for the defendant.

Cur. Adv. Vult.

Goldney, J. This was an action brought upon three Promissory-notes for $500, $1,500 and $2,500, respectively. In November, 1884, the defendant who is a trader carrying on business in Singapore, went to China intending to stay there some 3 years. During his absence he left his business in the charge of his son giving him a power of attorney to carry on the business. This power of attorney is dated the 15th November, 1884. During the defendant's absence his son had several monetary transactions with the plaintiff who is a money-lender. The notes, the subject of this action, arise out of these monetary transactions. The defendant's son assuming to act under his power of attorney, put the defendant's *chop* and his own *chop* on these notes. In all the money transactions with the plaintiff the son adopted this course. On the defendant's return from China, the son absconded leaving the defendant's business in difficulties. The defendant denies his liability upon these notes on the ground that his son, his agent, in putting the defendant's *chop* upon them exceeded his authority.

The plaintiff on the other hand maintains that the defendant's agent in putting the defendant's *chop* on these notes, was acting within authority conferred upon him by the power of attorney of the 15th November, 1884; and 2nd, that even if the agent exceeded his authority, the defendant has subsequently ratified and adopted the acts of his agent, and so is bound by them.

To deal with the 2nd point first, the facts upon which the plaintiff relies to prove ratification are disputed by the defendant. The plaintiff says that immediately after the defendant's return from China, first, his son, and then the plaintiff himself went to see the defendant in reference to the notes, the subject-matter to this action. That on both of these occasions the defendant acknowledged his liability and promised to pay the notes. The defendant on the other hand denies *in toto* that any such interview

GOLDNEY, J. 1887.

QUAIK SIEW SOON v. WEE KIM GUAN.

ever took place, or that he ever acknowledged his liability upon the notes. It will not be necessary for me to find which is in the right on this particular issue, as the plaintiff has failed to prove what may be said to be a condition precedent to a successful setting up of a subsequent ratification by a principal of an act done by his agent in excess of the limits of his authority. That is the plaintiff has failed to shew that at the time of the alleged ratification the principal was acting with full knowledge of the nature of the act committed by his agent, and with an intention to adopt that act at all events. *Freeman* v. *Rosher*, 13 Q. B. 780.

It was admitted by the plaintiff that neither before nor at the time of the alleged ratification had he informed the defendant that there were other notes for a large amount outstanding [in addition to the notes sued on] upon which his *chop* had been placed by his agent, nor did he inform the defendant of the other monetary transactions which his agent had had with him in connection with Keng Swee's affairs. The plaintiff in fact, at the time that the alleged ratification took place, concealed or suppressed or neglected to communicate to the defendant a material fact within his knowledge which the defendant had not the means of knowing and could not be presumed to know. The definition of a material fact is given in Arnould on Marine Insurance [6th Ed. p. 548], a definition which I think applies equally to the doctrine of subsequent ratification as it does to the Law of Insurance. It is as follows: "A material fact is one which if communicated to the other of the parties would induce him either to refrain altogether from the contract, or not to enter into it on the same terms." If the defendant's agent in putting the defendant's *chop* on the various Promissory-notes which, from time to time, passed between him and the plaintiff did exceed the limits of his authority, the fact whether or not the three notes presented by the plaintiff to the defendant were the only three instances in which the agent had exceeded his authority would most materially affect the judgment of the defendant in considering whether he would ratify the act done by his agent. It must not be forgotten that a subsequent ratification of an act done in the name of the party who ratifies it is tantamount to a prior command and has relation back to the time of the act done and is in point of law a command. The effect of such ratification as the plaintiff wishes to prove would be the same as if at the time of the doing of the act his agent had received a prior command from the defendant to do it. If the defendant admitted what in law is tantamount to a prior command in the case of the three notes sued upon, he could hardly hope to be able successfully to limit such command or authority to the three notes in question. The result would be that although at the time of the alleged ratification he was quite ignorant that any other similar notes existed, he would practically be admitting that he had given authority to his agent to exceed his powers and to make such other notes. As I have already stated any admission or conduct of the principal to be binding upon him as a ratification of the act of his agent must be made or done with a full knowledge of the nature of the act committed.

I think therefore that the plaintiff has completely failed to shew that there was on the part of the defendant any such ratification of the acts done by his agent in excess of the limits of the agent's authority as would make such acts binding upon the defendant himself.

The next question is whether in putting the defendant's *chop* on these notes, the defendant's agent was acting within the authority given to him by the defendant. What his authority was, is defined in the power of attorney given to him by the defendant on 15th November, 1884, a power to act for him in his absence in certain matters therein specified. I can find nothing in the power of attorney that authorises the defendant's agent to use his [defendant's] name and credit in financial transactions with money-lenders. It was alleged that the money was borrowed and used for the purpose of the defendant's business. What little evidence there was of this, I regret to say I do not believe. I give judgment for defendant with costs.

Judgment for defendant with costs.

BAWASAH MERICAN *v.* KOOTYAN CHETTY.

There is no power to order the forfeiture of any illicit exciseable article under Section 48 of the Excise Ordinance 4 of 1870, unless there has been a conviction of a person for breach of that section in respect to such illicit article.

The appellant Bawasah Merican had been charged before C. W. S. Kynnersley, Esquire, First Magistrate, for knowingly having in his possession five bales of *bhang* value $1,600 which had not been purchased from the Toddy Farmer of the Settlement, nor from a licensed Toddy shop-keeper under Section 48 of the Excise Ordinance 4 of 1870. The charge was enquired into on the 14th September, when it appeared that the appellant was the Chief Clerk of the "Prye Dock Landing and Shipping Company" and the bales had been landed from the s.s. *Orion* on the 5th July, and had been received by the defendant in the ordinary course of his duty. The defendant was not the owner of the bales. The Magistrate dismissed the charge, the prosecution admitting they were unable to prove the necessary *scienter*. Counsel for the prosecution however, asked that notwithstanding the dismissal the five bales of *bhang* might be ordered to be forfeited under the section as there was no doubt of their being illicit. The Magistrate took time to consider the point, and on the 21st September made an order for forfeiture. The appellant appealed to the Supreme Court, and the appeal was argued on this date before *Pellereau*, J., when on the conclusion of the arguments the learned Judge without expressing an opinion directed the case to be heard in the Court of Appeal, under Section 38 of the Appeal's Ordinance 12 of 1879.

December 22nd. The Appeal now came on to be heard in the Court of Appeal, consisting of *Ford*, C.J., *Wood* and *Pellereau*, J.J.

FORD, C. J. WOOD, & PELLEREAU, } J.J.
1887.

BAWASAH MERICAN v. KOOTYAN CHETTY.

Ross, [*Anthony* with him] for the respondent, objected to the appellant being heard on the ground that he having been acquitted by the Magistrate had no *locus standi* under the Appeals Ordinance and was not the owner or consignee of the bales.

Thomas, for the appellant contended, he had a *locus standi* in order to object to the forfeiture of the bales which had been found in his possession, and so prevent an injustice being done to the owner of the bales by being deprived of his property without being heard—he referred to *Cooper* v. *Wandsworth Board of Works*, 14 C. B. [N. S.] 194, 5, per BYLES, J.

The Court considered the appellant had a *locus standi*.

Thomas, for appellant then contended, that the Magistrate had no power to order a forfeiture of the bales when there had been no conviction—he referred to Sections 47 and 48 of the Excise Ordinance 4 of 1870 and asked that on quashing the order the Court would direct the bales be given up to the appellant.

Ross, [*Anthony* with him] contended, that Section 48 provided for three offences [1] by a person who not being the Toddy Farmer or a licensed Toddy shop-keeper sold or offered for sale any toddy or bhang, [2] for a person who purchased any toddy or bhang from any person other than the Toddy Farmer or a licensed Toddy shop-keeper, [3] the person who knowingly had toddy or bhang in his possession which was not purchased from the Toddy Farmer or a licensed Toddy shop-keeper. In the first two cases the toddy or bhang might originally have been purchased from the Toddy Farmer or a licensed Toddy shop-keeper, yet it was an offence if in the first case the person sells to any but the Toddy Farmer, or in the second if the person buys from any but the Toddy Farmer or a licensed Toddy shop-keeper. This being so it shewed the section was *not limited* to bhang *not* purchased from the Toddy Farmer or a registered Toddy shop-keeper. In the third case the burthen of proof was thrown by the section on the person "charged" and the words "all such toddy or bhang" in the section did not mean the toddy or bhang which the accused might be shewn knowingly to have had in his possession, and for which he would be punishable, but the toddy or bhang which he was *charged* with knowingly having had in his possession although the charge as regarded the *scienter* could not be proved.

The Court, [*Ford*, C.J., *Wood & Pellereau*, J.J.] held that unless there was a conviction of a person for breach of the Excise Ordinance 4 of 1870, Section 48, no order for forfeiture of the illicit exciseable articles in respect to which such breach was alleged to have been committed could be made under that section —they therefore quashed the Magistrate's order, but declined to make any order for the bales of bhang to be given up, leaving the appellant to his proper remedy therefor.

Order quashed with costs—no order for the bhang to be given up.

REGINA *v.* RODRIGUEZ.

SINGAPORE.

FORD, C. J.
1887.

NOV. 22.

The Indian Act XIII. of 1850 is still law in this Colony and is a "Special Law" within the meaning of Sections 5 and 41 of the Penal Code.

Regina v. *Overree & anor.*, 2 Kyshe [Cr. Rulings] 88, followed.

Semble. The Criminal Procedure Ordinance 6 of 1873 is however applicable to a prosecution under that Act, and the charge must, under Section 59 of the Ordinance, be limited to three charges and not "any number" as provided by Section 11 of the Act.

The prisoner was charged under Section 9 of the Indian Act XIII. of 1850 on five separate charges of embezzling moneys of the Government which he had been entrusted with as a public servant, *to wit:* a Clerk in the General Post Office. The material portions of the Act, are as follows:—

[1.] "Every person employed in the public service of Her Majesty..... and entrusted by reason of such employment, with the receipt, custody and control of any chattel, money or valuable security, who shall embezzle the same or any part thereof, or in any manner fraudulently apply, use, or dispose of the same or any part thereof, for any purpose other than the purpose to which the same is applicable under the trusts reposed in him, shall be deemed to have feloniously stolen the same."

[8.] "Every person possessed or having the receipt, custody or control of any chattel, money or valuable security, in trust for any other person or persons, who shall embezzle the same or any part thereof, or in any manner fraudulently apply, use, or dispose of the same for his own use or benefit in breach of the trust reposed in him, shall be deemed to have feloniously stolen the same."

[9.] "Every person convicted of having feloniously stolen any chattel, money or valuable security under this Act shall be liable to be transported out of the territories under the Government of the East India Company for life, or to be imprisoned with or without labour for any term not exceeding seven years."

[11.] "Any offender under this Act may be proceeded against on the same charge for *any number* of distinct acts of embezzlement or fraudulent application, use, or disposition as aforesaid, committed by him *within six* calendar *months* from the first to the last of such acts: and proof of a gross deficiency in the accounts of any such Trustee or Public Servant shall be evidence of the offence charged, until such deficiency is otherwise explained."

This Act had been wholly repealed in India by Act XVII. of 1862 which has never been in force in this Colony. In 1872 the Straits Penal Code [Ordinance 4 of 1871] came into operation in this Colony, and in 1873 the Criminal Procedure Ordinance 6 of 1873 was passed. The sections of the Penal Code material to this report are as follows:—

[2.] "Every person shall be liable to punishment under this Code *and not otherwise* for every act or omission contrary to the provisions thereof, of which he shall be *guilty* within the Colony, from and *after* the coming into operation of this Ordinance."

[5.] "Nothing in this Ordinance is intended to repeal, vary, suspend, or affect any of the provisions of any Act for punishing mutiny and desertion of Officers and Soldiers in the service of Her Majesty or of any *special* or local *law*."

FORD, C. J. 1887.

REGINA v. RODRIGUES.

[41.] "A "special law" is a law applicable to a particular subject."

[42.] "A "local law" is a law applicable only to a particular part of the Colony."

By Section 59 of the Criminal Procedure Ordinance aforesaid, it is enacted:

"When a person is accused of more offences than one of the same kind committed within one year of each other, he may be charged and tried at the same time for any number of them not exceeding three....."

On the prisoner being arraigned,

Groom, for him contended, the indictment was bad as charging him under the Act XIII. of 1850, which he submitted was repealed by the Act XVII. of 1862; and although at that date there was no Criminal Procedure Act like it in this Colony, still at this date there were both the Penal Code and the Criminal Procedure Ordinance. The Act of 1850 must be considered no longer in force, as the Penal Code provided for punishments under it "and not otherwise," Section 2. He submitted the only reason for charging the prisoner under the Act of 1850 was, that if errors of any kind were found in his books, the *onus* was on him to explain them, Section. 11.

Bonser, [*Attorney-General*] contended, Act XIII. of 1850 was still in force, although repealed in India. *Regina* v. *Overree*, 2 Kyshe [Cr. Rulings] 88; that it was a "special law" within Sections 5 and 41 of the Penal Code, and was saved. Section 11 dealt with falsification of accounts for which no provision was made by the Code; this point as to the Act being a "special law" was not argued in the case cited, but it was obvious it must have been referred to as the Penal Code was in force when that case was decided.

Groom, in reply contended, the report of *Regina* v. *Overree*, was not a full report of the case [*a*]. As it seemed so much at variance with Section 1 of the Act XVII. of 1862, and as provision was made by the Code for criminal breaches of trusts by public servants [Section 409], he asked that the question whether the Act XIII. of 1850 was still in force in this Colony, might be reserved for the Court of Appeal;—it was a point he submitted which might well be reserved.

Ford, C.J. prior to the case of *Regina* v. *Overree* being cited, was inclined to think Sections 5 and 41 did not apply, as this was a case of mere breach of trust which was provided for by the Code, and by Section 2 the case should be dealt with only under the

[*a*.] It was not brought to the notice of the Court in this case that in *Regina* v. *Overree*, though the question was decided in Singapore on 16th December, 1872, the prisoner had been tried and convicted in Malacca some time before [November, 1872]; that the Penal Code came into operation on the 16th September, 1872, but the embezzlement in that case took place *prior to* the coming into operation of the Code; that by Section 2 of the Code, its provisions applied only to persons *guilty* of an act committed *after* its coming into operation; that that was *not* Overree's case, and he could *not* be punished under the Code, but only under the old law—see *Regina* v. *Lee Cheng*, Volume 2 of these Reports, Criminal Rulings, 88. Had these facts been brought to the notice of the Court, the decision in this case might possibly have been different.—J. W. N. K.

Code, but he eventually held that that case was directly in point and was based on too solid grounds for him to reserve the point; he therefore ruled Act XIII. of 1850 was a "special law" within the meaning of the Penal Code, and was still in force.

FORD, C. J. 1887.

REGINA v. RODRIGUEZ.

Groom, then contended, that the indictment was bad as it contained five charges; that it should be limited to three, committed within a year of each other, by Section 59 of the Criminal Procedure Ordinance 6 of 1873, and the provision of Section 11 of the Act XIII. of 1850 as to "any number" of charges was impliedly repealed.

Bonser, [*Attorney-General*] consented to the indictment being amended by being confined to three charges only.

The amendment was then made and on the prisoner pleading "guilty" he was sentenced to two years' rigorous imprisonment.

LEE JOO NEO *v.* LEE ENG SWEE.

SINGAPORE.

GOLDNEY, J. 1887.

December 8.

Where there are descendants, but no children living of an Intestate, on the proper construction of the Statute of Distributions [29 Car. II. c. 3, Section 7] the estate is to be divided into as many shares as there were *children* who had left living descendants and not according to the number of the descendants themselves. The descendants of each such child take as together representing such child and the share only of such child.

Re Ross' Trusts, 13 L. R. Eq. 290, followed.

The contrary opinions expressed in Text Books of authority [*a.*] must be considered incorrect and this Court is bound by the above decision.

In distributing the estate of a person dying intestate domiciled here and leaving property here, the Statute of Distributions is the only rule, and the exclusion of females in sharing in such estate according to Chinese Law and Custom will not be recognised.

The nature and facts of this case sufficiently appear in the judgment.

Drew, for certain of the next-of-kin.

Davidson, for others of them.

Cur. Adv. Vult.

December 17th. *Goldney*, J. The question before the Court, was as to the shares in which the fund now in Court representing Sit Tean Neo's estate is to be distributed among her descendants. By a decree dated May 28th, 1878, this Court, among other things, declared that the Will of the said Sit Tean Neo, so far as it relates to the property in question, was bad and ordered such property to be distributed amongst the next-of-kin of the testatrix, living at the time of her death, according to the Statute for the Distribution of the Estate of Intestates. The Registrar has reported that the three children of Sit Tean Neo predeceased her, and that at the date of her death there were seven grandchildren and four great-grand-children.

Mr. Drew, who appeared for Lee Kim Neo, one of the grandchildren, the daughter of Lee Kian Soon, contended that the fund should be divided into three parts, one-third of which should be sub-divided among the descendants of the testatrix's son, Lee

[*a.*] 2 Wm. on Executors [8th Ed.] 1503 and authorities there cited—also *re* Ross' Trusts, *suprà*, 294.

GOLDNEY, J. 1887.

LEE JOO NEO v. LEE ENG SWEE.

Kian Ann; one-third among the descendants of her son, Lee Kian Soon, and one-third among the descendants of her son Lee Joo Kay. That, as those descendants consist both of grand-children and great-grand-children of the intestate, persons not all equally next-of-kin to her, they can only take as representatives of their respective parents, and not in their own right as next-of-kin, *i.e.*, take *per stirpes* and not *per capita*.

Mr. Davidson, on the other hand contended, that upon the proper construction of the Statute, that all the children being dead, grand-children take an equal share, for, as all the children are dead, their children take as next-of-kin, that is *per capita* or equal shares in their own right, and that the great-grand-children take as representatives of their own deceased parents.

The point raised in this case was before the Court of Chancery in 1871, *In re* Ross' Trusts, 13 L. R. Eq. 290. Although Text Books of great authority support Mr. Davidson's construction of the Statute, I feel myself bound to follow the decision of the Vice-Chancellor in that case.

In the case of *In re* Ross' Trusts, after discussing the opinions expressed in the various Text Books of authority, Vice-Chancellor Wickens came to the conclusion that the proper construction of the Statute was, that if there are descendants, but no children living, to share the estate, it is to be divided into as many shares as there are children who have left living descendants, and that the descendants of each such child are to take as representing the child, and of course only the child's share. Following this decison, I hold that in this case the fund must be divided into thirds of which one-third is divisible among the descendants of Lee Kian Ann, one-third among the descendants of Lee Kian Soon and the remaining third among the descendants of Lee Joo Kay.

Another point was raised by Lee Eng Swee, *viz.*, that the descendants of Sit Tean Neo, who are females, cannot share in the distribution of testatrix's estate. This proposition of Lee Eng Swee is founded upon the provisions contained in the Will of the deceased, and upon what he alleged is the Law and Custom of China.

As to the provisions of the Will, this Court has declared that the Will in that respect was bad, and as far as such provisions refer to the property in question, the testatrix must be considered to have died intestate, and that such property is to be distributed according to the Statute of Distributions. This decision has not been appealed against.

As to the alleged Law and Custom of China, Lee Eng Swee cannot incorporate such alleged Law or Custom with the Statute of Distributions.

There is an entire concurrence of opinion among jurists, and there is a uniformity in the judicial decisions of all ages and countries in support of the rule [1] that the succession *ab intestato* to immoveable or real property, is wholly governed by the *lex loci rei sitæ*, and that it descends according to the order or law of succession prevailing in the country where it is situated.

Secondly, that the succession *ab intestato* to moveable property is wholly governed by the law which prevails in the place where the intestate was domiciled at the time of his or her death.

It has been proved in this suit that the deceased at the time of her death was domiciled in the Colony. The moveable property also is situated in the Colony. The law therefore which must govern the distribution both of the Intestate's immoveable and of her moveable property is the law of this Colony, and not the law or custom of any other country.

In re ARMOOGUM & ORS.

The terms on which a Hindu husband and wife should separate might be the subject of reference to arbitration; and this Court has jurisdiction to order an award—which directs the wife to return to her husband, or in default, that she or her parents and relatives who joined in the reference should restore to the husband certain jewelry which were given by the husband to the wife at the time of marriage—to be filed in Court with a view to execution in so far as it orders the restoration of the jewelry.

This was an application by Armoogum for an order that an award made by certain arbitrators might be filed in Court with a view to its being enforced as a judgment. It appeared that certain disputes and differences having arisen between the applicant Armoogum and his wife Pakeerchee, her mother Anjayalay and brother Kali, as to the return of the wife to cohabitation with the applicant, and the return of her marriage gifts, in default of her doing so, a submission was, on the 27th August, 1887, made and signed by all the said parties referring the said disputes to arbitration of certain headmen of the Hindu community. The arbitrators having enquired into the matter on the 12th day of November, 1887, made and published their award in writing, which, omitting formal parts, was as follows:—"We do hereby award that the said Pakeerchee shall return to her husband the said Armoogum forthwith, and that the said Kali her brother, and the said Anjayalay her mother, shall permit her so to do; and if they shall refuse or neglect so to do, upon formal demand in that behalf, then and in such case the said Pakeerchee, Kali, and Anjayalay shall refund and return to the said Armoogum his marriage expenses and gifts to the wife, made by him, as follows"—then followed a list shewing account of expenses and articles of jewelry and their respective value. This award was notified to the wife, mother and brother, and a formal demand for the wife to return to the applicant was also made—they all declined to abide by the award in any respect. The present application was thereupon made to *Pellereau*, J. on the 12th December, and the learned Judge on the 16th, directed that the questions arising on the application should be re-argued before both Judges present in the Settlement. The questions were therefore again argued before the two Judges.

Adams, for the applicant submitted that there were two questions for the Court—firstly, whether the matter in dispute

WOOD & PELLEREAU. } J.J. 1837.

In re ARMOOGUM & ORS.

was referrable to arbitration; and secondly, when referred and awarded on, whether the award could be made a rule of Court. He contended that as to the first question it was clear on the authorities that the terms of a separation might be referred—*Russell on Arb.* [3rd Ed.] 10; *Soilleux* v. *Herbst*, 2 B. & P. 444; *Bateman* v. *Countess of Ross*, 1 Dow. 235; *Hooper* v. *Hooper*, 29 L. J. Pro. & Div. 59; *Redman on Arb.* 13; *Chambers* v. *Caulfield*, 6 East 244; *Rodney* v. *Chambers*, 2 East 283; 2 *Bright on Hus. and Wife* 311. The matters being referrable, the second question depended on whether this Court had jurisdiction to order the award to be filed. The words of the Charter of 1855 as to Ecclesiastical jurisdiction were large enough to confer such a jurisdiction; but previous decisions,—*Lim Chye Peow* v. *Wee Boon Tek*, 1 Kyshe, 236; *Shaik Madar* v. *Jaharrah*, Ib. 385, had restricted the jurisdiction. Without going the length of arguing whether those decisions were sound or not, he submitted the award here was not an absolute direction for restriction of conjugal rights; that that part of the award was precatory, but the alternative part directing the return of the money and jewels was mandatory on default of compliance with the previous part of the award. The previous application was made solely with the view to enforcing the latter part. The award could not be said to be an order for restitution of conjugal rights, for an alternative was allowed. Although this Court had declined to enforce a native marriage by decreeing restitution of conjugal rights, it had often exercised jurisdiction in matters arising out of such marriages, *Pootoo* v. *Valee Utu Taven*, 1 Kyshe, 623; *Hawah* v. *Daud*, Str. L. R. 253,—and even as to ascertaining whether a husband was a suitable person or not, *Salmah* v. *Fatimah*, 1 Kyshe, 421. The Court had thus full power over every kind of settlement or dispute as to property resulting from native marriages, and the application was properly made on the Civil and not Ecclesiastical side of the Court.

G. S. H. *Gottlieb* for the wife, mother and brother contended, the award was all one and indivisible; and the Court from the authorities quoted having no jurisdiction to order restitution of conjugal rights had no jurisdiction to order the filing of the award as to the return of the money and jewelry which would only be an indirect way of compelling the parties to render restitution of conjugal rights.

Pellereau, J. The applicant asks for an order to file an award which is as follows [reads award]. The question is not merely one of restitution of conjugal rights between Hindus; there is an alternative, the restitution of jewelry. On the first argument, I was inclined to consider that the two things were connected, and if there was want of jurisdiction as to the former, there was want of jurisdiction as to the latter. The authorities cited by Mr. Adams however go the length of shewing that the terms of a separation can be referred; and considering those cases, I have come to the conclusion that the terms of a separation in the case of natives can be referred to arbitration. The terms imposed by the award here are, that if the wife does not return to the

husband—if she separates from him—she and her mother and brother must restore to the husband the jewelry he gave at time of marriage. I can see no reason why the Court should not enforce this part of the award; and I am of opinion therefore, that the Court has jurisdiction to order the award to be filed, limiting the enforcing of it [if necessary] only as to the restitution of the jewelry. At present, I decide simply the question of jurisdiction; the order for filing the award must be applied for on a later day on notice to the other side to shew cause why the award should not be filed.

WOOD & PELLEREAU } J.J.
1887.
In re ARMOOGUM & ORS.

Wood, J. I agree with my brother PELLEREAU that we have jurisdiction to order the award to be filed. I do not think it necessary to go the length of saying that in all cases the Court would exercise the jurisdiction it has. As in this case there is an alternative, I think the case stronger, and the award should be filed.

11th January, 1888. *Adams*, now moved that the award be filed.

The wife, mother and brother in person, shewed cause. It appeared that the wife Pakeerchee was an infant under 21 years of age at the date of the award.

Pellereau, J. ordered the award to be filed limited to the restitution of the jewelry as against the mother and brother only.

Order accordingly.

In re SINYAK RAYOON & ANOR.

PENANG.

WOOD & PELLEREAU } J.J.
1888.
January 10.

The Court in deciding who is a fit and proper person to be appointed guardian of a native infant is not bound by any hard and fast rule of the law of England on the subject, but will under the words "so far as circumstances will admit" in the Charter of 1855, take into consideration the law, religion, practice, or custom, of the nationality or class to which such infant belongs, on the subject of guardianship.

Choa Choon Neoh v. *Spottiswoode*, 1 Kyshe, 216, and *Yeap Cheah Neo* v. *Ong Cheng Neo*, 6 L. R. P. C. 381, s.c. 1 Kyshe, 326, discussed.

The Charter of 1855 by the combined operation of Ordinance 6 of 1878 and Ordinance 3 of 1878, Section 83, is still in force in this Colony so far as it is not inconsistent with the latter Ordinance and the Ordinances 4 and 5 of 1878.

Yeap Cheah Neo v. *Ong Cheng Neo*, [suprà] as to this point, followed.

This was originally an application for a *Habeas Corpus* to obtain the custody of the abovenamed alleged infants, but it appearing that neither the applicant [the paternal uncle] nor the person detaining the alleged infants [the maternal grand-mother] had any right to their custody, the application was by leave of the Court so moulded as to be an application for the appointment of a guardian, it being alleged by the applicant [Haji Choot Mahomed Salleh] that by the Mahomedan Law the paternal uncle had a prior right to the custody of the infants than the maternal grand-mother. It was then intended to adduce evidence as to the Mahomedan Law on the subject, but this was objected to by Counsel for the maternal grand-mother [Choot Amamah] on the ground that such evidence was irrelevant and could not be considered by the Court, which was to be guided by the law of

WOOD & PELLEREAU. } J.J. 1888.

In re SINYAK RAYOON & ANOR.

England alone. This question was adjourned by the learned Judge [*Wood*, J.] for argument before both Judges present in the Settlement, and now came on to be heard. The further material facts appear in the judgments of the learned Judges.

Ross, for the maternal grand-mother detaining the alleged infants contended, that the law of England modified by Indian Acts or local Ordinances and Imperial Statutes applicable to the Colony was the law here. *In the goods of Abdullah*, 2 Kyshe Ecc. Cases, 8; *Regina* v. *Willans*, 3 Kyshe, 19-23; that *Chulas* v. *Kolson binte Seydoo Malim*, Str. L. R. 462, s. c. Woods' Oriental Cas. 35, was directly in point; that in cases of guardianship the Court was guided by its own rules, that is the law of England, and if the Mahomedan law could have been recognised there was no need of the Mahomedan Marriage Ordinance 5 of 1880 having been passed. His further arguments and authorities will be found in the judgments of the Court.

Van Someren, [*Thomas* with him] for the paternal uncle, the applicant, contended, that the Court would be guided exclusively by the Mahomedan law on the subject, if not, then it would certainly take that law into consideration, as to who would have been the guardian if that law was applied, and they relied mainly on the Charter of 1855, *Choa Choon Neoh* v. *Spottiswoode* [supra] and *Yeap Cheah Neo* v. *Ong Cheng Neo* [supra]. They also contended, that the Mahomedan Marriage Act only applied to the Mahomedan law of *property—Jamaludin* v. *Hajee Abdullah*, 1 Kyshe, 503; and no inference could be drawn against Mahomedan law on other subjects being considered. With reference to the *dictum* in *Chulas* v. *Kolson*, possibly it was correct at that date under the peculiar wording of the clause in the Charter referring to guardianship, but the words of Ordinance 5 of 1868, Section 26; Ordinance 5 of 1873, Section 46; and Ordinance 3 of 1878, Section 12, were different and the general provision in the Charter for the law of England to be administered "so far as circumstances would admit" included a case like this at the present time. Their further arguments and authorities will be found in the judgments of the Court.

Ross, in reply contended, that the Charter of 1855 was no longer in operation as it was repealed by Ordinance 5 of 1868, Section 1—revived by Section 4,—but the latter was repealed by Ordinance 6 of 1878, which came into operation at the same time as Ordinance 3 of 1878. Section 83 of the latter did not keep the Charter alive—as the Charter being at that moment gone by force of Ordinance 6, it was not "in force" within Section 83 of Ordinance 3.

[*Pellereau*, J. pointed out that Section 83 took the Court to the laws in force in the old Court of Judicature, of which the Charter of 1855 was one—and that Court was prior to Ordinance 6 of 1878; he also pointed out that the question now raised was in principle decided by the Privy Council as to the effect of the two Sections 1 and 4 of Ordinance 5 of 1868 coming into operation at the same moment.]

Cur. Adv. Vult.

9th February, 1888. *Wood*, J. read the judgments of *Pellereau* J. and himself as follows:—

Pellereau, J. In this case it was admitted by both parties that the parents of the infants were at the time of their deaths domiciled in Acheen and that the children at that time were themselves resident there. Under such circumstances, the Court, which undoubtedly has jurisdiction under Section 19 of Ordinance 3 of 1878 over the infants who are now commorant in Penang should, in the appointment of a guardian, be guided by the law of Acheen; as it has not however been shewn that this law is different from the law of Penang, the Court must presume that it is the same, and the question arises what is the law of Penang on the subject of the appointment of guardians. It has been constantly ruled by the Courts of this Colony that the law of England such as it was in 1826 is the law of the Colony subject to any amendment passed by the Legislative authority of the Colony. The law of England was held to have been introduced into the Colony of the Straits' Settlements in 1826 by Letters Patent, and the special paragraph of those letters applicable to this case has been repeated by the Letters Patent in 1855, in the following terms:—

"We further ordain that the said Court and the several Judges thereof do have such jurisdiction and authority as our Queen's Bench and our Justices thereof, and also as our High Court of Chancery and our Courts of Common Pleas and Exchequer, respectively, and the several Judges, Justices and Barons thereof respectively have and may lawfully exercise within that part of our United Kingdom called England in all civil and criminal actions and suits and matters concerning the revenue and in the control of all inferior Courts and jurisdiction *as far as circumstances will admit.*"

In the case of *Ong Cheng Neo* v. *Yeap Cheah Neo & Ors*; 1 Kyshe, 344, the Judicial Committee of the Privy Council have decided substantially as follows:—

"In their Lordships' view the Charters referred to [*viz.*, those of 1807, 1826 and 1855] if they are to be regarded as having introduced the law of England into the Colony must be taken to have done so under the same qualification, *viz.*, as far as circumstances will admit."

Adverting to the judgment of Sir BENSON MAXWELL, C.J. in the case of *Choa Choon Neoh* v. *Spottiswoode*, 1 Kyshe, 346, their Lordships say:

"It appears to us that in that judgment the rules of English law and the degree in which in cases of this kind regard should be had to the habits and usages of the various people residing in the Colony, are correctly stated."

The expressions of Sir BENSON MAXWELL thus referred to, are the following:—

"In this Colony so much of the law of England as was in existence when it was imported here and is of general [and not merely of local] policy and adapted to the condition and wants of the inhabitants, is the law of the land, and further that law is subject in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them."

WOOD & PELLEREAU. } J.J. 1868.

In re SINYAK RAYOON & ANOR.

This judgment of Sir BENSON MAXWELL was given on the 19th January, 1869, at the time when Ordinance 5 of 1868 was in force; and in spite of its first section, it was thus ruled by the Privy Council in the abovementioned decision, that the Letters Patent of 1885 were in force in this Colony in 1869; therefore taking into account the re-enacting Section 83 of Ordinance 3 of 1878 which at present regulates the constitution of this Court, and specially mentions the Letters Patent applicable to the previous Courts of Judicature of this Colony, I come to the conclusion that the words "as far as circumstances will admit," which have nowhere been specially repealed and are not inconsistent with any repealing law, do still continue the law of this Colony, and afford a rule for the conduct of the Court in the appointment of guardians to infant children belonging to alien or native races. I hold in consequence that in the selection of such guardians the Court should apply the law of England, and in doing so, should consider the circumstances of each case, the interest and welfare of the infants, their treatment, their sex, their education, the religion of their parents and the rules which, according to that religion, regulate their domestic customs and relations. Each case must necessarily stand upon its own grounds, and it is a beneficial character of the law, such as I hold to be, that its elasticity allows the Judge in matters of guardianship to take into account, in the interests of the infants, the varied circumstances of their position.

I need not say anything in the case on the question, whether the Civil Ordinance of 1878 coupled with Section 10 of Ordinance 3 of 1878, has introduced into this Colony the law of England such as it was in 1878, with all the powers of the High Court of Justice in matters of guardianship; such an introduction would lead probably to the same result which I have arrived at in applying and construing the Letters Patent of 1855, and the words "so far as circumstances will admit."

Wood, J. In this matter a Rule *Nisi* was obtained by Mr. Thomas calling upon Choot Amamah Lombak to shew cause why a writ of *Habeas Corpus* should not issue, directing her to produce before the Court the bodies of the infants abovenamed. The applicant is the paternal uncle of the infants, and the respondent their maternal grand-mother; and it was asserted by the applicant that as such uncle, he was entitled by Mahomedan law to the custody of the infants in question.

It was intimated to the applicant by the Court, in order to proceed formally in this matter, it was obligatory upon him to prove his status as guardian, but inasmuch as the question would certainly arise in the matter now in dispute, whether or no the Court would, in disposing of the custody of the children, act in conformity with Mahomedan law and custom, this point from the importance of the question, was argued at length before myself and Mr. Justice PELLEREAU sitting together as a Court of first instance.

Mr. Ross, for the respondent contended, that this Court would administer only English law as modified by Legislative enactments applicable to this Colony, and would pay no regard to Mahomedan law and custom. Mr. Van Someren [Mr. Thomas with him] contending that the Court in deciding upon this matter of guardianship should take into consideration and be guided by Mahomedan law and custom. Mr. Ross urged in support of his contention, that although the Courts of this Colony may have recognised the plurality of wives, and the validity of marriages and divorces if effected in accordance with Chinese, Tamil and Mahomedan Law and Custom; yet that they have persistently administered English law though inconsistent with native law, custom, and religion in the case of adopted children, of testamentary disposition of the whole instead of a portion of a Mahomedan man's estate, personalty as well as realty—of the distribution of personalty—of the non-precedence of the 1st wife of a Chinese husband—and other matters. And shortly, that in all other matters except the mere recognition of the status of husband and wife and the facts of their divorce, the law of England has been held to be the law of the Colony and this rightly so, as English law is by our Charters, Acts and Ordinances declared expressly or impliedly to be law of the Straits Settlements.

Mr. Van Someren, for the applicant contended, that although English law is the basis of the law of the Straits Settlements, yet regard must be had to the laws and customs of the native population, and this upon the authority of the Privy Council in the case of *Ong Cheng Neo* v. *Yeap Cheah Neo & Ors.*, 1 Kyshe, 344, in which it is stated "in their Lordships' view the Charters referred to [*viz.*, those of 1807, 1826 and 1855] if they are to be regarded as having introduced the law of England into the Colony, contain the words 'as far as circumstances will admit'..." In applying this general principle, it has been held that Statutes relating to matters and exigencies peculiar to the local condition of England, and which are not adopted to the circumstances of a particular Colony do not become a part of its law although the general law of England may be introduced into it; and in particular in page 346, adverting to the language of the judgment of Sir BENSON MAXWELL, C.J. in the case of *Choa Choon Neoh* v. *Spottiswoode*, their Lordships say:

> "It appears to them that in that judgment the rules of English law and the degree in which in cases of this kind regard should be had to the habits and usages of the various people residing in the Colony are correctly stated."

These expressions of Sir BENSON MAXWELL are contained in the report of the case last referred to in 1 Kyshe, 221:

> "In this Colony so much of the law of England as was in existence when it was imported here, and is of general [and not merely local] policy, and adapted to the condition and wants of the inhabitants, is the law of the land, and further that law is subject in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them."

WOOD & PELLERAU. } J.J.
1888.
—
In re SINYAK RAYOON & ANOR.

That the Charters are now in operation in the Colony, is clear from the re-enacting Clause 83 of Ordinance 3 of 1878, although apparently repealed by Ordinance 6 of 1878 which repeals the existing Supreme Court Ordinances,—the four Ordinances 3, 4, 5 and 6 having to be read together and a similar and for all purposes an identical point being decided by the Privy Council in the case above reported, pages 346, 347.

The following cases were referred to in the arguments—Goods of *Abdullah*, 2 Kyshe's Rep. Ecc. Ca. 8; *Regina* v. *Willans*, 3 Kyshe, 16; *Chulas* v. *Kolson binte Seydoo Malim*, Straits L. R. 462; Goods of *Lao Leang Ann*, Wood's Or. Ca. 35; *Fatimah* v. *Logan*, 1 Kyshe, 255; *Ong Cheng Neo* v. *Yeap Cheah Neo*, 1 Kyshe, 326; *Hawah* v. *Daud*, Straits L. R. 253; *Re* Willoughby, 30 L. R. Ch. Div. 324; *Choa Choom Neoh* v. *Spottiswoode*, 1 Kyshe, 216; *Halimah* v. *Bradford*, Straits L. R. 383; *Pootoo* v. *Valee Uta Taven*, 1 Kyshe, 622; *Re* Ullee, 53 L. T. [N. S.] 711, s.c. on Appeal 54 L. T. [N. S.] 286; *Jamaludin* v. *Hajee Abdullah*, 1 Kyshe, 503; and *Shaik Ahmoodeen Moollem* v. *Mamat Safoora Bilice*, 6 Suth. W. R. Misc. Rulings, 125.

In this case, much argument has been raised before us upon which we do not purpose to give any decided opinion. We hold it to be law now established in the Colony that the Charter of 1807 granted to this Settlement English law, subject to the modifications, if any, which that Charter contains, and that this Charter [the language of which is for all the purposes of this suit repeated in the Charters of 1826 and 1855] must be taken into consideration in applying English law. Whether, if the point were now material to be decided, the Court should consider itself bound by the interpretation of the words in the Charters that the Court shall administer the law of England "as far as circumstances will admit," to be equivalent to "so as to prevent it from acting *unjustly* and *oppressively* on the native races" as expressed by Sir BENSON MAXWELL in *Choa Choon Neoh* v. *Spottiswoode*, which language is apparently approved of by the Privy Council in *Ong Cheng Neo* v. *Yeap Cheah Neo*, I do not consider myself bound to say. It may be that those expressions being *obiter dicta* extend no further than the particular circumstances of each of those cases and that in their true sense it is a strain upon language to give them this exact meaning. In dealing with the matter of the choice of a guardian, I should hold myself bound by the principles of the law of England which enjoin the Court to consider in such cases the interests of the children, and no doubt in providing for their welfare I should hold myself bound, without deciding in exact accordance with Mahomedan law, to consider Mahomedan law and the customs of Mahomedans as circumstances to be taken into consideration in deciding the questions of guardianship. In my judgment so far as this case is concerned, the matter is identical whether we administer English law "so far as circumstances will admit" and "so that injustice and oppression" may not ensue or whether we simply apply English law. The spirit of the law in

either case seems to me to be precisely the same, which is to provide for the guardianship of the children that their interests may best be secured.

WOOD & PELLERAU. } J.J. 1887.

In this decision I leave untouched the question of the application of Acheen law. The domicile of all the parties is no doubt Achinese, but we must assume until the contrary be shewn that the law of Acheen is identical in this matter with that of England.

In re SINYAK RAYOON & ANOR.

Order accordingly.

May 1. In the course of the enquiry as to the facts of the case and the Mahomedan law, it having appeared that the latter law only applied up to the time the infants attained puberty, and the alleged infants both had so done, and in fact the female alleged infant was a married woman, which marriage had been consummated, the Court considered they were not infants requiring guardians, and refused to make any order, except for the maternal grand-mother's costs against the applicant.

LEE KANG WYE *v.* NG AH MIN.

PENANG.

WOOD, J. 1888.

January 13.

Before there can be a conviction for cheating under Section 417 of the Penal Code, there must be conclusive evidence of a dishonest intent at the time of obtaining the money or goods; where the evidence does not necessarily shew a dishonest intent at the time, but is consistent with such either being or not being the fact, no conviction can be had.

Where, therefore the prisoner obtained a sum of money from the prosecutrix, promising to give her a share in a boat or tongkang belonging to him, and to let her hold the certificate of registration of the boat,—but a few days after excused himself for not giving the certificate on the ground that her share was a small one, and a few days later on declined to admit she had a share at all, and denied receipt of any money,

Held, as the evidence was consistent with a dishonest intent at the time of obtaining the money, as also with the denials being due to a subsequent change of mind, a conviction for cheating under Section 417 could not be sustained.

The appellant had been convicted by C. W. S. Kynnersley, Esquire, First Magistrate, for cheating, under Section 417 of the Penal Code, and sentenced to three months' rigorous imprisonment, and a fine of $100. The evidence shewed that the appellant was a cousin of the prosecutrix; that he had gone to her one day saying he had bought a boat—a tonkang—for $400, and he would give her a fourth share in it if she paid him $100 therefor. The prosecutrix agreed to take a share, and paid the appellant at the time $30 to account, five days after she paid him $20 more and four days thereafter the balance $50. He told her he would give her a "surat prahu" [literally boat paper]—presumably the certificate of registration—for her to keep. Three or four days after, he told her as her one-fourth share was a small one, she could not have the "surat" [paper] to keep; but he would go into accounts every four months and see whether there was any profit or loss. After four months he called to see the prosecutrix and she asked him if there were any profits, he replied she had no share in the boat, and went away. She asked for her money, but he denied having received it,—the prosecutrix then reported the circum-

WOOD, J. 1888.

LEE KANG WYE v. NG AH MIN.

stances at a Police Station. It also appeared that at the time the prosecutrix agreed to take a one-fourth share as aforesaid, she sent her son to see the boat and it was pointed out to him by appellant. There was no question, he was the owner of the boat so pointed out. The appellant denied having given any share to the prosecutrix and also the receipt of any money from her for the purchase thereof. Having been convicted as aforesaid, he now appealed, and the formal record of conviction sent up by the Magistrate with the case stated by him herein, was [omitting formal parts] as follows:—

"Lee Kang Wye is convicted before the undersigned Magistrate, &c., for that he in the month of April, 1887, did cheat one Ng Ah Min by inducing her to pay him a sum of money, *to wit*: $100, in the belief that he would give her a fourth share in a tongkang *which he did not do*, and thereby committed an offence punishable under Section 417 of the Penal Code."

Van Someren, for appellant contended, that there was no evidence of a dishonest intent *at the time* he offered the prosecutrix the share or received the first payment; that the whole case, including the denial of the receipt of any money, was consistent with an honest intention at that time, but a subsequent change of mind. That was not sufficient upon which to convict—*Queen* v. *Heeraman Huloye*, 5 W. R. Cr. 5; *Re* Heeraman Haloye, 1 Ind. Jur. 97, and *Mayne on the Penal Code*, 339, 340. The case at most was one of breach of contract. The peculiar wording of the conviction shewed this, and would tend to shew the Magistrate had not considered the real point in the case, namely, whether there was a dishonest intent at the time.

D. *Logan*, [*Solicitor-General*] contended, that there was sufficient evidence to support the conviction, as the appellant promised the prosecutrix the register, and then excused himself for not giving it to her—then denied she had any share—and eventually denied he had received any money. The Magistrate might well from these facts have come to the conclusion that the appellant had a dishonest intent at the time he first received the money,—that he had then in fact no intention to fulfil his promise, but was desirous of obtaining money of the prosecutrix which he could only have done by means of the deception. The Magistrate having found the appellant guilty of "cheating" [Section 417] shewed he must have considered the real question in the case—the dishonest intent at the time—and having on the evidence come to the conclusion, that the appellant had that dishonest intent and was guilty, the Court would not interfere with his decision. The wording of the formal conviction was due to a clerical error and the words "which he did not do" were intended for "which he did not *intend to* do;" the Court could amend the formal conviction under the Appeals Ordinance 12 of 1879, Section 33, by inserting these two words and the conviction would then be perfectly good.

Wood, J. said that he could only amend the conviction if the facts warranted it—here the evidence was not such as necessarily proved a dishonest intent; it was consistent with the appellant's

guilt as well as with his innocence—with the fact that there might have been a dishonest intent at the time, as with the defendant's denials being due to a subsequent change of mind. The prosecutrix was bound to shew *conclusively* there *was* the dishonest intent—they have failed to do so beyond a reasonable doubt—it was at most a case of mere suspicion. There was therefore no evidence before the Magistrate on which he could lawfully convict the appellant. The formal conviction also tended to shew the Magistrate had not considered the real question of the dishonest intent, and seemed to think a mere non-fulfilling by the appellant of his promise was sufficient to render him guilty. The conviction must be quashed.

WOOD, J. 1888.

LEE KANG WYE v. NG AH MIN.

Conviction quashed.

SAHAT *v.* HAJEE BRAHIM.

PENANG.

WOOD, J. 1888.

February 27.

A person who inflicts a wound on another is answerable for the results, if the results follow without unreasonable conduct on the part of the man wounded.

Where, therefore the prisoner inflicted a wound on the prosecutor, which in itself was not a serious wound, but the prosecutor omitted to obtain proper and immediate remedies, by reason whereof the wound got into an unhealthy state and only after it got to that stage the prosecutor was sent to the hospital where he was kept by the Medical Officer for treatment for twenty-three days during which time he was unable to follow his ordinary pursuits,

Held, that the foul state of the wound and the consequent detention in hospital must be considered the result of the prisoner's act, and the case was therefore one of grievous hurt under Section 325 of the Penal Code, and not simple hurt under Section 323, and a Magistrate's conviction for the latter could not be sustained as he had no jurisdiction over a case of grievous hurt.

The appellant [Sahat] had been convicted by J. K. Birch, Esquire, Magistrate, Province Wellesley, for voluntarily causing hurt to the respondent under Section 323 of the Penal Code. The evidence for the prosecution was that the prosecutor [the respondent] went to lift his fish-traps from a field and having done so, was returning home when the prisoner [the applicant] followed him, and having made up to him, struck the prosecutor with a heavy stick on the left upper-side of forehead which caused the prosecutor to fall down senseless. The prisoner then went away leaving the prosecutor lying in the field in that condition, and so he remained for upwards of an hour, when having recovered his senses, he got up and managed to make his way home. The prosecutor was very ill after that for some days and was unable to get up and go out. He requested his wife to inform the Penghulu of it, but she omitted to do it. The prosecutor thereafter was unconscious from fever caused by the wound, and six days after a Detective came to his house, and he reported the assault, and was thereupon sent to hospital. From the evidence of the Apothecary it appeared that the prosecutor had been in hospital from 18th November to 11th December, suffering from a scalp-wound which was some days old when he was admitted and was then mattering, and in an unhealthy state. There was no injury to the bone, but it was exposed. The Apothecary was of opinion that the wound would have been healed in half the time had it been treated at once. Fever again came on and the man

WOOD, J. 1888.

SAHAT v. HAJEE BRAHIM.

was in a weak state, but this was attributed to want of proper treatment at first. He was naturally of a good constitution and at time of his discharge from hospital was nearly well. The Magistrate dealt with the case summarily as aforesaid and sentenced the prisoner to six months' rigorous imprisonment. The prisoner appealed.

Van Someren, for appellant contended, that the offence disclosed by the evidence if to be believed was *grievous* hurt, as the prosecutor was unable for more than 20 days to attend to his usual occupation, and was thus an offence which the Magistrate had no jurisdiction to deal with summarily and the conviction should be quashed. He referred to Sections 320, 325 of the Penal Code; *Man* v. *Samsah*, 3 Kyshe, 99; Ordinance 13 of 1872, Sections, 1, 5; *Regina* v. *Ramtohul Singh*, 5 W. R. Cr. 12; *Regina* v. *Pym*, 1 Cox. Cr. Ca. 339, and Mayne on the Penal Code, 250.

D. *Logan*, [*Solicitor-General*] for the Crown contended, that the Magistrate might fairly have considered on the evidence that the case was one of simple hurt only, as the prosecutor's detention in hospital was partly caused by his own act in not obtaining immediate and proper remedies and was not the direct act of the prisoner.

Wood J. I am of opinion that the Magistrate should, looking at the evidence, have come to the conclusion that the complainant was, by the act of the defendant, rendered unable to follow his ordinary pursuits for the period of twenty days. That he was so in bare fact is, I think, clear. For six days he was insensible and then went to the hospital; his being kept in hospital treatment is proof presumptive at least that he was unable with safety to follow his ordinary pursuits. I think that the defendant's act caused the results, in such a case as this, if the results follow without unreasonable conduct on the part of the complainant. I can see no unreasonable conduct on the part of the complainant in this case. The conviction must be quashed, and the case remitted to the Magistrate to be dealt with as one of *grievous* hurt.

Conviction quashed. Case remitted accordingly.

SAMMUGUM *v.* FRASER.

SINGAPORE.

GOLDNEY, J. 1888.

March 2.

The defendant being the lessee of certain brick fields belonging to the Government, by one of the clauses of the lease agreed if required to make and supply to and for the use of the Government, bricks of a given size and quality at a fixed rate per 10,000. The plaintiff thereafter became a contractor to the Government for the building of a wall for the Public Works Department and was to provide all necessary materials for the work. The Government arranged with the plaintiff that he should procure his bricks from the defendant, the cost of which should be deducted from the contract price to be paid the plaintiff. The Government thereupon gave the plaintiff orders on the defendant for bricks of the requisite dimensions, which the plaintiff handed to the defendant and obtained from him the right quantity of bricks. The plaintiff afterwards found a large portion of the bricks so supplied by the defendant were of smaller size and brought the fact to the notice of the Government. The Government however, on the defendant presenting his bill against them for full size bricks paid him his bill in full and thereafter deducted the amount from the amount they had to pay the plaintiff for the wall. The plaintiff thereupon sued the defendant for his loss by reason of the defendant's supply of the smaller size bricks.

Held, on appeal [reversing the judgment of the Court below, *Goldney*, J. dissenting] that there was no privity of contract between the plaintiff and the defendant nor any duty which the defendant owed the plaintiff, and the plaintiff could not therefore recover.

This was an action to recover $295.24, the plaintiff's loss in consequence of the defendant supplying him with bricks smaller than those he ought to have delivered. The defendant, by his defence, denied he sold any bricks to the plaintiff or made any arrangement with him for the supply of bricks; and alleged that his contract was with the Government on whose account he delivered the plaintiff the bricks and he had been paid by the Government for them. Among other things that were proved in evidence, it was shewn that the defendant had a lease from the Government, dated 4th September, 1885, of certain brick fields, and by a clause in this lease he agreed, when required, to make and supply to the Government certain quantities of nine-inch bricks per month at $80 per 10,000 bricks; that the plaintiff had a contract with the Government, dated 6th November, 1885, for the building of a wall at the Lunatic Asylum, Singapore, and as he had to supply all the materials of the work, it was arranged between the plaintiff and the Government that he should procure his bricks from the defendant, and their cost was to be deducted by the Government from the contract price to be paid him for the wall; that the plaintiff for this purpose, got orders from the Government on the defendant for nine-inch bricks, which orders he handed the defendant and obtained from him the requisite quantities of bricks; that the plaintiff received the bricks without examining them, but afterwards found out that a large portion of them were 8½-inch bricks, instead of nine-inch; he immediately communicated the fact to the Government who however, though they ascertained the complaint to be true, considered the plaintiff was himself to blame for having received the bricks, and on presentation by the defendant of his bills for the quantity of bricks supplied, as nine-inch bricks, paid him in full and afterwards deducted the amount from the amount they had to pay the plaintiff for the wall. The plaintiff submitted to this deduction and in addition having had to purchase other bricks by reason of the smallness of the defendant's bricks he suffered a loss and now sued the defendant for damages for such loss, which he estimated at the amount for which he brought this action.

Plaintiff, in person.

Buckely, for defendant.

Cur. Adv. Vult.

March 12th. *Goldeny*, J. This was an action for breach of contract. The plaintiff, a contractor under the Public Works Department, was supplied with a large number of bricks by the defendant. He alleges that these bricks by the contract should have been nine-inch bricks, whereas in fact they were only 8½-inch bricks. It is not disputed that the supply of bricks in size less than the contract size, would entail a loss upon the plaintiff, but on the part of the defendant two defences were raised. First,

GOLDNEY, J. 1888.

SAMMUGUM v. FRASER.

that there was no contract between the plaintiff and the defendant; secondly, that even if there was any contract, that the principle of *Caveat emptor* applies, and that the plaintiff having accepted the bricks cannot recover any loss that he may have sustained.

As to the first point, I think the contract was between the plaintiff and the defendant and that the intervention of the Public Works Department was simply in the interest of the defendant to secure the defendant receiving payment for the bricks supplied by him to the plaintiff. There was no obligation on the part of the plaintiff to use the defendant's bricks, all that he had to do under his contract with the Public Works Department was to use bricks satisfactory to them. For the interest of all concerned he authorised the Public Works Department to retain out of the moneys due to him under his contract the price of the bricks supplied to him by the defendant. There was no contract between the Public Works Department and the plaintiff for the supply of bricks. Assuming that the contract for the supply of bricks was made by the Public Works Department with the plaintiff on making that contract they acted as agents for the defendant. As the contract of the agent is in law the contract of the principal, the latter may come forward and sue them although at the time the contract was made the agent acted as, and appeared to be the principal. In my opinion the defendant has failed to make out his first ground of defence.

As to the second point raised by the defence with reference to warranties as to quality upon sales of goods, the general rule is that the law does not imply a warranty as to their goodness or quality. The rule is *Caveat emptor* and in general no liability is incurred by reason of bad quality or defects, unless there be an express warranty or fraud; but where goods are sold as being of a particular description this will amount to a warranty that they answer such description. The bricks in question were sold by the description of nine-inch bricks, and if they did not answer that description there has been a breach of contract. Where the goods delivered to the buyer are inferior in quality to that which was warranted by the vendor, the buyer has the choice of three remedies. *First.* He may [except in the case of a specific chattel in which the property has passed to him] refuse to accept the goods and return them. *Secondly.* He may accept the goods and bring an action for the breach of warranty. *Thirdly.* If he has not paid the price, he may set-off or set-up by way of counterclaim, damages for breach of warranty in the vendor's action for the price.

The second proposition that the buyer may after receiving and accepting the goods bring his action for damages in case the quality is inferior to that warranted by the vendor needs no authority. It is taken for granted in all cases, there being nothing to create an exception from the general rule, that an action for damages lies in every case of a breach of promise made by one man to another for a good and a valuable consideration—*Poulton* v. *Lattimore*, 9 B. & C. 257. In my opinion there has

been a breach of contract on the part of the defendant which entitles the plaintiff to damages; the only question is the amount of such damages—as far as I am capable of judging on the evidence before me, the plaintiff is entitled to $93.60 damages. Verdict will be for the plaintiff for $93.60 with costs.

FORD, C. J. WOOD, PELLEREAU & GOLDNEY, J.J. 1888.

SAMMUGUM v. FRASER.

The defendant appealed against this judgment, and such Appeal was heard on the 7th and 8th June before the Full Court of Appeal, consisting of *Ford*, C.J., *Wood*, *Pellereau* and *Goldney*, J.J.

Buckley, [*Nanson* with him] for the appellant.

Respondent, [plaintiff] in person.

Cur. Adv. Vult.

June 12th. The Court being divided in opinion, the judgment of the majority of the Court [*Ford*, C.J., *Wood* and *Pellereau*, J.J. was read by

Wood, J. In this case it is with much regret that we are compelled to differ from the judgment in the Court below. We say with regret for according to the facts there found it would appear to be clear that the defendant has been over-paid for the supply to the plaintiff of inferior bricks for which the plaintiff has in account with the Crown been improperly charged. The Court below however, has found that there was a contract between the plaintiff and defendant, and on this point as it appears to us, the judgment below cannot be supported. The facts appear to us to be that Fraser having long ago agreed with the Crown to supply bricks to their order for the Public Works of the Colony, the plaintiff subsequently enters into an agreement with the Crown to do certain work for which bricks are required, which bricks the Crown undertakes to obtain for him through their connection with Fraser, at a certain price, which price is to be deducted from the amount to be paid by the Crown to the plaintiff on the completion of his work. Plaintiff thereupon obtains orders from the Crown on Fraser for the supply to him of bricks of certain dimensions, and for a time Fraser does supply these bricks; he afterwards supplies and plaintiff takes away bricks of smaller dimensions which are not worth the price due for the larger bricks, and thereupon at once makes known the fact of the inferiority in dimension of the smaller bricks to Mr. Ayre, who acts for the Crown. Of this Mr. Ayre takes no practical notice, and subsequently the Crown pays Fraser in full as for bricks of the larger dimensions deducting the full price on settlement with the plaintiff for the work done on the ground urged by Fraser, that the plaintiff by taking away the bricks of smaller dimensions given to him by the defendant, accepted them as being of full size.

Looking at the judgment of the Court below and the evidence taken before it, we can see nothing by which any contract can be assumed to have existed between plaintiff and defendant. The defendant has throughout held to his contract as being with the Government alone, and the mere delivery of the bricks to the

FORD, C.J. WOOD. PELLEREAU & GOLDNEY. J.J. 1888.

SAMMUGUM v. FRASER.

plaintiff cannot constitute any contract of sale as between plaintiff and the defendant, where, as here, delivery is obviously a delivery under another contract, nor under such circumstances does the mere heading of bills sent in by defendant to the Government in respect of the plaintiff, afford any evidence of such a contract of sale if indeed such bills when carefully looked at do not directly aid the plaintiff's contention. The defendant as it appears to us, had had no dealings except with the Government with whom he had undertaken to deliver bricks to their order, and the fact that the Government had intervened in the matter and the plaintiff become a receiver of bricks made by Fraser, seems to us to have been caused by the joint action of the plaintiff and the Government to which the defendant has been no party. We look at Fraser as contracting with the Government alone; he is ultimately paid by the Government for the bricks supplied to plaintiff, notwithstanding that they know that there had been a complaint made by plaintiff that the bricks were smaller in dimension than they ought to have been, he seems to have demanded payment of the Government and the Government have paid him, with full knowledge through their servant Mr. Ayre, that the bricks were under size on the ground urged by Mr. Fraser as abovestated, and admitted as valid by the Government that the plaintiff by taking away the bricks had accepted them as of full size. That the plaintiff has sustained injury as above expressed we certainly think, and could it have been established upon sound equitable grounds in this action, regard being had to the facts of the case, that irrespective of direct contract between plaintiff and defendant, a duty could be shewn to exist on the part of defendant to re-pay the plaintiff the sum which he has received for the supply of the inferior article at the price of the superior one, we should have received such a result with satisfaction, a result which after much consideration we are unable to reach.

Goldney, J. I regret that I am unable to agree with the decision at which the majority of this Court has arrived. The point upon which I differ from the rest of the Court is one rather of fact than of law. To state it shortly, it is the construction to to be put upon the orders under which the bricks were in fact delivered by the defendant to the plaintiff, and for which deliveries in fact, the defendant received in payment the plaintiff's money. These orders were handed by the Superintendent of Works, Mr. Ayre, to the plaintiff, who sent them with his carts to the defendant's brickyard and received delivery of the number of bricks specified in the order. On the whole evidence that was before me in the Court below, the inference which I drew [an inference which nothing which has been argued before this Court has altered] was, that these orders were advice notes or delivery orders upon the defendant for the supply of bricks given to the plaintiff by the Superintendent of Public Works *acting for and on behalf of the defendant and at his request.* Looked upon in this light, the transaction is a very simple one. The Government having started some brick works for the purpose of being able to obtain a certain quality

FORD, C.J. WOOD, PEL LEREAU & GOLDNEY. } J.J. 1888.

SAMMUGUM v. FRASER.

and size of bricks for public buildings, find it to their advantage to lease these works instead of carrying them on themselves. Not to lose the object for which the works were started, a stipulation is put in the lease which obliges the lessee if required so to do, to make and supply to, or for the use of Government, bricks of the size, quality and description, &c.

In the carrying out of this stipulation, the lessee [Fraser] and the Government seem to me to have come to an understanding that when public works are being constructed and the Government are not their own contractors, and bricks are required by the contractor for use upon the Government works, that the lessee on receiving notice from the Government would accept the Government contractor instead of the Government—supply him with bricks at the Government rate—provided always that the Government would secure the lessee from loss by arranging with the contractor that they [the Government] should stop the price of the bricks supplied to the contractor by the lessee out of the monthly payments due from the Government to the contractor. A passage from *Ram on Assets*, p. 386, perhaps will illustrate the principle which seems to me to apply to this case:

"Between a lessor and his lessee for years there are a privity of contract and a privity of estate. And as to an action of debt for the rent reserved in the lease, the privity of contract is personal and holds only between the lessor himself and the lessee himself.

If a lessee for years assigns the term, then on the privity of contract between the lessor and lessee, the lessor may, until he has accepted of the assignee as his tenant, bring an action of debt against the lessee for the rent due after the assigment. But this action of debt, the lessor cannot maintain after he has taken rent of the assignee and so accepted him as his tenant, for this acceptance extinguishes the privity of contract."

To apply this illustration, it seems to me that the privity of contract between Fraser and the Government [in reference to the particular quantity of bricks contained in the order] was extinguished by the acceptance by Fraser of the plaintiff in the place of the Government of which acceptance in my opinion there is ample evidence before the Court. The privity of contract between Fraser and the Government being extinguished, a new privity of contract arose between Fraser and the plaintiff on which the plaintiff can bring his action. The view taken by the majority of the Court is that these orders are actual contracts of bargain and sale between the Government and defendant, contracts in which the Government act as principals and not as agents. If the latter view is correct, it must follow that there was a contract of bargain and sale between the Government and the plaintiff. That is, that the Government having bought the bricks from the defendant re-sold them to the plaintiff. There was, as far as I can see, no evidence of such a contract or transaction. The defendant's manager seems to me to have stated pretty clearly what the real transaction between the parties was when he said "the Government is responsible; the money comes from the contrator." In other words the Government were acting as sort of *del credere* agents for the vendor.

FORD, C. J. WOOD, PELLERAU & GOLDNEY. J.J. 1888.

SAMMUGUM v. FRASER.

The evidence before this Court is not I think absolutely inconsistent with either contention; that is, it is not absolutely inconsistent with the view that the order on which the bricks were delivered to the plaintiff were contracts to which the defendant and the Government alone were parties,—and on the other hand, the evidence I think cannot be said to be absolutely inconsistent with the view that in handing these orders to the plaintiff, the Superintendent of Public Works was acting for *defendant and on his behalf*, and that the bricks were delivered by the defendant to the plaintiff on *that* understanding. Before the appellant can succeed, he must establish that the Court below *could not* by law have drawn from the evidence before it the inference that the Superintendent of Public Works on handing the orders for the delivery of bricks to the plaintiff, was acting for the defendant—*Great Western Railway Co.* v. *Bragge*, 15 L. R. Q. B. Div. 628. In my opinion, the appellant has failed to do this. A great deal of stress was laid upon the lease of the brickfield by the Government to the defendant, dated the 4th of September, 1885. The view which I took of this case from the first was that it in no way affected the plaintiff who never was a party to it.

On the other points raised by the appellant, the majority of the Court are, I understand, of opinion that if a privity of contract existed between the plaintiff and the defendant, that the plaintiff would have a right to recover damages from the defendant. I think the appeal should be demissed with costs.

Judgment reversed. Costs in the Court below and on the appeal to be paid by respondent [plaintiff].

SHAYNA MUSTAN ROWTER *v.* KANA SHAIK IBRAHIM.

PENANG. WOOD, J. 1888. March 7.

Although the Statute of Frauds if intended to be relied on must, by Section 175 of the Civil Procedure Ordinance, 1878, be specially pleaded, yet there is nothing to prevent the Court in the exercise of its discretion even at the trial of a case, giving leave to the defendant to amend his defence by pleading the Statute.

This was an action on an agreement for a lease for the specific performance of it or damages for its breach. The statement of claim set out the agreement which was in writing, and the defendant in his statement of defence specifically admitted having made it. During the course of the trial the agreement was produced and it appeared that it had never been signed or executed by the defendant.

Adams, [on behalf of *Thomas*] for the defendant immediately thereupon applied to the Court for leave to amend his defence by pleading the Statute of Frauds.

G. H. S. *Gottlieb*, for the plaintiff objected, contending that under Section 175 of the Civil Procedure Ordinance the Statute must be specially pleaded; he referred to *Clarke* v. *Callow*, 46 L. J. Q. B. [N. S.] 53; *Pullen* v. *Snelus*, 48 L. J. C. P. [N. S.] 394; *Catling* v. *King*, 46 L. J. Ch. [N. S.] 384; and contended that to allow such an amendment at the trial especially, would be practically to defeat the section. He further contended that the defendant having admitted the agreement in his statement of defence should not be permitted now to deny it, *Collette* v. *Goode*,

7 L. R. Ch. Div. 842; that the defence was a technical one and should not be favoured and let in by an amendment,—*Rolt* v. *Cox*, 2 Wils. 253, and *Collette* v. *Goode*, suprà.

WOOD, J. 1888.

SHAYNA MUSTAN ROWTER. v. KANA SHAIK IBRAHIM.

Wood, J., said the Statute of Frauds was passed with the express object of putting down fraud and perjury, and it could hardly be called a technical defence. Under the provisions of the Civil Procedure Ordinance, 1878, the Court had large powers of amendment, powers which were intended should be liberally exercised. Section 175 dealt exclusively with the defence of the Statute being specifically pleaded, but did not expressly or by implication prevent an amendment being allowed to put in such a plea; the Court had power to allow amendments even at a trial and there was no reason why an amendment to let in such a defence should not be made even at that stage; and if the plaintiff was taken by surprise by the amendment he would be entitled to have an adjournment. He would therefore, in exercise of his discretion and power, allow the amendment asked for, and if he was wrong in so doing, the plaintiff could set him right through the Court of Appeal.

Leave to amend given.

SYED MAHOMED ATTAS *v.* TEK LEE.
SYED MAHOMED ATTAS *v.* TAN POK SYE.

PENANG.

Section 322 of the Civil Procedure Ordinance, 1878, is merely permissive and the Court in the exercise of its discretion may refuse a case to be withdrawn, or postponed, or shifted down the list, notwithstanding both parties consent, and are desirous to do so.

WOOD, J. 1888.

March 8.

These were actions on a building contract. They were connected but somehow the first of them was on this day's list for hearing, and the second of them on the next day's list. The parties were desirous the two cases should be tried together and as *Thomas*, Counsel for the defendants was absent from Penang, but was expected to arrive the next day, the parties and Solicitors on both sides agreed to postpone the cases to a day in the following week and below the fifth next case on the list. On the first case being called on for trial in open Court,

Van Someren, [for *Thomas*] for defendants moved for a postponement accordingly, and referred to Section 322 of the Civil Procedure Ordinance 5 of 1878.

Adams, for plaintiff signified his consent and stated he did not mind being shifted five cases lower down, but objected to go to the bottom of the general list.

Wood, J. [after consulting *Pellereau*, J.] said his learned brother agreed with him in holding that Section 322 was merely permissive and did not deprive the Court of its control over the Cause list. He strongly objected to postpone a case to another day as it would not be fair to other suitors whose cases had been fixed for definite days to be deprived of their days. The only postponement he could therefore allow was, that when there was a consent on both sides, the case should go to the bottom of the general list.

Adams, thereupon consented to go to the bottom.

Order accordingly.

REGINA *v.* ONG KONG POON.

PENANG.
WOOD, J.
1888.
March 12.

The prosecutor had rented a strip of land at the back of a shop in Prangin Lane in which he resided. The appellants [thirteen in number] were carrying granite stones, passing and repassing over the strip, thereby scattering some paddy the prosecutor had laid out to dry. This led to words and eventually to blows. The strip lay at the back of the shop by the sea side, and though some distance from the public thoroughfare, it was open on all sides and was distinct from the shop land which was fenced all round; over the strip was a lane or foot-path. Crowds of people were attracted to the spot by the noise of the fight.

Held, that the strip was not a "public place" within the meaning of Section 159 of the Penal Code, so as to render the appellants guilty of an affray.

The appellants [thirteen in number] had been convicted by R. N. Bland, Esquire, Magistrate, for an affray "at Prangin Road, in Penang, so as to disturb the public peace" under Section 160 of the Penal Code. One of the appellants was also convicted for voluntarily causing hurt. The evidence shewed that the prosecutor had rented a strip of land at the back of the shop he occupied, No. 134, Prangin Lane, on which he was drying paddy. The appellants were carrying granite stones and passing backwards and forwards over the strip of land and scattering the paddy thereby. This led to an altercation which ended in a general row in which sticks were used and stones thrown about. The prosecutor himself was wounded by the appellant who was convicted of hurt and was eighteen days in hospital. The strip of land lay on the sea side of the shop lands which was fenced all round, and over this strip was a lane or foot-path. The spot was open on all sides, but was some distance from the public thoroughfare, Prangin Road. On the row beginning crowds of people came up from all sides and eventually the Police too, who succeeded in arresting the appellants. The appellants now appealed against the conviction for "affray."

Thomas, for them contended, that the place was not a "public place" within Section 159 nor was it a disturbance to the public peace. There was no evidence of either. The crowds were drawn by the disturbance and were not there before.

D. *Logan*, [*Solicitor-General*] contended, there was sufficient evidence that the place was a "public place" as though private land rented by the prosecutor, it was open on all sides like the generality of lands at the back of Beach Street adjoining Weld Quay, and the evidence shewed crowds of people were present. He referred to *Mayne on the Penal Code*, 241.

Wood, J. I think the evidence adduced was insufficient to support the fact of the place being a "public place" within Section 159 of the Penal Code. The conviction for affray is therefore quashed.

Conviction quashed.

In re RAJAH SAMSUDIN TUNKU JAKSA.

PENANG.
WOOD, J.
1888.
March 12.

Neither the Magistrate enquiring into an Extradition Case under the Extradition Act of 1870 [33 & 34 Vic. c. 52], nor this Court on proceedings thereunder for an *Habeas Corpus*, can take *judicial notice* of any Treaty made with any Foreign Power, nor of any Proclamation or Order in Council, by Her Majesty or otherwise [*a.*],

[*a.*] See now Ordinance 1 of 1888, Section 14, as amended by Ordinance 9 of 1888, Section 2.

applying such Act to the Treaty, even though such Treaty and Proclamation or Order exist in fact, and are duly published in the *Government Gazette* in accordance with the Act.

There *must* be evidence before the Magistrate that the Act has been applied to the Treaty; but the bare production *in evidence* before him, at the enquiry, of the *Government Gazette* containing such Treaty and the Proclamation or Order in Council, is conclusive *evidence* of the Act having been applied.

If this is omitted, this Court has no jurisdiction to supply the defect, by receiving the *Government Gazette* in evidence, for it has no power to receive any evidence, but is confined to the evidence and documents which were before the Magistrate.

Query. Whether the Magistrate has power under the aforesaid Act to receive evidence tendered by the accused in reference, not to his identity or the matter being a political offence—but as to his innocence, and in disproof of the case for the prosecution?

This was a Rule *Nisi* obtained by *Van Someren* on behalf of the abovenamed accused, calling on W. Egerton, Esquire, Magistrate, Penang, the Jailor of the Criminal Prison, and the Consul-General for the Netherlands to shew cause why a writ of *Habeas Corpus* should not issue with a view to the discharge of the accused from custody.

The accused was charged with having cheated the Gambling Farmer at Sirdang, in Sumatra, and his extradition had been requisitioned for by the Consul-General for the Netherlands, and the Governor of this Colony had issued his Order to the Magistrate, under the aforesaid Extradition Act, 1870, signifying the fact of such requisition having been made. The accused was arrested and the enquiry was held by the Magistrate who committed him to prison, under Section 9, to await the Governor's Order for his rendition to the Netherlands authorities. On the close of the case for the Crown, Counsel for the accused tendered evidence to prove him innocent of the charge. The Magistrate, after referring to Sections 8, 9 and 10 of the Extradition Act, 1870, declined to receive any evidence for the accused, considering he had no power under the Act to take it, unless the prisoner's identity was in question, or the offence was a political one—and suggested that the Supreme Court, on the application for the *Habeas Corpus*, was the place and time to tender and receive the evidence here offered. Her Majesty the Queen had entered into a Treaty with His Majesty the King of the Netherlands for the extradition of fugitive criminals found in each other's dominions: the Treaty was dated 19th June, 1874, and by Her Majesty's Order in Council, dated 6th August, 1874, the aforesaid Act was applied to it. The Treaty and Order in Council, or Proclamation was published in the *Straits Government Gazette* of 24th October, 1874. There was no evidence however before the Magistrate of the Treaty, or that the Act had been applied to it; the *Government Gazette* was not produced in evidence, nor was it then in any manner referred to. There were several objections to the proceedings and commitment, but the two hereinafter mentioned, were the only ones referred to in the arguments, as the decision of the Court rendered it unnecessary to go through them. The Rule *Nisi* now came on for argument.

D. *Logan*, [*Solicitor-General*] shewed cause and contended, that the Magistrate having had the Treaty and Order frequently before him in other cases, was quite aware of their existence and

WOOD, J. 1888.

In re RAJAH SAMSUDIN TUNKU JAKSA.

he was entitled to take judicial notice of them. The Criminal Courts were to presume that all requirements of the law, in order to constitute the offence, had been complied with. Ordinance 6 of 1873, Section 47; 33 & 34 Vic. c. 52, Sections 2, 5; *Reg.* v. *Wilson*, 3 Q. B. Div. L. R. 42. The Treaty was matter of "public history" and books on public history were receivable in evidence. Act II. of 1855, Section 47; he now therefore tendered the *Government Gazette* of 24th October, 1874, in evidence, as proving the Treaty and Order in Council. At all events, the wrongful rejection of evidence would be no ground for setting aside a conviction or order, unless injustice was done—Ordinance 12 of 1879, Section 33, and *a fortiori* the mere omission by an oversight, to take evidence, would not be. The Magistrate was right in refusing to take the evidence tendered by the prisoner; he had no power to receive it—Extradition Act, 1870, Sections 9, 10.

Van Someren, in support of the rule contended, the application of the Act to the Treaty was the essential thing, before the Act could be acted on—33 & 34 Vic. c. 52, Sections 2, 5; the provisions of the Order and Treaty limited or modified the provisions of the Act. *Ibid*—*Reg.* v. *Wilson*, suprà; and the Magistrate *must* therefore have before him *evidence* of the Order. *Clarke on Extradition*, 178 [2nd Ed.] Neither the Magistrate nor this Court could take judicial notice of the Treaty or Order in Council. 1 *Taylor on Evidence*, [8th Ed.] Sections 10, 18, 1305-9; 1527, 28; 1662-64. There being no evidence of the Act having been applied, the proceedings here were defective in the most essential of requirements. This Court could not remedy the defect and supply the evidence by receiving the *Government Gazette* now tendered, as it was bound by the order of commitment and the evidence and documents on which it proceeded—that order was final and could not be re-opened or added to. *Re* Piper [*a*.] and *re* Favier [*b*.] The Act and Ordinance referred to by the other side, had no application to an Extradition case. *Re* Rykschroeff, 2 Kyshe, *Hab. Cor. Ca.* 10. The Magistrate improperly refused to receive evidence tendered to prove the innocence of the accused: he had power to receive it. *Reg.* v. *Lauvadier*, 15 Cox's C. C., *Clarke on Extradition*, pp. 184-90.

[*a*.] antè p. 221.

[*b*.] *L. T. Newspaper* [N. S.] No. 2274 of 30th October, 1886, p. 444—"*Extradition*. 33 & 34 Vic. c. 52, Sections 9, 10—Jurisdiction of Magistrate—Decision of Magistrate conclusive—Alibi—New Evidence. We have received the following note of an application in the vacation: This was an application on a return to a writ of *Habeas Corpus* in the case of two Frenchmen, Adrien Favier and Joseph Provin, for whose extradition the French Government had applied under the Treaty between France and this country in respect of an alleged crime, and who had been committed by Mr. Bridge, Police Stipendiary Magistrate at Bow Street, to await the warrant of the Secretary of State for extradition for such crime.

Bernard G. Wilson, Solicitor for the prisoners contended, that inasmuch as the Extradition Act, 1870, provided for the retention of the prisoners in this country for a period of fifteen days after the committal by the Magistrate and previous to their being handed over to the authorities, to enable them to apply for a writ of *Habeas Corpus ad subjiciendum*, such provision was so made for the express purpose of giving the Judge before whom the writ was returnable, jurisdiction to re-open the case, so as to admit, as in this case, any evidence which could be given on behalf of the prisoners, but which could not possibly be produced before they were committed. And further, that the

WOOD, J. 1888. — *In re* RAJAH SAMSUDIN TUNKU JAKSA.

Wood, J. I am of opinion the Rule must be made absolute. The Extradition Act, 1870, can only be enforced where there has been a Treaty with the Foreign State making the requisition, and the Act has been applied to the Treaty by Order in Council. There was no evidence in this case of the Treaty or Order in Council. They both exist in fact, and the only question is, whether the Magistrate could take *judicial* notice of them. The authorities cited are clear, that neither he nor this Court can do so. The objection is therefore fatal. This Court has no power to re-open the case and receive evidence, after the Magistrate has committed the accused—even though such evidence is the mere production of the *Government Gazette*, which, at the enquiry, would have been conclusive. I fail to see the application to an Extradition case, of the sections in the Acts and Ordinances referred to by the Solicitor-General. It is unnecessary to say anything as to the power of the Magistrate in such cases, to receive the evidence tendered by the accused. I should like to have heard it fully argued, and to have considered the point,—but the first objection succeeding, that is sufficient to dispose of the case. The Rule will be made absolute for the *Habeas Corpus* to issue for the prisoner's discharge.

Rule absolute.

SAHID *v.* FU AH SEH.

PENANG. — WOOD, J. 1888. — March 26.

The prisoner seeing a hawker go past, called him and asked to see some of the sarongs he had for sale. The hawker handed him four, and it was eventually agreed he could have them for $3. The hawker then asked for payment, but the prisoner told him to come "another day"; thereupon they had words and the prisoner having struck the hawker, ran away with the sarongs. He could not be found nor the sarongs, till he was arrested on a later day on a warrant.

Held, he was properly convicted of "theft" under Section 379 of the Penal Code.

A statement made by a person to another at or about the time of the occurrence of the fact spoken to, is admissible as corroborative evidence by that other person under Section 31 of the Evidence Act II. of 1855.

The appellant [Sahid] had been convicted by J. K. Birch, Esquire, Magistrate of Province Wellesley, of theft under Section 379 of the Penal Code. The evidence shewed that on the 4th January, at about mid-day, the prosecutor, who was a hawker of

evidence then to be produced, went to prove an *alibi*; also that the official documents produced by the authorities demanding the extradition, did not disclose sufficient evidence upon which the Magistrate could have jurisdiction.

Danckwerts for the Crown, relied upon the case of *Reg.* v. *Maurer*, 10 Q. B. Div., contending that the Judge had no jurisdiction to re-open the case, and that the prisoners were in the four corners of the committal.

Grantham, J. I think that the application must be refused. I am of opinion also that there was sufficient evidence to give the Magistrate jurisdiction, and that, having so committed the prisoners, he had properly acted within his jurisdiction. The contention of Mr. Wilson as to my having jurisdiction to re-open this case, falls to the ground in the face of the case of *Reg.* v. *Maurer*, cited by the learned Counsel. As to the further contention of Mr. Wilson as to the *alibi*, I am also of opinion that such evidence on behalf of the prisoners could not affect the Magistrate's decision to commit, nor my own that I have not jurisdiction to re-open the case. The production of new evidence is not sufficient to give me the jurisdiction contended for on behalf of the prisoners. The application can only succeed when the Magistrate had not sufficient evidence before him upon which to commit. The prisoners must therefore be re-committed to prison, to await the Home Secretary's warrant."

WOOD, J. 1888.

SAHID v. FU AH SEH.

cloths went with his basket of cloths to a Kampong at Telok Ayer Tawar for the purpose of selling his cloths. He was not far from the appellant's house, when the appellant called him and asked to see some of the "sarongs" he had for sale. He had a look at four sarongs which the prosecutor had handed him, and then made the prosecutor an offer and eventually agreed to pay prosecutor $3 for them. The prosecutor asked for the money, but the appellant said he would pay "another day." Upon this the parties "fell out," and the appellant struck the prosecutor a blow on the eye, and then ran away with the four sarongs into his house. A friend of the prosecutor also a hawker, then came up and the prosecutor related to him what had happened and the two went to the Police Station and reported. The Corporal thereupon went to the house of the appellant, but did not find him or any of the sarongs. He then instructed the prosecutor to apply for a warrant which he did, and the appellant was arrested. The second hawker to whom the prosecutor told the tale was called by the prosecutor as a witness before the Magistrate to corroborate him as to that fact.

Capel, for appellant contended, that the conviction should be quashed [1] as the evidence shewed the prosecutor had willingly parted with the sarongs, and in order to constitute "theft" under the Penal Code, Section 379, there must be a *taking* of the thing from the possession of the owner *without his consent.* Although the evidence might have shewn that the prisoner's act was larceny according to English law, yet it was not "theft" under the Code. He referred to *Mayne on the Penal Code*, 309; [2] he contended the evidence of the second hawker was hearsay and inadmissible.

D. *Logan*, [*Solicitor-General*] contended, the evidence shewed a taking of the sarongs by means of a trick, and the consent of the prosecutor was only that the appellant should examine the sarongs, but not to take them without paying for them. At all events, if it was not "theft," it was "cheating" under Section 415, and the Court could amend the conviction under the Appeals Ordinance, 1879; [2] he contended the evidence of the second hawker was admissible under the Indian Act 2 of 1855, Section 31.

Wood, J. I am of opinion that the evidence is sufficient to establish the charge of "theft" under Section 378, Illustration 4, and that the evidence in corroboration was rightly received under the Indian Act 2 of 1855, Section 31.

Conviction affirmed.

REGINA *v.* DORASAMY PILLAY.

PENANG.

WOOD, J. 1888.

March 26.

A Magistrate sitting in a case within his *summary* jurisdiction, cannot take the case in his Chambers, but is bound to hear it in open Court [*a.*]

There cannot be convictions under Sections 162 and 163 of the Penal Code under one and the same state of facts.

The appellant had been convicted by Walter Egerton, Esquire, Magistrate, [1] for offering a gratification to Rosa Catherine

[*a.*] As regards a Justice of the Peace see *Hajee Shaik Abdul Cader* v. *Aisha and Ors. & In re* Kynnersley, antè p. 151. See also *Regina* v. *Chin Ah Chi*, 20th March, 1890, *infrà*.

Norris, the wife of Charles Vincent Norris, a public servant, in order that the said Rosa Catherine Norris might by "corrupt means" induce the said Charles Vincent Norris to shew in the exercise of his official functions, favour to the appellant in respect to the supply of rations to the General Hospital, under Sections 162 and 165A. of the Penal Code; [2] for offering a gratification as aforesaid in order that the said Rosa Catherine Norris might by "the exercise of personal influence" induce the said Charles Vincent Norris to shew favour as aforesaid, under Sections 163 and 165A. of the Penal Code. Rosa Catherine Norris was a witness for the prosecution, and she stated that the appellant in offering her the gratification [$100] said he wanted her "to ask" her husband [who was the Apothecary at the General Hospital] to help him so that he might not lose his contract for the supply of rations to the hospital; there was no further evidence in respect to the object of the appellant in offering the $100. From the evidence of Charles Vincent Norris [who was not present when the money was offered] it appeared that the appellant was Contractor for the supply of rations to the General Hospital, Penang, but had been supplying rations of an inferior quality, and there was a probability of his contract being cancelled. The appellant appealed against the conviction, and from the case stated by the Magistrate it appeared *inter aliá* that the case was called on for hearing at the Police Court in the usual way, but "on the application of the prosecution who urged that Mrs. Norris was very unwilling to appear in open Court, the Magistrate took the case in his Chambers which opens into the Court by double doors; that during the case these doors were open as well as the outer-doors and that no person was, to the knowledge of the Magistrate, excluded; that before taking the case in Chambers, the appellant's Counsel stated he had no objection to its being so heard." There was an affidavit of the appellant's Solicitor stating that the door said to open into the Court opened into a space which formed the passage for the Magistrate from his Chambers on to the Magisterial Bench; that this space or passage was railed off from the rest of the Court and in the line of the rails was a door by which the Magistrate's peon generally stood; that the public were never allowed in this space or passage or within the rails aforesaid. This affidavit was not contradicted, but nothing turned on it. The appeal now came on for hearing.

Van Someren, for the appellant contended [1] that it was irregular for a Magistrate dealing with a case in his summary jurisdiction to hear it otherwise than in open Court, that is, sitting in the Police Court, as the essential of "a Court" is, that it should be held in public, *Daubney* v. *Cooper*, 10 B. & C. 237; that it was different when he was only holding a preliminary enquiry with a view to committing a prisoner to the Assizes, *Cox* v. *Coleridge*, 1 B. & C. 37; *Hajee Shaik Abdul Cader* v. *Aisha & Ors, Re* Kynnersley, antè p. 151; that in a summary case he had no jurisdiction to hear and sentence when off the Bench, and his sitting as he did here, in Chambers, was not "a Court." As Magistrate in a summary case, he must sit in the Police Court. *Max. on*

WOOD, J. 1888.

REGINA v. DORASAMY PILLAY.

Mag., 3, 4; though as a Justice in a preliminary enquiry he may sit in private—*Ibid.* 85, 86; the Summary Juridiction Ordinance 13 of 1872 spoke of "a Magistrate," but it must mean a Magistrate when sitting in the Police Court, Act 13 of 1856, Section 22; and Ordinance 13 of 1872, read in conjunction with the Interpretation Ordinance 1 of 1868, Sections 7, 10; the Magistrate was to sit in such places as the Governor might appoint as Police Courts—Ordinance 3 of 1878, Section 1, Clause 4, and Section 57; but the Magistrate's Chambers had not and was not likely ever to be so appointed. The sittings in Chambers not being "a Court," the Appeals Ordinance 12 of 1879, Section 34, Clause 1, did not apply as it dealt with convictions and orders of a "Court" —nor did Clause 2, as it was limited to irregularities *up to* or *before* trial; here the irregularity went on right up to the passing of sentence. The Legislature had for some reason taken the precaution in the last Ordinance passed last year, Ordinance 19 of 1887, Section 1, to define a "Magistrate" as used in that Ordinance to mean "a Magistrate sitting in a Police Court"—but this was only declaratory of what the term always meant elsewhere; the proceedings here not being then before a "Court," the conviction must be quashed. *Regina* v. *Lloyd*, 19 L. R. Q. B. Div. 213. Any want of objection or even consent on the part of the appellant the then prisoner could not avail. *Fletcher* v. *Moore*, 18 L. J. Ch. [N. S.] 384; *Regina* v. *Bertrand*, 1 L. R. P. C. 520; [2] he contended that the evidence shewed either that Mrs. Norris was to use "corrupt means" as by sharing the $100 with or paying it to her husband to induce him to shew favour, or it was for herself in order that she might use her "personal influence." The two things could not stand together and one or other of the convictions must be quashed on this ground too.

D. *Logan*, [*Solicitor-General*] admitted that the two convictions were inconsistent, but it was immaterial as regarded the actual result, which of them was quashed. As regarded the hearing in Chambers, he contended as the doors of the room were open and one of them opened into the Court itself and no person in fact had been excluded, as had been the case in *Cox* v. *Coleridge*, and *Daubney* v. *Cooper*, the room was an "open Court," and the proceedings had been had in a "Court."

Wood, J. This Court cannot allow such a proceeding as this to pass, or else the public might well think it permits all kinds of irregularities to be committed. The convictions are quashed on the ground of fatal irregularity in not trying the case in open Court. Incidentally, I may state that the two convictions cannot be upheld, but the Magistrate should have adjudicated as to whether the prisoner offered the money in order that the person to whom it was offered should induce the public servant to shew favour by the exercise of "personal influence" *or* by "corrupt means."

Convictions quashed [*a*.]

[*a*.] See a second report of this case where the prisoner was subsequently reconvicted, 20th August, 1888, *infrà*.—J. W. N. K.

KHOO HOCK LEONG *v.* LIM ANG KEE.

PENANG.

WOOD, J.
1888.

April 3.

The effect of Sub-sections 4 and 6 of Section 1 of the Civil Law Ordinance 4 of 1878 is, that if in any suit which might have been instituted before that Ordinance was passed, a Court of Equity would have given relief or recognised an equitable claim, whether on the part of a plaintiff or defendant, this Court, under that Ordinance, is to give the same relief, or recognise the same rights, in all and any suits or proceedings before it, irrespective of the nature of the suit or proceeding, and who is or would formerly have been plaintiff or defendant therein.

Where, therefore in an action for the recovery of land, in the nature of an action of ejectment under the Common Law, the Court considered the plaintiff was entitled to recover possession, but was also satisfied that the defendant had, *bonâ fide*, in the belief that the land was his, expended money in making improvements to it, which improvements the plaintiff would obtain the benefit of, on getting possession of the land, the Court, in giving judgment for the plaintiff for the recovery of the land, ordered that he pay the defendant a sum of money [which the Court then assessed] for the improvements so made.

This was an action to recover possession of certain lands at Pyah Trebong District, in Penang, belonging to one Khoo Sam Chye deceased, and comprised in Government Indenture No. 245 of 1853-56 and Deeds Poll No. 101 of 1854-56 and 661 of 1855-56. The plaintiff was the son and administrator of the said Khoo Sam Chye. The second defendant was only a tenant of the first defendant. The first defendant claimed the land under Government Indenture No. 21 of 1848-49 and Deeds Poll Nos. 329 of 1854, 5,205 of 1878, 5206 of 1878 and 1650 of 1884. The Government plan of the district, shewed the land to be the land comprised in the plaintiff's Indenture No. 245, but did not shew where the land, comprised in defendant's Indenture 21 was —and no trace of such land was able to be discovered. The deceased Khoo Sam Chye died in 1864, leaving three young children, of whom the plaintiff was the eldest, and the only son—the plaintiff, about seven years after his father's death, left this Settlement for Rangoon, and only returned about a year before this action. He was not aware, all the time he was away, that his father Khoo Sam Chye's land was in the possession of strangers, but on his return found the defendant in possession, and thereupon brought this action to eject him, and recover possession of the land. The Court was satisfied the plaintiff did not stand by and wilfully or otherwise mislead the defendant. The land in the defendant's Indenture No. 21 and Deed Poll 329 of 1884, belonged to one Quah Boon Kah, who, on the 28th October, 1854, by the aforesaid Deed Poll No. 5205 of 1878, mortgaged the land for $300, to one Pierre Edmond Mathieu. The said P. E. Mathieu died a few years after, leaving the mortgage still unpaid, and Daniel Logan and Frederick John Caunter Ross were the Trustees of the Estate of the said P. E. Mathieu, and came into possession of the Indenture, Title Deeds, and Mortgage Bond aforesaid. In 1877, the said Quah Boon Kah being then long since dead without any known kin,—the said Daniel Logan and Frederick John Caunter Ross, [the mortgage aforesaid being still unpaid] in exercise of their power of sale, were desirous of putting up the mortgage land for sale. They however had no knowledge of the land itself, and therefore instructed certain persons named Shaik Ismail and Lee Ah Choy, to make enquiries

WOOD, J. 1888.

KHOO HOCK LEONG v. LIM ANG KEE.

and discover the mortgaged land. The said Lee Ah Choy, from information so received, considered he had found the land wanted, in the land the subject-matter of this action. At the time of Lee Ah Choy's supposed discovery, such land was overgrown with jungle, and had been abandoned for some 25 years and more. Lee Ah Choy communicated his supposed discovery to the said Daniel Logan and Frederick John Caunter Ross, through the said Shaik Ismail, and they proceeded partly to clear the land so discovered, and thereafter put the same up to public auction, on the spot, but could get no bidders at all. They then instructed the said Lee Ah Choy to try and get a purchaser for the land, by private sale, and in 1878, the said Lee Ah Choy introduced to them one Lim Ah Wye as an intending purchaser of the land so discovered, and which was then believed to be the land comprised in the said Indenture No. 21 and the Mortgage Bond aforesaid. The said Daniel Logan and Frederick John Caunter Ross, acting under this belief too, sold the land so discovered to the said Lim Ah Wye for $100,—and by the aforesaid Deed No. 5206 of 1878, conveyed the land comprised in Indenture No. 21, and in the Mortgage Bond No. 5205 of 1878 to him in fee. The said Lim Ah Wye then went into possession of the land so discovered, cleared the same fully, and planted it out with nutmegs and other fruit trees, and continued to do so till 1884. On 17th day of November, 1884, the defendant Lim Ang Kee purchased the land, so in possession of the said Lim Ah Wye, in its improved condition, for $170, and Lim Ah Wye thereupon conveyed to him, by the aforesaid Deed No. 1605 of 1884, the land comprised in Indenture No 21, the said Lim Ah Wye and said defendant then still believed that the land so agreed to be sold, was the land comprised in the said Indenture and Title Deeds. The defendant Lim Ang Kee thereafter, under the same belief, took possession, by his tenants, of the land and remained undisturbed until 1887, when the plaintiff arrived in the Settlement and claimed possession of the land from him. During his possession, and before the plaintiff made his claim to the land, the defendant further planted out and improved it. The land comprised in the defendant's Indenture No. 21, in respect to a peculiar indentation on the Northern boundary, was not unlike the land so occupied by the said Lim Ah Wye, but the measurements and names of adjoining owners, were different, and in particular the fact that according to defendant's Indenture No. 21, a stream formed the *Northern* boundary of the land comprised therein, while the land in the occupation of the said Lim Ah Wye, had a stream for its *Southern* boundary. The land, as described in the plaintiff's Indenture No. 245, fitted exactly, in all particulars, with the land in the occupation of the said Lim Ah Wye. The defendant Lim Ang Kee was not however aware of this till the trial of this case, and he purchased, entered into possession, and improved the lands so in the occupation of the said Lim Ah Wye, under the belief that the land was his, and that it was comprised in Indenture No. 21. This Indenture was in English, and could not be read or understood by the

defendant Lim Ang Kee—he however had no reason to suspect his title was defective. The plaintiff having now proved his title to the land, and neither the defendant, nor Lim Ah Wye, nor the Trustees of the Mortgagee aforesaid, could shew that Quah Boon Kah had ever been in possession of the land, and the possession of Lim Ah Wye, falling short of the statutory period of twelve years, the Court considered the plaintiff was entitled to recover possession of the land. The improvements made by the said Lim Ah Wye, and defendant Lim Ang Kee, were estimated by witness to be about $200. The defendant Lim Ang Kee admitted having received $45 for three years rent of the land during the time he was in possession thereof. Counsel for the defendant Lim Ang Kee claimed, that if the plaintiff was to recover possession of the land, he should be ordered to compensate the defendant Lim Ang Kee for the improvements effected by him and Lim Ah Wye. This claim arose incidentally during the progress of the case, and was *not* made in the pleadings in the action. The question of this claim was now argued, and this report is confined to that question only, as nothing else transpired in the case, calling for a report. Sub-sections 4 and 6 of Section 1 of the Civil Law Ordinance 4 of 1878, are as follows:

[4.] "The Court shall recognise and take notice of all equitable duties and liabilities, appearing incidentally in the course of any cause or matter, in the same manner in which the Court on its Equity side would have recognised and taken notice of the same, in any suit or proceeding duly instituted therein before the passing of this Ordinance."

[6.] "Subject to the aforesaid provisions, for giving effect to equitable rights and other matters of Equity in manner aforesaid, the said Court shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities by the Common Law or by any custom, or created by any Statute, in the same manner as the same would have been recognised and given effect to, if this Ordinance had not been passed."

Van Someren, for defendant Lim Ang Kee contended, that he was entitled to be compensated for the improvements, as they had been made *bonâ fide* under the belief that he had a title to the land, which now appeared to be defective; that it was not necessary, in order to be entitled to such compensation, for him to shew that the plaintiff had stood by; it was sufficient, in equity, that he had made improvements *bonâ fide* under the belief of title, which improvements the plaintiff would now reap the benefit of, on obtaining possession. The defendant having paid Lim Ah Wye for the land in its improved condition, was entitled to be paid for that and his own improvements. He cited Ordinance 4 of 1878, Section 1; Clause 4, Story's Eq. Jur., Sections 385-88; 799a, 799b, 1234-37; *Robinson* v. *Ridley*, 6 Mad. 2; *Attorney-General* v. *Baliol College*, 9 Mad. 411; *Bright* v. *Boyd*, 1, Story's Rep. [Amer.] 478; *Lord Cawder* v. *Lewis*, 1 Y. & C. 427; 2 Spence's Eq. Juris. pp. 206, 304; *James* v. *Dean*, 15 Ves. 236; *Walley* v. *Walley*, 1 Vern. 487; 2 Kent's Com. 334-6; Smith's

WOOD, J. 1888.

KHOO HOCK LEONG v. LIM ANG KEE.

Man. of Eq., p. 196-7; *Powell* v. *Thomas*, 6 Hare 300; *Neesom* v. *Clarkson*, 4 Hare 97; 2 Wh. & T. L. C. in Eq. 518-20; and as to equitable rights being recognised under Sub-section 4, Section 1 of the aforesaid Civil Law Ordinance, even as against a plaintiff in an action of ejectment, he referred to *Williams* v. *Snowden*, W. N. [1880] p. 124.

Clutton, for plaintiff contended, the defendant was not entitled to compensation, [1] The authorities cited were clear that he must claim under a "defective" title, but here he had no title at all; that he must have made the improvements without notice, but here he had constructive notice, the land was not his: he was guilty of laches in not enquiring; if he had, he would have found, from the glaring inconsistencies between the boundaries of the land described in his Title Deeds, and the land he occupied, that the latter could not be the former. [2.] Section 799b. of Story, shewed, that compensation would be allowed a defendant, *only when the plaintiff himself was seeking equity*—it was based, and proceeded only on the principle that he *who sought equity* must do equity; but here the Court was *not* invoked by the plaintiff in support of an *equitable* claim,—he was suing in ejectment as at Common Law—the authorities did *not* shew the defendant could have *sued* in equity for the value of the improvements, and would imply he could not. *Powell* v. *Thomas*, *supra*; and the sub-sections of the Civil Law Ordinance did not extend rights beyond what they were before, and this was clearly shewn by Sub-section 6 of Section 1. [3.] The claim for improvements was not a claim against the land,—it gave no lien; it could only be allowed as against rents and profits, and it was the party's own fault and loss, if the rents and profits did not suffice. *Story*, Section 799a.

Wood, J. Under the circumstances of this case, I think the defendant Lim Ang Kee had reasonable grounds for believing the plaintiff's land, to be lands of Lim Ah Wye, which he had a right to sell. I therefore consider that notice, constructive or otherwise, cannot be imputed to him. With reference to the second ground for resisting the claim for improvements, I am of opinion the equitable rule must now always prevail in the same manner in which the Court, in its Equity side, would have recognised and taken notice of the same in any suit or proceeding duly instituted before the passing of the Civil Law Ordinance. Any suit duly instituted in Sub-section 4, Section 1, I understand to mean, any suit *whatever*, and that if in *any* suit duly instituted, a Court of Equity would have recognised a claim, that claim must be recognised now. It is immaterial what was the nature of the suit or whether the claim is or would have been by a plaintiff, or a defendant only. The Court is no longer bound by these technicalities, and it is sufficient to find that equity would have recognised the claim. One of the principles or maxims of equity is, that when the true owner seeks to enforce his title against a *bonâ fide* occupier under a defective title, who had made improvements in the belief that the land was his, he should be re-paid the value of the improvements which the true owner would get the benefit of, and that maxim, and the rights incident to it, are now to be as applicable to a suit-at-law,

WOOD, J. 1888.

KHOO HOCK LEONG v. LIM ANG KEE.

as to a suit-in-equity. The result is, the defendant Lim Ang Kee is, in my opinion, entitled to be compensated for his improvements. The claim, as I understand the authorities, is against the land,—any rents and profits received from the land, being applied in reduction of the claim. Here the defendant received $45 for 3 years' rent—the improvements are shewn to be about $200. I consider therefore $150 a fair sum to be paid defendant Lim Ang Kee, by the plaintiff, for the improvements. There will therefore be judgment for plaintiff for the recovery of the land in question, but he must pay the defendant Lim Ang Kee $150, for improvements less mesue profits received. The plaintiff will have the general costs of the action, and the defendant Lim Ang Kee the costs of the claim and argument as to compensation for the improvements. Execution for possession of the land will be stayed until plaintiff shall have satisfied defendant Lim Ang Kee's claim. The setting off of costs, against costs and claim, may be effected by the parties, or by the Registrar, if they cannot agree.

Judgment accordingly.

REGINA *v.* HOEY HOON & ORS.

SINGAPORE.

FORD, C. J. & GOLDNEY, J. 1888.

April 4.

Semble. There can be no conviction under Section 11 of the Preservation of the Peace Ordinance 6 of 1872, without evidence that warning was given, under Section 9, on *the occasion* of the riotous assembly.

Although such a conviction cannot be sustained, yet in the case before the Court there being evidence of riot and other offences, the Court refused to quash the conviction, but under Section 34, Sub-section 2 of the Appeals Ordinance 12 of 1879, annulled the proceedings and sent back the case to the Magistrate to be tried again on a proper charge.

Query. Whether a Magistrate who sentences a prisoner to six months' imprisonment under the Preservation of the Peace Ordinance has power to couple with it a sentence of whipping?

The appellants had been convicted along with others by J. O. Anthonisz, Esquire, Magistrate, under the Preservation of the Peace Ordinance 6 of 1872, Section 11, for being members of an unlawful assembly and refusing to disperse after warning had been given, and were severally sentenced to six months' imprisonment and thirty strokes with a rattan. It appeared there had been riots in the town of Singapore, and on the 22nd February, 1888, public warning had been given in terms with the Ordinance, and all riotous assemblies were ordered to disperse. On the 23rd there was a further riotous assembly in the town, and a good deal of damage was done by the rioters; the appellants were among the rioters and were arrested by the Police. No warning was however given on the occasion of the latter assembly and riot, and there was therefore no evidence of it nor of the Proclamation made under Section 7 of the Ordinance, on December 24th, 1872, [*Government Gazette*, 3rd January, 1873, p. 5.] The appellants appealed against the conviction.

The sections of the Ordinance so far as material to this Report, are as follows:—

7. "And whereas the peace of the Settlements has on various occasions been broken by the assembling together of bodies of armed men for unlawful

FORD, C. J. & GOLDNEY, J. 1888.

REGINA v. HOEY HOON & ORS.

purposes, leading in many instances to the destruction of property, the plundering and burning of houses and the commission of murder and other crimes, and it is expedient to make better provision for the prevention of such offences, it is further enacted,

Whenever it shall appear to be necessary for the preservation of the public peace at any of the Settlements, it shall be lawful for the Governor in Council to declare by Proclamation to be published in such manner as may seem fit, that the said Settlement or any part thereof shall be subject to the following provisions of this Ordinance and every such Proclamation shall remain in force until cancelled by Government notification published for the purpose."

9. "Whenever any persons shall be found during the existence of a Proclamation under this Ordinance, unlawfully, riotously, or tumultuously assembled to the disturbance of the peace and to the terror of Her Majesty's subjects, any Justice of the Peace may, in an audible voice, warn such persons that they are acting in contravention to law, and require them to disperse and depart to their habitations or to their lawful business; and all persons remaining so assembled after such warning may be dispersed and taken into custody by any Peace Officer or Special Constable, or by any other person acting under the orders of a Justice of the Peace, and shall be liable to the punishment prescribed in Section 145 of the Penal Code, and if any person or persons so warned to disperse shall be hurt, maimed, or killed in the dispersing, seizing, or apprehending or endeavouring to disperse, seize, or apprehend the persons hurting, maiming, or killing him or them shall be free, discharged, and indemnified from the consequences, except on evidence of gross carelessness, wantonness, or malice."

11. "All persons remaining unlawfully, riotously, or tumultuously assembled after having been warned by a Justice of the Peace under Section 9, and all persons found carrying arms contrary to the provisions of Section 10, in either case during the existence of any Proclamation under Section 7, shall be liable to whipping in place of, or in addition to, any other penalty prescribed by this Ordinance."

At the suggestion of the Court [*Ford*, C.J.] the Appeal was heard before himself and *Goldney* J., the two Judges present in the Settlement.

Groom, for the appellants contended, that the warning must be given on the occasion of the assembly, because it must be made in an audible voice; although warning had been given on the 22nd, still that did not suffice the requirements of the Ordinance. There was in fact no evidence even of such a warning having been made, nor of any warning on the occasion of the assembly now in question, that there was also no evidence of the Proclamation under Section 7 which was necessary to be shewn—*Regina* v. *Fursey*, 6 C. & P. 81. He also contended, that the punishment was in excess of the Magistrate's power, as a sentence of whipping could not be coupled with a sentence of six months' imprisonment.

Harwood, [*Acting Attorney-General*] for the Crown admitted warning had not been given as required by Section 9, but he contended that the evidence disclosed graver offences; that the Magistrate had convicted them of being members of an unlawful assembly when he might have convicted them of rioting and other offences—the Court therefore could deal with the case under Section 25 of the Appeals Ordinance 12 of 1879, and remit the case to the Magistrate—in fact three courses were open to the Court under that Ordinance either to alter the adjudication and convict the accused of rioting, ordering the sentence to stand, except as to the whipping—or to annul the proceedings and send

the case back to the Magistrate to try the accused on a proper charge, or to remit the case for further evidence and amendment of the conviction: or the case might even be sent back to the Magistrate to deal with it as a case for trial at the Assizes.

Groom, in reply contended, that the case could only be remitted to the Magistrate or dealt with under the Appeals Ordinance, if it were necessary for the due determination of the appeal, which, he submitted, it would not be in the present case.

Ford, C.J. The Court does not propose to express an opinion on the conviction itself, because it is admitted by the Attorney-General that this conviction cannot be sustained; but as it is of opinion that the evidence does shew that some offence was committed, it sends back the case under Section 34, Sub-section 2 of the Appeals Ordinance to the Magistrate, directing the accused to be tried again on a proper charge. We shall not quash the conviction, but in the words of the sub-section we annul the proceedings and direct the case to be sent back to be tried again on a proper charge.

Order accordingly.

JENAIBOO *v.* NARAINEN CHETTY & ANOR.

A mortgagee in exercising his power of sale is not a trustee for the mortgagor; and however recklessly and imprudently he may exercise the power short of actual fraud, and however disadvantageous the sale might be, he is not answerable to the mortgagor for it nor will this Court interfere with the sale.

Jones v. *Matthie*, 11 Jur. [O.S.] 504 and *Warner* v. *Jacob*, 20 L. R. Ch. Div. 220, followed.

Where a purchaser from a mortgagee at an auction held under the power of sale, prevents [without the knowledge of the mortgagee] third parties from purchasing and thereby obtains the property at a great undervalue,

Held, he could not be allowed to avail himself of his purchase, but, on payment to him by the mortgagor of his purchase-money and cost of conveyance—he was, in Equity a trustee of the property for the mortgagor.

Fuller v. *Abrahams*, 3 Bro. and Bing. 116, followed.

The nature of this suit, the facts giving rise to it and arguments of Counsel fully appear in the judgment of the Court.

Van Someren, for defendants cited *Downes* v. *Glazebrook*, 3 Meriv. 210; *Chambers* v. *Goldwin*, 9 Ves. 271; *Cholmondeley* v. *Clinton*, 2 Jac. and W. 90; *Jones* v. *Matthie*, 11 Jur. [O. S.] 504, 761, reversing 2 Coll. Ch. Rep. 465; *Cockell* v. *Bacon*, 16 Beav. 159, 60; *Davey* v. *Durrant*, 1 De Gex and J. 535, S. C. 26 L. J. Ch. [N. S.] 830; *Robertson* v. *Norris*, 1 Giff. 421; *Adams* v. *Scott*, 7 W. R. 213; *Locking* v. *Parker*, 8 L. R. Ch. Ap. 30; *Cotterell* v. *Stratton*, Ibid. 295; *Re* Alison, 11 L. R. Ch. Div. 284, 293; *Warner* v. *Jacob*, 20 L. R. Ch. Div, 220, s.c. 46 L. T. [N.S.] 658; *Nash* v. *Eads*, 25 Sol. Jour. 95; *Martinson* v. *Clowes*, 25 L. R. Ch. Div. 857, on App. 52 L. T. [N. S.] 706; *Macleod* v. *Jones*, 24 L. R. Ch. Div. 289; *Bettyes* v. *Maynard*, 49 L. T. [N. S.] 389 reversing 46 L. T. [N. S.] 766, and 31 Vic. c. 4.

Adams, for plaintiff cited *Cotterell* v. *Stratton*, suprà, p. 302, *per* SELBOURNE, L.C.

Van Someren, replied.

Cur. Adv. Vult.

WOOD, J. 1888.

JENAIBOO v. NARAINEN CHETTY & ANOR.

May 24th. *Wood*, J. In this suit, Jenaiboo, a pauper plaintiff, as the administratrix of Kundoo Mah, sues the defendants Narainen Chetty, a mortgagee with a power of sale, and Madar, who is the purchaser of the mortgaged premises, alleging that the land was improperly sold by Narainen Chetty to Madar and asking that the sale be set aside and asking generally for relief. The facts as I find them are as follows: Kundoo Mah in March, 1884, mortgages certain land in Penang to the defendant Narainen Chetty to secure $100 with interest at the rate of 18 per cent. per annum payable monthly. In this deed the usual power of sale in favour of the mortgagee is inserted. About 2 years ago Kundoo Mah dies and no administration is taken out to her estate until shortly before the institution of this suit. Interest was paid for some time, but at length interest for 22 months or thereabouts being in arrear and the principal sum unpaid, the defendant, by his attorney in fact, Supramanien Chetty, proposes to sell the property under his power of sale. No notice is formally given to the present plaintiff who was not then administratrix of Kundoo Mah, but notice is given to the sureties who joined with Kundoo Mah in the mortgage to Narainen, and the intended sale is brought to the knowledge of the present plaintiff who ineffectually attempted to induce Supramanien Chetty to postpone the sale. The sale was advertised by notice affixed to a tree in a conspicuous place on the premises [a piece of suburban land facing the race-course and distant some 2½ miles from George Town] to take place on the spot at 2 p.m. on Monday, October 17th. After consultation with, and on the advice of a surety, Pakir Kakah, the place of sale was altered from the spot to Sheik Alis', the auctioneer's premises in town, and a bell-man, a man of intemperate habits, was sent round to inform the neighbourhood that the sale was to be at the auctioneer's premises in Penang Street. No alteration was however made in the notice affixed to the tree on the spot, nor was any one there at any time during the day to direct persons to the place of sale in Penang Street. At the sale which took place in Penang Street at 3-30 or thereabouts no reserve price was fixed, and the land was knocked down and subsequently sold to the defendant Madar for $170. At the sale however, this incident occurred, Baboo, who states that he is a relative of the defendant Madar, and who was formerly the husband of Jenaiboo the plaintiff, whom he had divorced,—knowing the land and its value and seeing that it was going for what he thought an insufficient price, bids $200, but no notice being taken of it by the auctioneer, the defendant Madar and Kakah the surety come up to Baboo and saying, "Don't bid for it, we are going to buy it and divide it among the children," upon which Baboo abstained from further bidding. In addition to these facts, I find that the property was sold much under its value, probably for a 3rd only of its value—that no effort was made by the mortgagee to ascertain the value of the property, or to vary the place of sale with the consent of persons interested, except Pakir Kakah who was interested as a surety only and who, though I do not find that the Chetty knew

it, was the friend and associate of Madar the purchaser, and by no means the friend of the children of the mortgagor or an agent on their behalf; and indeed the views of the Chetty [Supramanien] as to his duty as mortgagee with a power of sale are given with much straight-forwardness and simplicity. In answer to me he states:—

"I have sold land once or twice before, and I understand what should be done in such cases. In case of default the first thing is to seize. It may or may not be that notice should be given before. I don't think it is necessary to send any notice to the mortgagors. A notice I think should be sent to the parties interested similar to that which has been posted on the premises. I should then proceed to sell and the direction I should give to the auctioneer would be to take the best bid. I did not make any particular enquiries as to the value of the property. I considered the property was worth from $150 to $200. It was my own estimate. I made no special enquiry. I was present at the sale. I did not make any reserve. I was there casually. I considered it my duty to sell for what it could fetch and to put no reserve on the price at all. I should have sued the mortgagors for the balance after deducting the amount realised and the expenses. If $10 had been bid I should have considered it proper to accept the $10 and have sued for the amount of costs and the balance. I look upon myself only as the person whose duty it is to put the property up to public auction, and that I have nothing to do with any reserve price. I do not care whether it fetches much or little. In case of no bidding that day I would put the property up to auction on another day—but if there were any bid however small, I would have taken it. I do not know if I could get a purchaser for $100 or so by private sale. Had the property been my own I would certainly not sell for so small a sum as $10, but would reserve it for another auction or for private sale."

Under these circumstances, the plaintiff asks that the sale to Madar be set aside as frandulent and void, and the plaintiff as administratrix be at liberty to redeem—or that an account be taken of the mortgage and the defendants decreed to pay the plaintiff as administratrix the value of the land less the amount due on the mortgage or for other relief.

Mr. Adams for the plaintiff contended, that the defendant Narainen Chetty through his agent or attorney in fact Supramanien Chetty had effected a sale to Madar which was fraudulent and void in law; that as mortgagee with a power of sale, he was bound to consider the interests of the mortagors which he failed to do; that the sale was conducted in complete disregard of their interests and solely in his own interests; that the sale should have been preceded by notice to the parties interested; that it should have been conducted at the spot after once having been advertised to be there sold, unless by the consent of the mortgagors or unless the notice has been counter ordered by another notice or by persons on the spot at time of sale, to direct intending purchasers to the place of sale. That it is not enough for this purpose to send a drunken bell-man over the town to give advertisement to parties in the neighbourhood, as to the change of intention, and that inquiry should have been made as to the value of the premises and a reserved price put in order to prevent sacrifice. As to the defendant Madar, that he was a party to all the proceedings of the defendant Supramanien, and his adviser as to all the improprieties of the sale; that he and Pakir and

WOOD, J. 1888.

JENAIDOO v. NARAINEN CHETTY & ANOR.

Kakah conbined together to enable Madar to get the land far under its value, a value, a result which was brought about by the direct fraud of both of them in falsely pretending that they were intending to buy for the next-of-kin.

Mr. Van Someren for the defendant Naraineu contended, that the sale was not fraudulent, but that the mortgagee acted clearly within his rights and that the conduct of Madar was not such as to render him answerable to the plaintiff. This contention for the defendant is founded upon the position that it is erroneous to suppose that a mortgagee with a power of sale is in any sense of the word a "trustee for the benefit of the mortgagor in the exercise of that power," or that as V. C. Stuart expresses it in *Robertson* v. *Norris*, 1 Giff. 421, 424, the Court of Chancery "requires that he shall exercise the power of sale in a provident way with a due regard to the rights and interests of the mortgagor in the surplus money to be produced by the sale," but that the law is now clearly established as expressed by KAY, J., in *Warner* v. *Jacob*, 20 L. R. Ch. Div. 224, reviewing the cases cited before me in argument, that a "mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit to enable him the better to realise his debt. If he exercise it *bonâ fide* for that purpose without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud."

That this is the existing state of the law, I am very reluctantly obliged to admit.

Mr. Adams contended that the cases had never gone quite the length of supporting such a condition of things as exist in the present case, but if not, it is clear to me that they supply a *ratio decidendi* which would apply to cases of still greater hardship and still greater disregard of the interests of a mortgagor than is displayed by the defendant in this case. Lord COTTENHAM in *Jones* v. *Matthie* says, "when the power of sale is conferred, it must be "remembered that it is so by bargain between one party and the "other, and it is for the party who borrows to consider whether "he is not giving too large a power to him with whom he is "dealing." Jessel, M. R. in *Re* Alison, 11 L. R. Ch. Div. 293, referring incidentally to the position of mortgagor and mortgagee with power or trust for sale, says "a mortgagee cannot be a "trustee for a mortgagor. No duty is imposed upon him." The principle enunciated in those two cases of *Jones* v. *Matthie* and *Warner* v. *Jacob*, seems to me to give to a mortgagee exercising a power of sale with every ingredient of disregard to the feelings and interests of others—of negligence and imprudence short of actual fraud—complete impunity. As Mr. Van Someren allowed me to put it, if suddenly without notice and without preparation, but still without fraud, the mortgagee resolved to sell the mortgaged premises at an auction held on that very day, he would not be answerable. That such is the law of England in conformity with which I am bound to adjudicate I cannot but admit; but tried by the test of such a case as this, or the extreme case of a

mortgagee selling the mortgaged premises recklessly and foolishly, the reasonableness of such law may well be called in question. It is admitted that although a mortgagee is no trustee until after the surplus comes to his hands when he becomes a trustee for the mortgagor in respect of that surplus, surely it ought to follow that knowing the injury that may result from hasty and improvident conduct, he is bound at least to use reasonable prudence; that it is so in morals is, I should say, indisputable, and I regret to find that the law is such as to screen the folly, the negligence or the vindictiveness of a mortgagee in the exercise of his power of sale. Surely in this, as in many an analogous case, reason should be the test that a man should so use his own as not to injure another, and that the rule should be that the mortgagee in the exercise of his power of sale should at least act with reasonable prudence.

With respect to the other defendant Madar, Mr. Van Someren contended, that whether he was altogether untruthful in stating that he was purchasing as trustee for the children, or really was so purchasing and afterwards changed his mind, Equity will not assist the children as against him—that it was a lie or a change of purpose and as such, could not be assailed. No authority was adduced which could distinctly justify this position, but the conduct of the defendant Madar was so strongly tinged with what I could not look at as other than fraud, that I shoul feel inclined without direct authority on the point, to decide against him on the simple ground that a man cannot be allowed to profit by his own wrong. But on looking more narrowly into books of reference I find in 2 *Kent's Commentaries*, the following passage: "So it will "be a void sale if the purchaser prevails on the persons attending "the sale to desist from bidding by reason of suggestion by way "of *appeal to the sympathies of the Company.*" A note cites for this portion the English case of *Fuller* v. *Abrahams*, 3 B. & B. 116; and further states, "Mr. Justice STOREY in *Veazie* v. *Williams*, "3 Storey, 633, approves of the conclusion I have drawn from the "case."

In the case of *Fuller* v. *Abrahams*, a barge was put up for sale by auction, and the plaintiff addressed the company present saying he had a claim against the late owner by whom he said he had seen it used, whereupon no one offered to bid against the plaintiff; the Court was of opinion that the sale under the circumstances could not be supported. It appears to me immaterial whether in this case Madar falsely stated that he was buying as trustee for the children, or really did buy for the children and afterwards changed his mind. He has committed "wrong" either way, and he cannot benefit by it.

The sale however of the land will not be declared void. I find that the defendant Narainen knew nothing of the underhand conduct of Madar, but Madar must be held to be the trustee for the administratrix, the plaintiff in this suit who represents the children at whose expense he obtained the property at so much below its real value. What to do best for all parties concerned may be doubtful, but I think it will be sufficient to declare that

WOOD, J. 1868.

JENAIDOO v. NARAINEN CHETTY & ANOR.

defendant Madar is trustee for the plaintiff, but entitled to be re-paid the sum for which he purchased the land and the costs of the conveyance to himself leaving the parties under proper advice to deal with the property hereafter as they may be best advised.

As the defendant Narainen has, through the conduct of Supramanien, raised what I consider a tangible question, although I find for him I do not do so with costs. Supramanien after something like 22 months' cesser of the payment of interest suddenly resolves to sell. He shews complete unconcern about the existence of his mortgagor, takes the advice of a surety who did not represent their interests, makes no enquiries into the value of the property, and afterwards put off the sale from the land to the town without consulting the persons directly interested and in a manner calculated to injure the sale.

Although I am constrained to find that what defendant Narainen did was within his rights, there are yet points of difficulty in the case which arose by his act, and I therefore disallow him his costs.

Judgment accordingly.

June 1. On Adams' application the Court directed the defendant Madar to pay the plaintiff her costs of the suit.

COOPANG CHETTY *v.* VEERA PADIACHEE & ORS.

PENANG.

PELLERAU, J. 1888.

April 12.

The defendants, certain Hindu headmen or Panchayet, to whom a charge against the plaintiff, one of their caste, had been submitted for enquiry and decision, found the charge proved and decided that unless the plaintiff underwent purification he was to be excommunicated from their temple and caste: the plaintiff failed to purify himself and was thereupon formally excommunicated. Thereafter the defendants as such headmen, procured a *tom tom* to be beaten in public, and the other members of the temple or caste publicly informed of the decision and excommunication, and warned from associating with, or selling to, or buying from, the plaintiff. The plaintiff sued the defendants for libel and slander.

Held, the publication of the decision and excommunication was privileged by the occasion, and in the absence of express malice, the action was not maintainable.

Held further, that the plaintiff also had no cause of action as regarded the alleged slander by publicly announcing the decision and excommunication, as in so far as it was made to members of the temple or caste, it was privileged, and in so far as it was made to outsiders [who neither were prevented nor had in fact refused to associate with, or buy from, or sell to, the plaintiff] he had sustained no special damage.

This was an action [small cause] to recover $500 damages for libel and slander. By the further particulars of claim delivered by the plaintiff it appeared that the libel and slander complained of was, that the defendants had stated that the plaintiff was keeping a low-caste woman and sleeping with her; that they had repeated the same in a notice sent by them to one Ramanjuloo; that the defendants had fined the plaintiff $25 for keeping the said low-caste woman and had ordered that in default of payment of such fine, the plaintiff and his family were to be excommunicated from the caste; that the defendants thereafter further slandered the plaintiff by procuring a *tom tom* to be beaten in the village of Bagan Tuan Kechil, Province Wellesley, to attract

attention, and that while the *tom tom* was so being beaten, procuring one of their number to warn and inform the public that no one should speak, or have anything to do with the plaintiff or his family as he and they had been excommunicated; that in consequence of such slander the plaintiff was injured in reputation and feelings and had in fact been "boycotted" by reason of the defendant's acts. The statement of defence alleged that certain of the defendants were headmen among the Hindus at Bagan Tuan Kechil and complaints had been made to them as such headmen about the conduct of the plaintiff and they were asked to enquire into the matter; that in consequence of such complaint and request it became and was the duty of the headmen-defendants, as such, to enquire into the truth of the complaints and in accordance with such duty they sent certain of their number to the plaintiff, and on receiving his answer they the defendant-headmen proceeded with the enquiry; before concluding it however, the defendants sent the said Ramanjuloo, who was a brother-in-law of the plaintiff a letter which was the alleged notice, which, omitting formal parts, was as follows:—

"We, all the chiefs and headmen of Bagan Tuan Kechil write to dear brother Ramanjuloo, clerk, to the following effect, *viz.*:—It having been reported to us about your brother-in-law Coopang Chetty, that many have often actually seen him lying in the same bed with Sakkeley Oappo, in her house which is composed of the three castes Pallan, Parayan and Sakkeleyan, and we were requested to inquire into it, thereupon we sent Veera Padiachee and Naraina Pullai to confer with Coopang Chetty privately. At their conference Coopang Chetty said, 'If you will pay me $500 I will give her up at once. If you won't do so I will not give her up,—after this you can do whatever you can.' At this we held a Court of inquiry and have recorded evidence, but have not yet given our decision pending your arrival. If it is not convenient for you to come, send reply in detail per bearer, Muduleyar Ramen. In default of your reply, we will pronounce our decision in accordance with our caste and be free from blame. To this effect."

That such letter was written under a sense of duty and without malice and in the *bonâ fide* belief that the charge then made was true and not otherwise, and the defendants therefore claimed that the said letter was privileged by reason of the occasion on which it was written. The statement of defence further alleged that on the 7th May, 1887, the said Ramanjuloo came to the defendant-headmen, and acknowledged the receipt of the letter and promised to see the plaintiff; that the next day he came and reported that the plaintiff denied the charge, but asked the defendant-headmen to enquire again into the matter and that he would abide by their decision; that the defendant-headmen thereupon asked that a submission in writing should be made and this was agreed to, and an agreement of submission was therefore drawn up and signed by the plaintiff, and the complainant one Narainan, which being translated, was as follows:—

"This agreement for arbitration is made and executed by us Coopang Chetty and Chuckalie Narainan of Bagan Tuan Kechil in Province Wellesley, on the 8th day of May, 1887, and submit the same for arbitration to Veera Padiachee the headman and Naraina Pullai, Kuppa Daven, Valoo Vandiar

PELLERAU, J. 1868.

COOPANG CHETTY v. VEERA PADIACHEE & ORS.

and Ramasawmi Pulley, the Panchayets, also of the above place, as follows: That as a dispute has arisen between us, we submit this to the said arbitrators for their investigation and decision and agree to submit to their decision, and pay the sum of $25 in case we fail to comply with such decision, and do also agree to submit to such penalty as may be awarded by Government. Thus we submit this paper to the said arbitrators with our mutual consent.

The mark of Coopang Chetty.
The mark of Chuckalic Narainan.

[*Signed*] Tindal Tambysamy.
" Chinnasamy.
" Punusamy Pullay.
" Singaravaloo Patten.

In the hand-writing and signature of Naraina Pullai."

That the defendant-headmen then held an enquiry which was duly attended by the plaintiff, and having satisfied themselves of the truth of the charge made against the plaintiff, they as such headmen decided that the plaintiff was to undergo purification in the temple at Bagan Tuan Kechil aforesaid, and in order to carry out such purification he was to bring the Brahmin Priest from Penang to officiate thereat; that the plaintiff should further pay the sum of $25 to defray the expenses attendant on such ceremony, but should the Brahmin Priest be of opinion that the plaintiff's offence was unpardonable and could not be condoned by purification, then the plaintiff was to be excommunicated; further, if the plaintiff should fail to purify himself within five days from such decision, he was to be excommunicated: the statement of claim then went on to state that the plaintiff failed to purify himself and the defendant-headmen thereupon formally excommunicated him and sent the other two defendants to tell and warn all Hindus of high-caste of the decision, so that they might not lose caste by associating with the plaintiff; that such publication of the decision was made under a sense of duty and without malice, and in the *bonâ fide* belief that the charge was made against the plaintiff was true and not otherwise, wherefore the defendants claimed that such publication was privileged by reason of the occasion on which it was made. The further material facts will be found in the judgment of the Court.

G. H. S. *Gottlieb*, for plaintiffs contended, that the notice and publication of the decision were neither of them privileged; that if they were, then there was express malice evidenced by the uncalled for publicity given to the decision by beating of the *tom tom* and warning the public at large. That the plaintiff had suffered special damage by the slander as he was deprived from social benefits as well as from the ordinary things of life such as buying his and his family's necessary food and selling his goods. He referred to *Folkard on Libel*, [4th Ed.] 262, 514, 15, 526; *Gilpin* v. *Fowler*, 23 L. J. Ex. [N. S.] 152, *Fryer* v. *Kinnersly*, 33 L. J. C. P. [N. S.] 96; *Brown* v. *The Cure of Montreal*, 6 L. R. P. C. 157, and *O'Keefe* v. *Cullin*, 7 Ir. Com. L. R. 319.

Ross, [*Anthony* with him] contended, that under the circumstances both notice and publication of decision were privileged; that the publication was done in the usual and customary manner

of Hindus, and there was no malice; that the alleged slander by reason of the public announcing of the decision was not actionable, because in so far as it was made to members of the caste, it was made by the headmen who had a duty to perform, to persons who had an interest in the decision, so as to save themselves from contamination; and in so far as it regarded outsiders there was no proof of special damage as they were neither prevented by the decision from associating with, or buying from, or selling to, the plaintiff and in fact had not refused to do so. They referred to *Odger on Libel*, 59, 82, 86; 196, 213, 226, 234; *Ayre* v. *Craven*, 2 Ad. and E. 2; *Roberts* v. *Roberts*, 33 L. J. Q. B. 249; *Allsop* v. *Allsop*, 22 L. J. Ex. 315; *Riding* v. *Smith*, 1 L. R. Ex. Div. 91; *Davies* v. *Solomon*, 7 L. R. Q. B. 112; *Lawless* v. *Anglo-Egyptian Cotton Co.*, 4 L. R. Q. B. 262; *Dickeson* v. *Hilliard*, 9 L. R. Ex. 79, 84; *Capital Bank* v. *Henty*, 5 L. R. C. P. Div. 514, on App. 7 L. R. App. C. 741, 54, 87; *Toogood* v. *Spyring*, 1 C. M. & R. 193, *per* PARKE, B., *Harrison* v. *Bush*, 5 E. & B. 344, 48; *Somervill* v. *Hawkins*, 20 L. J. C. P. 131, 226; they claimed *Brown* v. *Cure of Montreal*, [suprà], 207, 8, 211, was in defendants' favour.

Gottlieb, replied.

Pellereau, J. I am satisfied the plaintiff consented to submission and voluntarily signed it; that there was a second enquiry held, that is an enquiry after the submission was made, and such enquiry was held in the presence of the plaintiff. I also find as a fact that the plaintiff was not only excluded from the temple, but from transactions of everyday life. From that fact and from the beating of a *tom tom* Mr. Gottlieb has argued that there was actual malice on the part of the defendants. I do not however agree with him. With regard to publication to outsiders I do not think that is evidence of malice as it was a thing that could not be helped. I think that what the defendants did was consonant with Hindu ideas and customs: they published the decision in such a manner as to make it known to members of the caste or congregation—it no doubt also became known to outsiders, but it could not be helped. This publication was made verbally not in writing; it announced that plaintiff had been excommunicated from the temple and warned members of the caste from associating with, and buying and selling from, or to, the plaintiff. As regards the publication to outsiders, that has not resulted in special damage to the plaintiff—he is not in fact prevented from associating with others, or buying, or selling the necessaries of life from, or to them; as regards this slander therefore there is no actionable matter. Then, as to the question of privilege. Whether the plaintiff signed articles or not it is clear he was a member of the temple; it is clear there was a complaint and the Panchayet thought they should take action, and they sent a notice to the plaintiff through his brother-in-law. Plaintiff did nothing then. Subsequently, he signed the agreement of submission voluntarily as I hold, and that document is as follows [reads submission as above]. This clearly means there was to be an investigation whether the charge was true or not, and the headmen were to give a decision on it. The submission

PELLERAU, J. 1888.

COOPANG CHETTY v. VERRA PADIACHEE & ORS.

is not qualified—he submits to abide by the headmen's decision. The headmen or Panchayet hold the charge was true, and order purification as necessary. It was argued by Mr. Gottlieb that they could not insist on his carrying out the rites of purification in the temple when they had excluded him therefrom. I think that the Panchayet had a right to consider purification necessary, and that it was to be done in accordance with Hindu custom. I think the language in the submission broad enough not only to authorise the Panchayet from excluding the plaintiff from the temple, but in order to prevent contamination to others of the caste, to excommunicate him as they did. I consider therefore, the whole of what they did was privileged, and I do not see why they ought not to be considered to have acted *bonâ fide*. They having once decided the question it had to be communicated to their flock, and I do not think they acted in an excessive manner, but seem to have done so *bonâ fide*, honestly, and in accordance with their customs. I consider therefore the plaintiff's action fails both as regards the libel and the slander, and there must be judgment for the defendants with costs.

Judgment for defendants with costs.

In re NG HOCK SENG.

PENANG.

WOOD, J. 1888.

May 4.

It is no objection in Extradition proceedings that the accused having been arrested on a warrant is temporarily set at liberty and re-arrested on a further warrant.

Although the definition of offences under our present Criminal Law may not in all respects be identical with offences under the English Criminal Law, yet being in most offences the same though called under a different name, the Court if satisfied that the facts of the particular case in hand would amount to an offence within both definitions, will not discharge a prisoner simply because the names of the offences are different.

Where therefore the Orders in Council of 26th June, 1879, and 31st December, 1883, in the schedules thereto, of extraditable offences, enumerated the offences by names known to the law of England, among others "larceny"—and the accused in the case before the Court was charged with "theft,

Held, although there may be differences between the definition of "larceny" under the former law, and "theft" under our Penal Code, yet as the facts of the case then before the Court were sufficient to bring it within both definitions, and the offences enumerated in the schedule were, by the note at the beginning thereof to be construed according to the law of this Colony, the accused was not entitled to be discharged on the ground that "theft" was not among the offences mentioned in the schedule, and was more comprehensive than "larceny."

The Magistrate is not required under the aforesaid Orders in Council to make an enquiry into the truth of a charge against an alleged fugitive criminal prior to issuing a warrant for his apprehension. It is sufficient under Clause 4 of the former Order in Council that evidence is adduced before him which would be sufficient to justify the issue of a warrant if applied for the apprehension of a person charged with an offence committed within his jurisdiction—and a sworn information by a person in his presence, *ex-parte*, which discloses facts sufficient to justify such latter apprehension, is sufficient to justify the issue of a warrant under Clause 4, aforesaid.

Regina v. *Weil*, 9 L. R. Q. B. Div. 701, followed.

This was a Rule *Nisi* obtained by G. H. S. *Gottlieb* on behalf of the accused Ng Hock Seng, calling upon C. W. S. Kynnersley, Esquire, First Magistrate and Superintendent of Prisons, Penang, and J. H. Lamb, Keeper of the Colonial Gaol, Penang, to shew cause why a *Habeas Corpus* should not issue for the discharge of

the accused from custody. On 19th April, 1888, the Governor issued his Order under Clause 1 of the Queen's Order in Council of 26th June, 1879, to the said Magistrate and all other Magistrates of the Settlement which, omitting formal parts, was as follows :—

Whereas in pursuance of the provisions of the Orders of Her Majesty in Council, dated respectively, the 26th day of June, 1879, the 31st day of December, 1883, and the 29th day of November, 1884, a requisition has been made to me Sir Cecil Clementi Smith, K.C.M.G., Governor and Commander-in-Chief of the Colony of the Straits' Settlements by Sir Hugh Low, K.C.M.G., Her British Majesty's Resident, Perak, on behalf of His Highness the Sultan of Perak for the surrender of Ng Hock Seng, a fugitive criminal convicted of the crime of theft within the jurisdiction of His Highness the Sultan of Perak, and who was sentenced to 4 years' rigorous imprisonment, but escaped from legal custody on the 31st August, 1887. Now, I hereby direct and require you or one of you *to inquire into the truth of the charge* and to proceed in pursuance of the said Orders in Council."

This Order was duly received by the said Magistrate, and on 20th April, 1888, one William Porteous laid a written and sworn information before the said Magistrate which, omitting formal parts, was as follows :—

"I am an Inspector of Police, Penang, and am in charge of the Detective Department. His Excellency the Governor having ordered an enquiry to be made regarding the escape from the Perak Prison of one Ng Hock Seng for whose rendition an application has been made; I, by virtue of a Perak Warrant arrested the accused to-day at the Penang Prison and on being charged he admitted to have escaped from the Larut Prison. I pray that the usual warrant in pursuance of the provisions of the Order of Her Majesty in Council of 26th June, 1879, 31st December, 1883, and 29th November, 1884, be issued for the arrest of the accused on a charge of being a fugitive criminal convicted of the crime of "theft."

This was *the only evidence* before the said Magistrate and *thereupon* he on the same day issued his warrant which after reciting the order of the Governor directing him "to enquire into the truth of the charge and to proceed in pursuance of the Orders of Her Majesty in Council," proceeded to command the "Inspector-General of Police for the Straits Settlements and all other Peace Officers of Penang," forthwith "to apprehend the said Ng Hock Seng and bring him before me or some other Magistrate sitting at this Court to be further dealt with according to law." The accused had been a prisoner in the Penang Gaol for a theft committed by him in this Settlement, and while in prison was formally arrested on the Perak warrant on the 20th April, but as his term of imprisonment for the theft committed in Penang expired on the following day, 21st, he was on that latter day brought from the Gaol to the Central Police Station and there set at liberty, but immediately after re-arrested on the warrant last mentioned. He was remanded, from time to time, and eventually, again brought up on the 2nd May before the said Magistrate, and an enquiry was then held by the Magistrate into the truth of the charge. At such enquiry the original Perak Order of Commitment of the prisoner to the Larut Gaol for four years, and the original formal record of his Conviction were put in evidence; the signatures thereto of the Perak Magistrate being duly authenti-

WOOD, J. 1888.

In re NG HOCK SENG.

cated by the oath of a witness. The latter document shewed that the "theft" the accused had been convicted of, consisted in stealing "a shawl value $3 from the person of one Chow Boh, in Kota Road, Thaipeng," Larut, after four previous convictions. The said Magistrate also had in such enquiry held by him evidence of the identity of the accused with the person named in such Commitment and Conviction and of the fact of his having escaped from the Larut Gaol while undergoing the sentence mentioned in those documents. In addition to this, there was the evidence of the said William Porteous who executed both the Perak and the Penang warrants narrating the circumstances under which those warrants were executed. The information laid by him as aforesaid, the warrant issued thereon as aforesaid, the Governor's Order as above, and Her Majesty's Orders in Council of 26th June, 1879, and 21st December, 1883, as published in the *Government Gazette* were also put in evidence. This was all the evidence adduced at the enquiry, and thereupon the said Magistrate committed the accused to prison for fifteen days pending the Governor's Order for his rendition. This Rule *Nisi* was obtained on the 7th May, and now came on for argument. The portions of the clauses of Her Majesty's Order in Council of 1879 and 1883 aforesaid as were referred to in the arguments, or are otherwise material to this report, are as follows. Order of 1879, Clause 1.,

"If requisition be made to the Governor of the Straits' Settlements by any Foreign State.....for the surrender of a fugitive criminal of such State, who is suspected of being in any part of the Straits' Settlements, the Governor may issue an Order under his hand and seal to any Magistrate of the said Settlements *directing him to enquire into the truth of the charge.*"

Clause 2.

"Every such order of enquiry shall signify that the requisition for surrender has been made.....and shall require the Magistrate *to enquire into the truth of the charge and proceed in pursuance of this Order in Council.*"

Clause 3.

"The order for enquiry shall be a sufficient proof of the requisition having been made.....and on production thereof to the Magistrate..... he shall have the same powers as if the crime charged had been committed within his jurisdiction."

Clause 4.

"If *the evidence adduced* shall be such as would in the opinion of the Magistrate justify the apprehension of the fugitive criminal named or designated in the order, if the crime charged had been committed within his jurisdiction, he shall issue his warrant for the apprehension of the fugitive criminal. The warrant shall be issued in the same manner as if the crime charged had been committed within the jurisdiction of the Magistrate issuing it, and shall contain a memorandum stating that it is issued under this Order in Council."

Clause 6.

"A fugitive criminal apprehended on a warrant issued under this Order in Council shall be forthwith brought before a Magistrate within whose juris-

diction he shall be apprehended, and such Magistrate shall deal with the case in the same manner as if the fugitive criminal were charged with an indictable offence committed within his jurisdiction."

Clause 7.

"If any fugitive criminal shall, in pursuance of this Order in Council be brought before a Magistrate other than the Magistrate who issued the warrant for his apprehension, the depositions and documents upon which the warrant was issued and copies thereof certified under the hand of the Magistrate by whom the warrant was issued, shall, upon the requisition of the Magistrate before whom the fugitive criminal shall be brought, be forwarded to such last mentioned Magistrate."

Clause 8.

"Depositions, statements on oath, or affirmations taken in a Foreign State and copies of such original depositions or statements on oath or affirmations may, if duly authenticated be received in evidence in proceedings under this Order in Council. Such depositions, statements or affirmations and copies thereof shall be deemed to be duly authenticated for the purposes of this Order in Council, if they purport to be certified under the hand of a Judge, Magistrate or Officer of the Foreign State where the same were taken, to be the original depositions, statements or affirmations, or to be true copies thereof as the case may require, and if they are authenticated by the oath of some witness, or by being sealed with the official seal of some Minister of State; and all Courts of Justice and Magistrates in the Straits Settlements shall take judicial notice of such official seal."

Clause 9.

"The Magistrate before whom a fugitive criminal shall be brought in pursuance of this Order in Council shall, if such evidence is produced as would according to the law of the Straits Settlements, justify the committal for trial of the fugitive criminal, if the crime of which he is accused had been committed in the Straits' Settlements, commit him to some prison in the Straits' Settlements, but otherwise shall order him to be discharged. If the Magistrate commits the fugitive criminal to prison, he shall inform such fugitive criminal that he will not be surrendered until after the expiration of fifteen days, and that during such fifteen days he may appeal to any Judge of the Supreme Court of the Straits Settlements."

By Her Majesty's Order of 31st December, 1883, the term "fugitive criminal" in the previous order was to include any person convicted of any crime either before or after the date of such previous order, which if committed in England would be one of the crimes described in the schedule to the previous order—and "fugitive criminal of a State" included a person convicted of a crime as aforesaid within the jurisdiction of that State—the word "charge" included "conviction," and "the crime charged" included the crime of which the fugitive criminal was alleged to have been convicted. The schedule to the previous order by a head-note declared that the crimes therein enumerated were "to be construed according to the law existing in the Straits Settlements at the date of the alleged crime"—"theft" was not mentioned in this list, but "larceny" was.

Ross, for the Perak Government, shewed cause on behalf of the Magistrate and Gaoler; he contended that as regarded the evidence to be adduced under Clause 4, the information of Porteous

WOOD, J. 1888.

In re NG HOCK SENG.

was sufficient—that that clause did not contemplate an "enquiry" —and the Governor's Order directing an enquiry referred to Clauses 1, 2, 3 & 9, and meat the enquiry "into the truth of the charge," that is with a view to committal, but not to apprehension— that all that was required under Clause 4 was, that the Magistrate should be of opinion that the evidence was such as would justify the apprehension of the accused if the crime had been committed within his jurisdiction—that a sworn Information was the only evidence required by our law for a warrant, for the apprehension of an accused, to issue—it was to be the same, and need not be more in an extradition case. That the evidence under Clause 4 was different from that under Clause 9—in the former, it was sufficient if "in the opinion of the Magistrate" it was so for the purpose of arresting the accused—in the latter the evidence was to be "according to the law of the Straits Settlements"—the difference of language noted a difference in degree of evidence, and in *Sirdar Khan's Case*, 2 Kyshe [*Hab. Cor. Cas.*] 43, this Court admitted there was a difference in the evidence required for committal from that required for apprehending: the word "enquiry" was not to be found in Clause 4, and there was nothing to shew the Magistrate here was not satisfied the evidence disclosed by the information was not such as to justify a warrant for a crime within his jurisdiction. An information was evidence for the purpose of apprehending, though not for purpose of committing; and the facts referred to by Porteous who swore that the prisoner admitted having escaped from the Larut Gaol, and was the person convicted there of theft and who refers to the Governor's Order which disclosed particulars and required the arrest of a person with the very name to which the prisoner answered,—that that was reasonably sufficient to satisfy the Magistrate, the prisoner was the man wanted and to justify his issuing his warrant for his apprehension. The question of the sufficiency of evidence was for the Magistrate and this Court would not review it. *Regina* v. *Maurer*, 10 Q. B. Div. 513; it was sufficient that the Magistrate has jurisdiction, and a very little evidence was sufficient for him to issue his warrant on—per *Jessel*, M. R. in *Regina* v. *Weil*, 9 L. R. Q. B. Div. 701, 705-6; the word "evidence" in Clause 4 was evidently elastic, it included "depositions" "statement on oath" or, Sections 7 and 8—and why should it not include an information as here, which is practically a "statement on oath"—If an information is not evidence, how were prosecutions had of persons giving "false evidence" in an information? In cases for an order of arrest under Section 422B. of the Civil Procedure Ordinance 5 of 1878, "evidence" is required, and yet it is supplied by affidavit merely. No practical difference could be drawn between an "affidavit" and an "Information," on this point. As regarded the objection that "theft" is not "larceny" it was sufficient to point to the head-note at the beginning of the schedule of the Order of 1879 which required the offences there named to be construed according to our law. A similar objection between "cheating" and "obtaining money under false pretences" was raised in *Sirdar Khan's Case* [supra]

and thought nothing of by this Court. As regarded the two arrests, the observations of *Jessel*, M. R. [p. 705] and *Brett*, L. J. [p. 706-7] in *Regina* v. *Weil*, suprà, were conclusive against the objection.

Gottlieb, in support of the Rule contended, that there was a difference between the Extradition Act, 1870, and these Orders in Council—in the former, the Magistrate could issue a warrant without the Order of the Secretary of State [Sec. 8 cl. 2], but under these Orders in Council, the Magistrate could not do so: it was the Governor's order alone that could put him in motion. Then again, the Order of the Secretary of State under the Extradition Act, 1870, expressly directed the Magistrate to issue his warrant [see form of order at end of Act]; but here, the Governer's order was to "enquire into the truth of the charge": the order here is not to issue a warrant but to "enquire"—After the enquiry only, could the Magistrate issue a warrant for the apprehension of the accused. The Magistrate's warrant here recited the Governor's order to "enquire," but went on to command the prisoner's arrest. An enquiry was necessary to be held and under Clause 4, evidence was to be adduced; that meant, at the enquiry; but as Clause 4 dealt only with the issue of a warrant for apprehension of the accused, it followed that an enquiry at which evidence was to be adduced was to precede the issue of the warrant. There was no absurdity in holding two enquiries,—first prior to the issuing of the warrant and then again in the prisoner's presence, with a view to his committal; the liberty of the subject was not to be easily broken upon. *Regina* v. *Weil* though apparently strong in favour of the other side, on examination would be found to have no application to this case: that case proceeded under Clause 2 of Section 8, of the Extradition Act, 1870, a clause not to be found in these Orders in Council—very little was required to justify the issue of the warrant if it be issued after the Order of the Secretary of State, as his order directs it to issue. Here, the Magistrate could only issue his warrant if there was "evidence"; he had only the Information and Governor's Order before him; but a simple Information as was here laid, is not "evidence." Clause 4 was similar to Clause 1, Section 8, of the Extradition Act, 1870, and uses the word "evidence" merely. Clause 2 of that section spoke of "information and evidence," shewing a distinction between "evidence" and "information"—the word "evidence" in Clause 4 meant the same as "evidence" under clause 1, section 8, and did not therefore mean an "information." There was a distinction in point of law between "evidence" and "information." *Paley on Convictions*, 65. With regard to "depositions" and "statements on oath," that was limited to evidence given in that way *abroad*—but here Porteous was *in* the Settlement and might have been examined *vivâ voce*. Porteous' enquiring of the prisoner, of his antecedents, was not an "enquiry" within Clause 4 which must be held by the Magistrate. Then "theft" was not always "larceny"—it was a more comprehensive term, as the definition of it Section 378 of the Penal Code shewed,—there was therefore a difference between them. *Mayne*

WOOD, J. 1888.

In re NG HOCK SENG.

on the Penal Code, 312, 313; the schedule to the Order of 1879 does not mention "theft." The prisoner here might have been convicted of what was not "larceny," and would not therefore be liable to be extradited. The two arrests were illegal, it was to twice vex the accused with one and the same offence. *Regina* v. *Weil* did not apply as to this point either, as it turned on Clause 2, Section 8, which as stated before did not form part of these Orders in Council.

Wood, J. I think I can dispose of this case at once. As regards the two arrests, I consider the case *Regina* v. *Weil* decisive and there is nothing in the objection. As regards "theft" not being "larceny" it is true they may not always be convertible terms, but for the purpose of this case they are so. The "theft" of the shawl here would clearly be "larceny" at home, and as the offences in the schedule are to be construed according to the law of this Colony it is clear the objection must also fail. The first objection argued is the main point and although I had at first considerable doubt as to the construction of the clauses of the Order in Council, yet I have come to the conclusion an "information" *is* "evidence," for the purpose of issuing a warrant; and there was sufficient evidence in this case to justify the issue of such warrant. The word "enquiry" is not to be found in Clause 4, and no enquiry need be held prior to the issue of the warrant. I may say I mainly rely on *Regina* v. *Weil*. In that case *Jessel*, M. R. says:

"Another point suggested was this—that the evidence on which the Irish Magistrate issued his warrant was not such as would have justified the issue of a warrant if the crime had been committed or the criminal convicted in Ireland. But all that the Act requires is that the evidence should be sufficient 'in the opinion of the person issuing the warrant.' That is a matter of judicial discretion. *There must be some evidence, but very little will do, for it is merely for the purpose of detaining the man. It is very different from the evidence which is required under Section 10, to justify the committal of the prisoner.* There the evidence must be such as would 'according to the law of England, justify the committal for trial of the prisoner, if the crime of which he is accused has been committed in England.' There is nothing in the present case to shew that the evidence was not sufficient in the opinion of the Magistrate. Assuming therefore that we have jurisdiction I think that in the present case we ought not to interfere."

Brett, L.J. says,

"Assuming that we have jurisdiction I think there is no ground for our exercising it in the present case. I doubt whether there has been any irregularity whatever in the proceedings. I doubt much whether a Policeman is not justified in arresting a man without a warrant on reasonable grounds of suspicion of his having done that which would be a felony if committed in this country. But assuming that the Irish Policeman was wrong in making the arrest, the Irish Magistrate issued a warrant that the prisoner should be detained in custody, and afterwards a second warrant that he should be taken before the Chief Magistrate at Bow Street. It seems to me that the Irish Magistrate's first warrant was a warrant for the 'apprehension' of the prisoner within the meaning of the Act. I cannot think that the Act ought to be construed in the way suggested. It is necessary that the Magistrate should issue a warrant for the 'apprehension' of the criminal, but if he is already in custody, a warrant for his detention is a warrant for his 'appre-

hension.' But if it was necessary to do more Sir JAMES INGHAM issued a warrant for the detention of the prisoner, and it seems to me that that was a warrant for his 'apprehension' within the meaning of the Act. If he was already wrongfully in custody and there was proper evidence to justify his apprehension, Sir JAMES INGHAM was justified in issuing a warrant for his detention."

The information here disclosed some facts—and that was evidence—and the Magistrate was satisfied with it. I see therefore no grounds for interfering with the order of commitment, and the Rule must be discharged and the prisoner remanded to custody.

Rule discharged.

REGINA *v.* VONG AH HOON.

A Magistrate has no power to order under Section 62 of Ordinance 13 of 1872, a person to be bound over to be of good behaviour, without any evidence as to his character.

Where, therefore a Magistrate considered a charge of receiving stolen property had not been proved against a prisoner and ordered his discharge and the property to be returned to him, but having reason to suspect him of not being of good character, at the same time without any evidence as to character, ordered him under the aforesaid action to be bound over to be of good behaviour,

Held, on appeal, he had no jurisdiction to make the latter order, and the same was quashed.

The appellant had been charged under Section 411 of the Penal Code before J. Anthonisz, Esquire, Magistrate, with receiving stolen property, and was tried along with two others who were charged with the theft. The Magistrate decided that there was not sufficient evidence to convict either of the prisoners, and directed the property found to be restored to them: he however thought there was reason to suspect them of not being of good character and therefore bound them over under Ordinance 13 of 1872, Section 62, to be of good behaviour; the appellant in $500 and the other two prisoners in $100 each. The appellant alone appealed against the last mentioned order. Section 62 of Ordinance 13 of 1872, is as follows:—

"Whenever it appears to a Magistrate.....from the evidence as to general character adduced before.....him that any person is lurking within the jurisdiction, or has not any ostensible means of subsistence, or cannot give a satisfactory account of himself, or is by repute a robber, a housebreaker, or thief, or a receiver of stolen property knowing the same to have been stolen, or is of notoriously bad livelihood, or is a dangerous character, such Magistrate.....if the accused person is not present may issue a warrant for his arrest, and on his being brought up shall proceed to enquire into the matter and if after hearing the person accused and his witnesses, if he offers any witnesses for examination it appears that the person ought to be bound over, the Magistrate .....may make an order requiring him to give security by one or more sureties for his good behaviour for a period not exceeding.....six months....."

Groom, for the appellant contended, that the Magistrate had no jurisdiction to make the order. The charge was under Section 411 of the Penal Code, and the conviction or order under Section 62 of Ordinance 13 of 1872—it was all done in the one proceeding, and there had been no amendment of the charge nor any evidence given as to the appellant's general character, save and

GOLDNEY, J. 1888.

REGINA v. VONG AH HOON.

except evidence called by him which shewed him to be of good reputation and character; that there having been no proceeding under Ordinance 13 of 1872, and the order having been made without evidence, was bad.

Harwood, [*Acting Attorney-General*] for the Crown contended, that the order could only be quashed on its merits and not for any technical error or irregularity: that as the prisoners were before the Magistrate while the enquiry was going on he had jurisdiction to make the order under Section 62. If necessary the Court could amend the sentence, or send back the case to the Magistrate for directions.

Cur. Adv. Vult.

May 9th. *Goldney*, J. I think that this appeal must be allowed, and the order of the Magistrate that the appellant should give security for his good behaviour must be quashed. Under the circumstances of the case, I refrain from expressing any opinion as to the powers of a Magistrate under Section 62, Ordinance 13 of 1872. As this judgment will also affect the orders made in the cases of Seng Chin Seng and Wee Yew Tek who have not appealed, I will communicate with the proper authorities on their behalf.

Order quashed.

In re KYLE.

PENANG.

PELLERAU, J. 1888.

May 14.

Where a wife has been deserted by her husband who leaves her quite unprovided for, this Court has jurisdiction to declare her equity to a settlement attaches to property acquired by her before as well as during coverture, and to direct a settlement of such property on her for her separate use.

Such an order may be obtained on the *ex-parte* petition of the wife, where it is shewn the husband's whereabouts cannot be ascertained; it is unknown whether he be alive or dead.

This was a petition by the abovenamed Matilda Kyle, a married woman, praying for an order declaring that her equity to a settlement attached to a piece of land therein mentioned, and to a sum of $1,900 a chose in action belonging to her, and directing the land to be sold and the said $1,900 got in and after payment out of the joint proceeds, of the costs of the petition and certain debts of hers in the petition set out, for the balance thereof to be settled upon her for her separate use for life without power of anticipation, but with power of appointment among two adopted children of hers, and in case of the death of such children before her for other purposes not material to this report. The petition also prayed that a certain sum of $872 standing in her husband's name in the Chartered Bank of India, Australia and China, might be charged with a monthly payment of $20 or such other sum as the Court thought fit for her maintenance. The facts stated in the petition [which was on oath] so far as are material, were as follows:—The petitioner was the widow of one Michael McGuire, who died in December, 1880, and by his Will devised all his real and personal estate to the petitioner absolutely and appointed her his executrix. She proved the Will in this Court and obtained probate thereof, and as such executrix she

proceeded to realise the estate and eventually she thereby became possessed of $2,600 for herself. Of this, she had spent $100 for some domestic purpose, and of the balance she had invested $600 in the purchase of some land in McNair Road, Penang, which had been conveyed to herself in fee, and $1,900 she had invested at 12 per cent with one John Doral who paid her the interest more or less regularly. After the investment of the $1,900 at interest, but *before* she had purchased the said land, she intermarried with one David Kyle, a Ship-engineer, who at the time had nothing available to settle on her and was dependant wholly on his salary. No settlement of any kind was made on their marriage, but the conveyance of the land was made to the petitioner in fee with the full knowledge and consent of her husband the said David Kyle, who never thereafter interfered with the land, nor did he take any steps to reduce the petitioner's said chose in action of $1,900 into possession. The said David Kyle lived with the petitioner as husband and wife till 29th December, 1885, when he left to go first to Scotland and from thence to Australia. He corresponded with the petitioner for about six months thereafter during which time however he only made her one remittance of about $20. Since August, 1886, the petitioner had never heard of him or received a cent from him by way of maintenance, and for these and other reasons she believed he was now dead. For want of his support and only getting her interest of $19 per month and that not regularly, and a small occasional sum from the produce of the land which was a cocoanut plantation, the petitioner had got into debt in order to procure the necessaries of life, and had not only mortgaged the said land, but was indebted for arrears of house rent and otherwise, in all amounting to $886. By her first husband [McGuire] the petitioner had had only one child who had died in infancy; by her second husband [Kyle] she had no issue. Her first husband and herself however, had adopted two children, the younger of whom was still wholly dependant on her. The petition further stated that at the time of the said David Kyle's departure from this Colony, he had and still had standing to his credit in the Chartered Bank aforesaid, the aforesaid sum of $872, but the petitioner had been unable to draw that sum either to pay her debts or maintain herself. Being involved in debt as aforesaid and being pressed by her creditors, she was desirous of paying off her debts by the sale of the land and calling in of the $1,900, and further of being maintained out of the $872 of her husband's as aforesaid. The whereabouts of the said David Kyle being unknown, it was impossible to serve him with copy of the petition, but a copy was served on a Solicitor who had at one time, not long before his departure, acted for him in a certain action in Court against his employers. This Solicitor however, was also unaware of his whereabouts since, and never appeared to the petition which was not opposed.

Adams, for the petitioner now moved *ex-parte* for a decree in terms with the prayers of the petition, and referred to 1 *Bright on Hus. & W.*, 258, 9, 264; 2 Bright, 354; *Guy* v. *Pearkes*, 18 Ves. 196; *Lumb* v. *Milnes*, 5 Ves. 517; *Brown* v. *Clark*, 3 Ves. 166;

PELLEREAU, J. 1888.

In re KYLE.

Jacobs v. *Amyatt*, 1 Madd. 376a; *Sturgis* v. *Champneys*, 5 M. & Cr. 97, and *Lambert* v. *Lambert*, 2 Bro. Par. Cas. 18.

Cur. Adv. Vult.

May 28th. *Pellereau*, J. This is a petition by Matilda Kyle in which she alleges that she is possessed of certain lands and moneys in her own right, that her husband has deserted her and left her quite unprovided, that he has a certain sum in one of the Banks here, but she is unable to touch it, and being without sufficient means has had to get into debt. She prays that a declaration might be made that her equity to a settlement attaches to the land and moneys, and that the land might be ordered to be sold and the moneys called in, and after payment of her debts and the costs incidental to this petition, the balance might be settled on her for her separate use for life, without power of anticipation, but with a power of appointment among two children whom she names, and in case of their predeceasing her, for other purposes which I need not further allude to. She also prays that the amount in the Bank belonging to her husband might be charged with a given monthly sum for her maintenance. It is clear from the petition itself that the children she names are neither children of her own nor of her husband; that part of the petition therefore that prays for a settlement as far as these children are concerned, I cannot grant. As to the other part of the petition, I was inclined to think from the outset that where a husband deserts his wife and she has property which he might have an interest *in jure mariti*, the Court has jurisdiction to order a settlement of that property on the wife in such manner as shall seem just,—but understanding this was the first time the question has arisen in this Colony, I took time to look up the authorities and having done so, it is clear to me that the Court has the power. In the case of *Lady Elibank* v. *Montolieu*, 1 Wh. & T. L. C. in Eq. which is the leading case as the wife's equity to a settlement, we find the Commentor in his notes says the following:—

"By marriage the husband becomes entitled to receive the rents of the wife's real estate during their joint lives, and he becomes absolutely entitled to all her chattels personal in possession, and to her chose in action, as debts by obligation, contract, or otherwise, if he reduce them into possession; or if he do not, as administrator of his wife, if he survive her; and he becomes also entitled to her chattel real with full power to alien them, though if he die before his wife without having reduced into possession her chose in action or without having aliened her chattels real, they will survive to the wife—The husband acquires this interest in the property of his wife, in consideration of the obligation which, upon marriage, he contracts, of maintaining her and his children by her; but the common law is defective, inasmuch as it possesses no means of ensuring the performance of the duty imposed upon the husband, since in many cases he might have it in his power to alien all the property to which he is entitled *jure mariti*, or upon his becoming bankrupt or insolvent it would vest in his assignees for the benefit of his creditors, and thus his wife, however great may have been her fortune, might with her be left utterly destitute. Courts of Equity have from a very early period, endeavoured to remedy this deficiency in the common law by giving to the wife in certain cases a right to a provision out of her own property; this right is called her equity to a settlement. The jurisdiction to compel the husband or those claiming under him to make a settlement upon the

wife, was first assumed in cases where it was necessary for them to apply to the Court for assistance in order to obtain possession of the property of the wife; which assistance the Courts acting under the maxim that *he who seeks equity must do equity*, withheld until an adequate settlement was made upon the wife..... ..In consequence of this origin of the jurisdiction, it was thought that the equity of a wife to a settlement was confined to those cases in which the husband or those claiming under him were plaintiffs. However, since the decision of *Lady Elibank* v. *Montolieu*, the wife has been permitted actively to assert her equity as a plaintiff."

Then, there are two cases which are also mentioned further down these notes which I think it right to refer to. The first is *Barrow* v. *Barrow*, 18 *Beav.* 529, in which case it was held the wife's equity to a settlement attaches to property acquired by her before as well as after marriage, and the other *Wright* v. *Morley*, 11 Ves. 12, where it was held the wife was entitled to property of her own which the husband had not reduced into possession on his having abandoned her by going abroad without making any provision for her. The only doubt I had was whether such an order could be made in the absence of the husband, but I think the case of *Guy* v. *Pearkes* referred in 1 *Bright on Husband and Wife*, p. 158-9, which was cited by Mr. Adams shews that it can. The passage in Bright, is as follows :—

" In *Guy* v. *Pearkes*, it appeared that the wife was unprovided for; that her husband went to sea and totally deserted her ; that after going to sea and returning he did not cohabit with her nor afford her any support; that he afterwards, went to the East Indies and had not since been heard of, and that it was unknown whether he were living or dead."

From these facts we may safely take it he was not and could not have been served with any notice of the wife's claim to a settlement. The text proceeds :—

" In granting the application, Lord ELDON thus expressed himself, ' I have a strong impression upon my mind that this has been done; and independently of precedent I think the Court may do it as the husband deserting his wife, leaves her credit for necessaries, and would be liable to an action; and although execution could not be had against the stock, the effect might be obtained circuitously as he could not relieve himself except by giving his consent to the application of this fund.' "

In the present case it is stated that the husband has left the petitioner for over two years and has not since been heard of, and his whereabouts are unknown—it is equally impossible to serve him with notice of this petition. On the whole therefore, I am of opinion that this Court has jurisdiction to make the order prayed for, but before making a final order I think I should require evidence of the facts stated in the petition, in addition to the oath of the petitioner. At present I have only her oath for the facts, and as there are one or two matters—for instance about the house rent where she states she has lived for two years in the house and charges rent for three—which possibly she might be able to explain, I shall adjourn the petition to some convenient day to enable her to adduce evidence of the facts she alleges.

Order accordingly [*a.*]

[*a.*] Evidence was subsequently gone into, a final order made and the estate sold.—J.W.N.K.

In the goods of ING AH MIT.

PENANG. — PELLEREAU, J. 1888. — May 28.

A Chinaman having died intestate, leaving two widows, the Court granted joint administration to both. [*a.*]

The deceased abovenamed, a planter, died at Bukit Seraya in Province Wellesley in February 1887, leaving two widows named Lo Ah Hoon and Lo Kim Lean, a brother named Ing Ah Han, a son named Ing Sew Hock, and two daughters named Ing Sew Hong, and an infant six months' old. The second widow Lo Kim Lean now petitioned for Letters of Administration to his Estate to be granted to her, and cited the widow Lo Ah Hoon at the hearing. A *caveat* was filed by the brother Ing Ah Han. The estate was sworn at a little over $2,000. It was admitted by all the parties that both Lo Ah Hoon and Lo Kim Lean were widows of the deceased.

Adams, for the second wife, the petitioner Lo Kim Lean, asked that letters might be granted to her.

Lo Ah Hoon the first wife appeared in person, and asked that letters might be granted to her and the petitioner jointly.

Ing Ah Han the brother and caveator objected, and claimed to have a share in the estate.

Pellereau, J. The Court recognizes both widows—their rights are the same, and administration must be granted to both.

Joint administration accordingly.

LEE CHIN POO *v.* LEE CHYE HOON.

PENANG. — PELLEREAU, J. 1888. — June 1.

Where a partner on being sued by a sub-partner for partnership accounts, wilfully abstained from suing *his* partners for an account as he might have done, and merely alleged his partners refused to render him an account whereby he was unable to render the plaintiff, his sub-partner, any,

Held, the Registrar might presume everything against him, and award what the evidence before him would justify, even a percentage by way of profits, in absence of a more satisfactory mode of ascertaining the profits.

This was a suit for partnership accounts by a sub-partner against his partner. A firm named Ban Guan had early in 1881, been started in Penang to deal exclusively in spices; the firm was divided into twelve shares at $1,000 a share. The defendant was desirous of becoming a partner in the firm to the extent of one share, but not having money in hand at the time he borrowed a sum of $900 from the plaintiff, added $100 of his own thereto, and purchased one of such shares. In consideration of this sum of $900, the defendant executed an agreement in Chinese which after reciting these facts, provided that the plaintiff was to have eight-tenths of the said one-twelfth share of the defendant in the firm, and the $900 was to be considered as his capital towards such eight-tenths. This agreement did not provide for any fixed term for the partnership but did, for an annual accounting between the plaintiff and defendant. The other partners in the firm "Ban Guan" had nothing to do with the plaintiff, and only recognised the defendant as a partner. The firm Ban Guan was

[*a.*] See *Regina* v. *Yeoh Boon Leng*, 18th August, 1890, *infrá*.

managed by one Cheah Tek Hooi [who was also a partner therein], and Tek Hooi was assisted by the defendant therein; by this means, the defendant had an insight into the accounts and the business of the firm which, at the time the action was commenced and until this day was and is doing a large and lucrative business. The defendant never rendered the plaintiff any account, but stated to him the result of each years' business as to whether profit had been received or loss sustained and to what extent. This went on for years, but the plaintiff being unable to get accounts from the defendant eventually commenced this action. On 11th August, 1885, the plaintiff was about moving for a reference to the Registrar under Section 102 of the Civil Procedure Ordinance, when Counsel for the defendant intimated there was a preliminary point to be tried and the motion was not therefore made. Statements of claim and of defence were then delivered and from the latter it appeared that the partnership between the original partners of the firm Ban Guan would not expire nor its accounts taken till the beginning of the then next Chinese New-year [3rd February, 1886], until which time the defendant submitted the plaintiff was not entitled to an account. The case was placed on the trial list, but owing to the block of cases, was not called on for hearing till the 22nd of April, 1886. The period named by the defendant's statement of defence having then expired, he did not appear to defend the action and a decree [*Wood*, J.] was made dissolving the partnership between plaintiff and defendant as on 3rd February, 1886, aforesaid, and a reference to the Registrar to take the accounts. The defendant was served with copy of the decree. but took no notice of it. The plaintiff therefore on 29th June, 1886, obtained a Rule *Nisi* calling on the defendant to shew cause why he should not be attached for his contempt. On the rule being returned, the defendant put in an affidavit of his own in which he stated he had long since ceased to be an assistant manager of the firm Ban Guan and had no knowledge of its accounts since that time, and the manager Tek Hooi had refused to give him inspection of the books or render him an account. *Sheriff*, J. thereupon adjourned the Rule and ordered the said Tek Hooi to be subpœnaed; this was accordingly done, and on the Rule again coming on for argument, Tek Hooi was called and examined and stated he declined to allow defendant inspection, or to render him an account. *Sheriff*, J. thereupon ordered the defendant forthwith to sue Tek Hooi for accounts, but directed him also to pay the plaintiff's costs of the application. The defendant *never* sued Tek Hooi and had not done so to this date. The plaintiff thereupon threatened to renew his application for an attachment when the defendant at last filed an account which shewed certain sums received by him from the firm Ban Guan in each of the years, and certain sums expended by him, and shewed in the result that the defendant was indebted to Ban Guan in $250.60½. This account giving no dates and being otherwise informal was objected to by plaintiff when the defendant put in a further account which was only a repetition of the former accounts, but giving dates. The enquiry into the accounts was

PELLEREAU, J. 1888. —— LEE CHIN POO v. LEE CHYE HOON.

then begun before the Deputy Registrar when the enquiry was adjourned, from time to time, on account of the defendant's absence. Eventually, the plaintiff subpœnaed the said Tek Hooi to produce the account books of Ban Guan and on the date named in the subpœna, the said Tek Hooi attended before the Registrar in company with the defendant Tek Hooi then produced 21 account books which were marked by the Deputy Registrar, but immediately thereafter, the defendant objected to the books being inspected by the plaintiff or being left in Court. Tek Hooi supported the defendant in this objection, and notwithstanding the Deputy Registrar's order that three books at a time be left in Court for the plaintiff's inspection, the defendant and Tek Hooi objected, and eventually Tek Hooi said he would abide by the order of the Judge. The enquiry had in consequence to be adjourned, and the 21 books were taken away by the defendant and Tek Hooi. The plaintiff then applied on summons to *Pellereau*, J. for an order on Tek Hooi and the defendant to bring into Court the said account books, and deposit them in the Registry for the plaintiff's inspection. Tek Hooi and defendant both shewed cause against the application, and on the 2nd of March, 1887, *Pellereau*, J. refused to make any order on the ground that there was no privity between the plaintiff a sub-partner and Tek Hooi and other partners in the firm Ban Guan so as to entitle him [the plaintiff] to an inspection of the books; he thereupon dismissed the summons with costs for Tek Hooi, but without costs for the defendant. The plaintiff then attempted to proceed with the enquiry before the Registrar, but the defendant still absented himself. The Deputy Registrar eventually decided to proceed *ex-parte*. Service of notice on the defendant was proved, and the plaintiff gave evidence detailing the transactions between defendant and himself; among other things he swore to, was a statement made by the defendant to him that no profits had been made for the first two years, but in the third year the profits were $16,000 and on the fourth year $15,000, but he had not been told what the profits for the fifth and sixth year [the two last years of the partnership] were. On the last day of the enquiry upon a further notice being served on the defendant he at last appeared; he declined to cross-examine the plaintiff, or to state anything more than that he had only a small share in the firm and could not get the books and was unable to account to the plaintiff. The Deputy Registrar on 18th April, 1888, made his report in which after narrating most of the facts aforesaid, stated that he was satisfied the defendant and Tek Hooi were acting in collusion to deprive the plaintiff of his capital and profits, and under the whole circumstances of the case he considered the plaintiff was entitled to a return of his capital of $900 besides $547.60½ for his eight-tenths shares of profits; that allowing that the firm Ban Guan made no profits the first two years, yet he considered that the profits it made in the subsequent four years was $3,000 at least per year. The defendant excepted to this report, which exceptions now came on to be argued. The Deputy Registrar stated that he had arrived at the result he did by allowing the plaintiff about twenty-

five per cent. for profits, as he could not find out what the exact amount of profits were.

Thomas, for the defendant in support of the exceptions contended, there was no evidence to support the Registrar's finding; that although there was the defendant's statement that the profits for the 3rd and 4th years amounted to $16,000 and $15,000 respectively, yet the plaintiff admitted he could not tell what was the result of the further two years' business, and for all that appeared, a heavy loss might have been the result of the six years' business, and the profits of the 3rd and 4th years all swept away.

Van Someren, for the plaintiff in support of the report contended, that from the statement of defence it was clear the term for partnership in Ban Guan had expired, and the defendant could have sued Tek Hooi and co-partners for accounts; that he had been ordered by *Sheriff*, J. to do so, and had not as yet done it; that from his whole conduct before the Registrar, as well before as after, it was clear he was acting in collusion with Tek Hooi to deprive plaintiff of his accounts; he neither attempted to support the accounts he had filed, or to contradict the plaintiff's evidence, or to explain why he had not sued Tek Hooi; he *had* a means of getting at the accounts if he chose to sue, but had not troubled himself to get them—there was a presumption therefore against him—*Gray* v. *Haig*, 20 Beav. 219; *Duke of Leeds* v. *Earl of Amherst*, Ibid. 239, 240, 247; and as the Registrar was bound to find something definite—*Chin Guan Tak* v. *Chin Seah Pow*, 1 Kyshe, 586—he had done rightly in allowing a percentage for profits. *Walmesley* v. *Walmesley*, 3 Jo. & Lat. 556; 2 Lindley on Partnership [4th Ed.] 993.

Thomas, in reply contended, no presumption arose against defendant as he had not the books in his possession, nor until the plaintiff had sought to enforce the order of *Sheriff*, J. by attaching the defendant for not suing Tek Hooi. The plaintiff had not exhausted *all* means and remedies in his power to procure the books, and could not insist on any presumption against the defendant.

Pellereau, J. In this case, the plaintiff is a sub-partner of the defendant who is a partner in the firm Ban Guan of Penang. The agreement between the plaintiff and defendant provides for accounts to be gone into yearly. Of course, if circumstances prevented the defendant from going into accounts yearly, then he cannot be said to have wilfully been in default. For instance, if the manager or partners in the firm had refused to allow defendant inspection of the books, and thus placed him in such a position that he could know nothing of the accounts and was unable to communicate the account to the plaintiff, he would have been free from blame. Here however, I am satisfied the term of the partnership in the firm Ban Guan had expired, and the day for accounting among the partners in that firm had come; the defendant, if it be true he had been refused an account by his partners, had then every opportunity and right to sue them. In fact, this Court

PELLERAU, J. 1888.

LEE CHIN POO v. LEE CHYE HOON.

ordered him to do so—he did not do it and has never done it. Whether the plaintiff could have enforced that order against the defendant or not, I think is immaterial. The defendant *had* a right to sue if he chose; he wilfully abstains from doing it and from imparting any knowledge he would thereby have got, to his sub-partner the plaintiff. I think under all the circumstances of this case, the Deputy Registrar had every reason for concluding that the defendant was colluding with Cheah Tek Hooi, the manager of the firm Ban Guan, in fact, that one was helping the other in order that defendant should not render an account to the plaintiff. The plaintiff was entitled to insist, and the Deputy Registrar to hold, under the circumstances that the defendant *could have* produced the books if he chose, and as he wilfully withheld the books from the Court, to presume, from his conduct, everything against him. Then the question arises, was the Registrar right in coming to the conclusion that $1,447.60\frac{1}{2}$ are due to plaintiff for capital and profits? In the first place the defendant filed accounts shewing $2,616.47 on the credit side—he also shews $2,867.07\frac{1}{2}$ on the debit side, but he produces no evidence in support of the items on the latter side. The items on the credit side being against the interest of the defendant, the plaintiff under the circumstances was entitled to ask the Registrar to adopt those items and to disallow everything on the debit side. If the Registrar had so done, the plaintiff's eight-tenth shares in the defendant's one-twelfth share in the firm would have amounted to $2,000, and I could not have said he was wrong. The plaintiff however, in addition to this, in his evidence, says: "defendant told me there was no profit on the first two years—the profit on the 3rd year was more than $16,000, on the fourth year $15,000. Fifth year I got no information from him as to the profits, neither did I receive any on the 6th year." This evidence stands uncontradicted by the defendant, and shews the profits for the third and fourth years of the business amounted to $31,000. The Deputy Registrar however, has estimated the profits at $3,000 a year, which for six years during which the partnership lasted would be $18,000. How far the Deputy Registrar was right in arriving at this smaller figure instead of the larger one of $31,000 I cannot say. I think there was sufficient evidence for the Deputy Registrar to have found the plaintiff was entitled to a larger sum than he has awarded him; I cannot therefore say there was no evidence for him to award the smaller sum neither can I say, as the defendant wishes to say, the Registrar was wrong in so awarding. I cannot however increase the sum, and award the plaintiff more than has been given him—the plaintiff has not asked me to do so, and has not excepted to the report. All I am concerned therefore to see is, whether there is evidence to support the Deputy Registrar's finding. As I have already said I think there was. I agree with the Deputy Registrar in presuming against the defendant under the circumstances of this case, and although I differ from him as to his reasons, and in that way vary the reasons for his report, yet I arrive at the same conclusion he has. I think the evidence

shews the plaintiff was entitled to more, and I cannot therefore say there was no evidence for the Deputy Registrar to award him less. There is evidence to support his finding of $1,447.60½, and the plaintiff is entitled to judgment for that sum with costs. I therefore over-rule the exceptions, confirm the report, and direct judgment to be entered up for the plaintiff for $1,447.60½ will costs.

PELLEREAU, J. 1888.

LEE CHIN POO v. LEE CHYE HOON.

Exceptions over-ruled.

REGINA *v.* QUAK AH SAH.

SINGAPORE.

FORD, C.J. WOOD, PELLEREAU & GOLDNEY, J.J. 1888.

June 7.

The mother of a minor under sixteen years of age who has always had charge of the minor, cannot be convicted under Section 373 of the Penal Code, although she brings up and employs the minor for the purpose of prostitution [*a.*]

The words "or otherwise obtains possession of" in the said Section 373 are *ejusdem generis* with the preceding words "buys" and "hires" and cannot apply to a mother who always has had the custody and possession of her child.

Case stated by *Goldney*, J., as follows:—

"The prisoner was charged under the 373rd Section of the Penal Code with having obtained possession of a minor girl under the age of sixteen with intent that such minor should be employed or used for the purpose of prostitution. The girl in question was the prisoner's own daughter, and had been brought by her mother from Canton [as she admitted] for the purpose of her being placed as a prostitute in one of the brothels in Singapore.

The Jury found as a fact that the minor was under the age of sixteen years, and convicted the prisoner of the offence with which she was charged. On this verdict, I sentenced the prisoner to 12 months' rigorous imprisonment.

Having considerable doubts whether a mother prostituting her own daughter comes within the meaning of the 373rd Section of the Penal Code, I admitted the prisoner to bail on her own recognizance pending the decision of the Court for Crown Cases reserved. The offence created by this section appears to be *the obtaining possession* of a minor for a certain purpose, &c. The question is, can a mother obtain possession of her own daughter for the aforesaid purpose? If the Court finds that the conduct of the mother under the circumstances brings her within Section 373 of the Penal Code the conviction will stand, otherwise the conviction will be quashed."

Section 373 of the Penal Code [Ordinance 1 of 1871], is as follows:—

"Whoever buys, hires, *or otherwise obtains possession of* any minor under the age of sixteen years with intent that such minor shall be employed or used for the purpose of prostitution, or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose shall be punishable, &c."

Section 373A. of the Penal Code, Amendment Ordinance 3 of 1882, is as follows:—

"Whoever by any false pretence, false representation, or fraudulent or deceitful means, brings or assists in bringing into the Colony any woman with intent that such woman may be employed or used for the purpose of prostitution; and whoever brings or assists in bringing into the Colony any

[*a.*] *Regina* v. *Webster*, 16 L. R. Q. B. Div. 134.

FORD, C. J. WOOD, PELLEREAU & GOLDNEY. J.J. 1888.

REGINA v. QUAK AH SAH.

woman with intent that such woman may be sold or bought for the purpose of prostitution; *and whoever sells or buys any woman for the purpose of prostitution* shall be punished, &c."

The case now came on for hearing before the Full Court of Appeal, consisting of *Ford*, C.J., *Wood*, *Pellereau* and *Goldney*, J.J.

Harwood, [*Acting Attorney-General*] for the Crown.

The prisoner was unrepresented.

The Court was of opinion that the words "or otherwise obtains possession of" in Section 373 were *ejusdem generis* with the preceding words "buys" and "hires,"—and the section supposes the minor to be used as an article of traffic, and points to a person obtaining the woman from some one else. The section did not apply to a mother who having always had her child in her possession cannot be said to have obtained her possession for the purpose of prostitution. But the Court expressed the hope that if there was another section or law applicable to her and the facts justified it, a proper charge should be brought.

Conviction quashed.

REGINA *v.* KOOMAT.

PENANG. WOOD, J. 1888. June 20.

The Court having on an appeal remitted [under Ordinance 12 of 1879, Section 25] the case "to the Magistrate" for further evidence, "and for such amendment of the conviction as is consistent with the evidence,"

Held, the order could be carried out only by the convicting Magistrate from whose decision the appeal was made—and the mere fact that he was absent from the Colony did not authorise another Magistrate to take the further evidence.

Query. In remitting a case for further evidence under Section 25 aforesaid, has this Court power to remit it to any Magistrate other than the convicting Magistrate? [*a*.]

This was an appeal from the decision of Walter Egerton, Esquire, Acting First Magistrate, whereby he on 13th January, 1888, convicted the appellant [an additional Constable in the Police Force attached to the Hackney Carriage Department] of receiving a gratification other than legal remuneration for forbearing to shew in the exercise of his official functions, disfavour to one Lee Bok, under Section 161 of the Penal Code. The case was stated by Mr. Egerton, and the appeal was heard on 27th February, 1888, before this Court [*Wood*, J.] who ordered under Section 25 of the Appeals' Ordinance 12 of 1879 "that the case be remitted to *the* Magistrate to ascertain by the evidence of the witnesses examined in the Court below, the nature of the official duties of the appellant, *and for such amendment of the conviction as is consistent with the evidence taken*, and to find out specifically the motive for which the money was paid to the appellant by Lee Bok, whether by express agreement verbal or otherwise, and if so, what that agreement was, or whether the witness Lee Bok gave the money without any definite or express motive in whole or in part." The said Walter Egerton left this Settlement for England on leave on 1st

[*a*.] See *Regina* v. *Khoo Seang Ju*, 2nd July, 1888, post p. 392, and as regards re-hearing "as a fresh charge," see *Regina* v. *Goh Choo Lan*, 22nd August, 1888, *infrà*.

March, the Registrar transmitted under Section 26, the Order to the Police Court on the 3rd. On the 27th April, Mr. C. W. S. Kynnersley, the First Magistrate, purporting to act under the aforesaid order, took further evidence on the points mentioned, but for some reason which did not appear, did not amend the conviction or state whether in his opinion it did or did not require amendment. The further evidence so taken by him was thereafter transmitted by him to this Court, and the appeal now came on for further hearing. Section 25 of the Ordinance 12 of 1879, is as follows:—

"The Court shall give judgment in the said appeal after hearing the parties or their Counsel if in attendance on the day of hearing, and may affirm, alter, or reverse the adjudication of the Magistrate or Court of two Magistrates as justice may seem to require. Provided always, that if it shall appear to be necessary for the due determination of the appeal, the Court may order the witnesses examined, or offered, or named for examination in the Court below in the cause on either side, to be further examined, and may remit the case to *the* Magistrate or Court of two Magistrates for *amendment* and for *further evidence*, either for appellant or respondent; and *after* such amendment is made, or further evidence supplied, judgment shall be given by the Court."

Van Someren, for the appellant contended, the further evidence could not be looked at as the Magistrate who took it had no jurisdiction to do so; that "*the* Magistrate" in the Order of 27th February meant the Magistrate from whose decision the appeal was made, and the order in stipulating for any neceessary amendment of the conviction consistently with the evidence, shewed he was to form an opinion on the evidence, and could not therefore mean some other Magistrate who knew nothing of the former evidence in the case; that when any Magistrate was alluded to by the Appeals Ordinance, he was spoken of as "a Magistrate"—Section 18; having alluded to a decision by "*a* Magistrate," the subsequent sections, including Section 25 referred to that Magistrate as "*the* Magistrate"—meaning the Magistrate who had decided or stated the case. He further contended, that the fact of Mr. Egerton having left the Colony was immaterial and could not alter the legal effect of the order.

D. *Logan*, [*Solicitor-General*] for the respondent contended, that if this objection prevailed the case would be thrown over indefinitely; that the Order of 27th February was divisible into two parts, one requiring a merely ministerial act,—the taking of evidence as to the appellant's official duties, and the motive of the payment to him—and the other judicial, the forming of an opinion on the evidence as to whether the conviction needed amendment and what amendment; that there was no reason why the taking of the further evidence, the ministerial act, should not be done by *any* Magistrate; and although the judicial part of the order could not be carried out by him, yet as this Court would now have all the evidence before it, it could dispense with the opinion of the Magistrate and form an opinion on the evidence for *itself* and amend the conviction if necessary. He also contended, that as the Magistrate who took the further evidence did

WOOD, J. 1888.

REGINA v. KOOMAT.

not amend the conviction, it must be presumed he was of opinion that it did not require amendment, and was consistent with the evidence; that the original conviction being supported by the evidence and good on the face of it, the Court should dispose of the appeal at once.

Van Someren, replied.

Wood, J. said he regretted the delay that would be caused by the case standing over until the return of Mr. Egerton, but he saw no help for it. He was of opinion that the order only referred to the convicting Magistrate as the person to take the further evidence and form an opinion on it, and what was done here was not a carrying out of the order of the Court; that order following the language of Section 25 required "*the* Magistrate" to take the further evidence and make any necessary "amendment," the Magistrate referred to in the order was the convicting Magistrate, in fact he had considerable doubt whether the Court could under Section 25 remit a case for further evidence to any Magistrate other than the convicting Magistrate. The only order he could therefore make now was that the case should stand over for Mr. Egerton's return for him to carry out the Order of 27th February.

Order accordingly.

SHELLAPEN *v.* GORDON.

PENANG.

WOOD, J. 1888.

June 25.

The prisoner, a tindal on a Sugar Estate in Province Wellesley one night at 9 o'clock in the presence of several persons, received some planks from four coolies of the Estate and proceeded to cut them and nail them down as a flooring for a cow-shed belonging to the Estate which he had the use of for his cows; the planks belonged to the Estate and the coolies had had no permission to remove them. The Magistrate convicted the prisoner of receiving stolen property.

Held, on appeal that on these facts there was no satisfactory evidence of guilty knowledge on the part of the prisoner and the conviction was quashed.

Query. Could the planks under the circumstances be said to be "stolen" property within the meaning of the Penal Code?

The appellant Shellapen had been convicted by R. N. Bland, Esquire, Magistrate, Nibong Tebal, Province Wellesley, under Section 411 of the Penal Code, of receiving stolen property and sentenced to two months' rigorous imprisonment. The evidence before the Magistrate was to the effect that the appellant was a tindal on Caledonia Estate, Province Wellesley, of which the respondent Gordon was the manager; that on the night of 9th April last, at about 9 o'clock, four coolies belonging to the Estate took some 31 planks and 7 lantils [total value $14] which was on the Estate and brought them to the appellant who received them and proceeded to cut them and nail them down as flooring to a cow-shed built on the said Estate, which shed the appellant had the use of for his cows; the flooring was finished next night. The planks were new, but otherwise had no marks to distinguish them; they were carried by the four men and received by the appellant in the presence of many persons, who cut and nailed them down in their presence. The planks and lantils belonged to the Estate, but

there was nothing to shew the appellant knew that fact. The appellant appealed. By Section 411 of the Penal Code, the stolen property must have been "dishonestly" received, "knowing or having reason to believe the same to be stolen." By Section 410, property, the possession whereof has been transferred by "theft" is designated "stolen property." By Section 378, the taking "*dishonestly*" of any moveable property *out of the possession of a person* without his consent is said to be "theft." By Section 24, "dishonestly" is defined to be the doing of a thing with the intention of causing "wrongful loss" to one person or "wrongful gain" to another; and by Section 23 "wrongful gain" is defined to be gain by unlawful means, and "wrongful loss" is defined to be *loss* by unlawful means.

Van Someren, for the appellant contended, [1] there was no evidence that the appellant knew or had reason to believe the property to be stolen—his receiving them at night and working at the floor at night, was to be accounted for by his attendance at the fields all day in the business of the Estate; he received the things and proceeded to work them openly, and it was not shewn he ever knew the Estate owned any planks, &c.; [2] the planks were not "stolen" property as they were merely removed from one part of the Estate to another, and there cut up and nailed down to a building [the cow-shed] which either belonged to the Estate, or was part of the freehold as being let into the soil—the Estate therefore suffered no "loss" and it could not therefore be "wrongful loss" nor the things "dishonestly" removed. The planks could not also be said to have been taken "out of the possession" of the Estate when it formed part of, and was in the Estate land, which land was of course in the possession of the manager and proprietor.

D. *Logan*, [*Solicitor-General*] submitted the question of guilty knowledge was one of fact, and having been presumably found by the Magistrate, the Court would not interfere.

Wood, J. said he was of opinion that there was no satisfactory evidence of the *scienter* on the facts proved, and without deciding whether property was "stolen property" or not, must quash the conviction.

Conviction quashed.

MAN & ANOR *v.* LEHAH.

PENANG.

WOOD, J. 1888.

June 25.

A Magistrate, apart from Ordinance 13 of 1872, Section 60, has no power on convicting a person of an offence, to order him to give security to keep the peace; and that section only enables him to require security *in addition* to some other punishment provided for the offence of which the person is convicted.

Where, therefore a Magistrate convicted a prisoner of an assault under Section 352 of the Penal Code, but did not inflict a fine or imprisonment, and only ordered him to give security to keep the peace for six months,

Held, the order was bad for want of jurisdiction.

The appellants had been convicted by J. K. Birch, Esquire, Magistrate, Province Wellesley, under Section 352 of the Penal Code for using criminal force to the respondent, otherwise than

Wood, J. 1899.

MAN & ANOR v. LEMAN.

on grave and sudden provocation. The evidence for the prosecution was somewhat contradictory; that of the prosecutrix [the respondent] and her brother-in-law being, that the appellant Man had met her on the public road at Bagan Tuan Kechil and abused her and gave her two slaps on the face when he was pulled away by the appellant Mat Hashim who, however, himself gave her a further slap on the face. The evidence of an independent witness, the syce of a hackney carriage that the prosecutrix had hired immediately before the assault, was to the effect that the prosecutrix abused the appellant Man who thereupon went up and struck her twice with an umbrella he was carrying. The evidence for the defence gave an entirely different account of the disturbance. The Magistrate having convicted both the appellants as aforesaid, sentenced the appellant Man to one month's rigorous imprisonment, but the appellant Mat Hashim only to find security to keep the peace for six months. Both prisoners appealed against the convictions. By Section 352 of the Penal Code the punishment provided for an assault or using criminal force is imprisonment of either description or a fine or both. By Ordinance 13 of 1872, Section 60 it is provided that,

"Whenever a person charged with rioting, assault, or other breach of the peace, or with abetting the same, or with assembling armed men, or taking other unlawful measures with the evident intention of committing the same, is convicted of such charge before a Court of Quarter Sessions, or a Magistrate, and the Court or Magistrate by which or by whom the accused person is convicted, is of opinion that it is just and necessary to require a personal recognizance for keeping the peace from the person so convicted, the Court or Magistrate may *in addition* to any other judgment passed in the case, direct that the person so convicted be required to execute a formal engagement in a sum proportionate to his condition in life and the circumstances of the case, for keeping the peace during such period as it may appear proper to fix in each instance, not exceeding six months if the sentence be passed by a Magistrate, and not exceeding one year if the sentence be passed by Court of Quarter Sessions with a provision that if the same be not given the person required to enter into the engagement shall be kept in simple imprisonment for any time not exceeding six months if the order be passed by a Magistrate, or twelve months if by a Court of Quarter Sessions unless he bind himself with such period.

II.—If the accused person be sentenced to imprisonment the period for which he may be required to execute a recognizance and the imprisonment in default of executing such recognizance shall commence when he is released on the expiration of his sentence.

III.—Whenever it appears necessary to require security for keeping the peace, in addition to the personal recognizance of the party so convicted, the Court or Magistrate empowered to require a personal recognizance may require security in addition thereto, and may fix the amount of the security bond to be executed by the surety or sureties; with a provision that if the same be not given the party required to find the security shall be kept in simple imprisonment for any time not exceeding six months if the order be passed by a Magistrate, or one year if the order be passed by a Court of Quarter Sessions."

By Section 2 of the Penal Code, persons convicted of offences thereunder are punishable as therein provided "and not otherwise" except [Section 5] under any "special" or "local law." A "special law" is defined to be a law applicable to a particular subject [Section 41], and a "local law" a law applicable to a particular place [Section 42.]

Van Someren, for the appellants, as to the appellant Man contended, that the sentence was in excess of what the justice of the case required; it was a trivial assault consisting, if the prosecutrix was to be believed, of two slaps which left no marks of any kind, and though the appellant had been guilty of the like assault, consisting of one slap, he was merely directed to find security. The difference between the sentences was very great and under the circumstances, inconsistent, and the Court should reduce the sentence of imprisonment to a fine only as had often been done throughout the Colony, and the Court had power thus to "alter" the adjudication—Section 25, Ordinance 12 of 1879; *China Gunny* v. *Muniandee*, antè p. 161. He then contended, that the order to find security was bad, as the Magistrate's only power on convicting a prisoner of an offence, to require security for him, was derived from Ordinance 13 of 1872, Section 60, but there, only as an *additional* punishment in the present case, the Magistrate not having inflicted a fine or imprisonment could not call that section in aid.

[*Wood*, J. suggested that he had power perhaps by Common Law to require security.]

Van Someren, submitted he had not as the Common Law did not recognize the Magistrate, and his powers were purely Statutory; but even supposing he at one time had the power at Common Law, he had not it now, as by Section 2 of the Penal Code the prisoner was to be punished thereunder "and not otherwise" unless under a "special" or "local law" [Section 5]. Ordinance 13 of 1872 was such a "special law," but as shewn it was confined to security being required as an *additional* punishment. He also contended, the order was bad as it made no provision as required by Section 60 aforesaid, in case default was made in furnishing the security ordered. *Mootoo* v. *Ayah Doreh Pillay*, 3 Kyshe, 90, 91.

D. *Logan*, [*Solicitor-General*] contended, that the sentence of imprisonment on appellant Man should not be reduced; that the Magistrate had the prisoners and witnesses before him, and he must have had a reason for inflicting the imprisonment, and he being the officer entrusted by law with the duty of punishing petty offenders, it would be introducing a bad precedent to interfere with his sentence. As regarded the order on appellant Mat Hashim to furnish security, he admitted he had considerable doubts whether the Magistrate had the power to require security as he had done here.

Wood, J. said that as regarded the appellant Mat Hashim, he feared the Magistrate had not power to require security to keep the peace, apart from Ordinance 13 of 1872, Section 60, and he was of opinion that that section did not apply to this case, but only to cases of security being required as an *additional* punishment. As regarded the appellant Man, the desire of the Court was that all sentences by its Judges should be alike; and those by the Magistrate should be proportionately so; this Court would never for a trivial assault as this, especially when it was a first offence, impose rigorous imprisonment. He considered therefore that the

WOOD, J. 1888.

MAN & ANOR. v. LEHAM.

Court should interfere in the present case and alter the sentence from rigorous imprisonment to that of a fine. The sentence on the appellant Man would therefore be commuted to a fine of $25 [*a*.], and the order requiring security of the appellant Mat Hashim would be quashed.

Order quashed.

REGINA *v.* KHOO SEANG JU.

PENANG.

WOOD, J. 1888.

July 2.

On the trial of a prisoner for being the occupier of a house kept or used for the purpose of a Common Gaming House, the evidence whether of the prisoner himself or others given at a previous trial of persons found in the house and convicted of being present in a Common Gaming House is not admissible.

It is unsafe for a Magistrate to convict a person of being the occupier of a Common Gaming House solely on the statutory presumption of its being a Common Gaming House because persons are seen or heard to escape from it on the approach of the Policy—where there is *some* evidence in disproof of it.

Query. Has this Court power to send a case back under Section 34, Clause 4 of the Appeals Ordinance 12 of 1879, to a Magistrate *other than* the convicting Magistrate? [*b*].

The appellant had been convicted by A. H. Capper, Esquire, Magistrate, of being the occupier of a house No. 30, Bridge Street, Penang, and keeping the house for the purpose of a Common Gaming House, under Ordinance 13 of 1879, Section 2, Clause 1. The evidence before the Magistrate was to the effect that the premises in question had been entered by the Police under a warrant on the night of the 8th September, 1887, and nineteen persons arrested therein while a number of others were seen or heard to escape therefrom. The nineteen men were brought before a Magistrate [Mr. C. W. S. Kynnersley] and fined $25 each, and had appealed against the conviction, which however was affirmed by the Court. The present prisoner [appellant] was seen by the Police in the house on the night in question; and afterwards at the Station, he admitted he was the occupier of the house and head of a Club carried on therein; that on the trial of the nineteen men, the present prisoner [appellant] gave evidence for the defence, and on oath stated he was Secretary of the Club and occupier of the house. The landlord of the premises was also called on the hearing of that charge as well as the present charge against the prisoner [appellant] and proved the prisoner [appellant] was the tenant of the premises and at the time he engaged it, said he was going to open a Club; that he [the landlord] had occasionally been to the house after 6 p.m., but did not see anything particular beyond hearing singing and music. After the

[*a*.] In the case of *Cheah Boon Hean* v. *The Crown*, 22nd August 1888 [*not reported*], the Full Court of Appeal [*Ford*, C.J., *Wood*, *Pellereau* & *Goldney*, J.J.] reduced a fine of $3,000 imposed by a Magistrate on the appellant, for keeping a Common Gaming House, to a fine of $1,500, on the grounds that that was the maximum fine under the Gaming Ordinance and it being a first offence and there was reason for supposing the Magistrate in imposing the fine was influenced from the fact that the appellant was said to be the keeper of *another* gaming house, of which there was no proof in the case.—J. W. N. K.

[*b*.] See *Regina* v. *Koomat*, antè p. 386, and as regards re-hearing "on a fresh charge," see *Regina* v. *Goh Choo Lan*, *infrà*, 22nd August, 1888.

Inspector and landlord had been called to prove the above facts, one Stephen Leicester, Chief Clerk to the Magistrate, was called and stated that on 15th September, 1887, nineteen prisoners were brought before the Senior Magistrate, Mr. Kynnersley, for being present in a Common Gaming House; he produced the Magistrate's notes of the evidence given on that occasion and swore to the handwriting of Mr. Kynnersley; these notes of evidence being put in the evidence given by the present prisoner on the occasion was read by the witness. This concluded the case for the Crown. The prisoner [appellant] called no witness, but in his defence said he rented the house and opened a Club there at the request of a friend; he sometimes went to the house to amuse himself, but did not know how to gamble; he went to the house on the occasion of the entry by the Police as his friend sent for him. The prisoner on conviction was fined $500 and now appealed against that conviction.

Clutton, for the appellant contended, the evidence of the witness Leicester, and the Magistrate's notes of evidence in the former case were inadmissible [*a.*]; that apart therefrom there was no evidence of any gambling having taken place in the house, and as the evidence wrongfully received could not but have had weight in the mind of the Magistrate who tried the appellant, the conviction should be quashed.

D. *Logan*, [*Solicitor-General*] admitted the evidence was inadmissible, but contended that there had been no failure of justice. Appeals Ordinance 12 of 1879, Section 33, Clause 1; that there was evidence, apart from the objectionable evidence, that persons were seen and heard to escape from the house on the approach of the Police, and *that* was sufficient to make the house a Common Gaming House under the Gaming Ordinance 13 of 1879, Section 11, and to convict the appellant, the occupier thereof. If the Court thought the evidence not sufficient it should send the case back for further evidence under Section 25 of the Appeals Ordinance, or for a re-hearing on a fresh charge under Section 34, Clause 4—but in either case to the *same* Magistrate who had convicted the appellant, as he submitted the Court had no power to send the case back to any other Magistrate.

Clutton, in reply contended, that if the case was to be sent back for a re-hearing on a fresh charge there was no reason why it should be sent back to the same Magistrate; it should be sent back under Section 34, Clause 4, the language of which was "the Court" and not "the Magistrate," as in Section 25; "the Court" meant the Court below, but not necessarily the same Magistrate; the change of language between the two sections was evidence of a change of intention; it would be useless to send the case to the same Magistrate as he had made up his mind and was sure to convict.

Wood, J. I consider that the evidence given by Mr. Leicester, viz., proof of the notes of the prisoner's case, was improperly received and was calculated to prejudice the mind of

[*a.*] *Letchmee and anor.* v. *Ramasawmy*, Vol. 3 of these Reports, 102.

WOOD, J. 1888.

REGINA v. KHOO SEANG JU.

the convicting Magistrate as to this particular defendant. I think that independent evidence should be given as against this particular defendant, and I cannot help assuming that the Magistrate convicted the defendant mainly upon the evidence adduced in the former case in which the assumed gamblers were fined. I look upon it that the only facts proved as against the defendant are that he is the occupier of the house and that persons escaped from it on the arrival of the Police, which is statutory proof under Section 11, Ordinance 13 of 1879, that the house was kept by the occupier as a Common Gaming House. I do not however think it is safe to rely solely on this statutory proof of the keeping of a Common Gaming House by an occupier where as here there is *some* evidence in disproof of it; and I think that it is in the interests of the parties that this case should be re-tried upon evidence which is properly admissible,—and that evidence having been improperly admitted which no doubt had a powerful effect on the convicting Magistrate's decision—the case should be re-tried before the same Magistrate on the same charge upon fresh and independent evidence. Looking at Sections 25, and Clause 2 and Sub-section 4 of Section 34 of the Appeals Ordinance 12 of 1879, I entertain some doubt as to whether I can remit the case to a fresh Magistrate, and in deference to the request of the Solicitor-General, I refer it accordingly to the same convicting Magistrate.

Case remitted.

BLAZÉ *v.* MAYNARD & CO.

PENANG.

WOOD, J. 1888.

July 3.

A label of a particular colour having printed on it the name of a firm or business and the place where it is carried on, followed by a description of the article on which the label is affixed and the use of such article and the mode of using it, is a trade-mark, the use of a colourable imitation of which this Court will restrain.

A trade-mark does not become *publici juris* from the mere fact that it is also used by another person without objection for some years, concurrently with the user by the plaintiff of his mark.

Suit to restrain the use by the defendants of a trade-mark and $5,000 damages. The plaintiff was a Chemist and Druggist carrying on business in No. 18, Beach Street, as the Penang Medical Store, and having discovered and compounded a mixture for rheumatism which was largely purchased of him by Chinese, he in March 1874, and thence continuously, sold the mixture in bottles to which was affixed a red label with the words "Penang Medical Store, No. 18, Beach Street," printed in a half-circle thereon in English as a heading, and underneath, followed in Chinese characters, the following "Wonderful medicine for rheumatism. It has the power to dispel the rheumatism, to strengthen the constitution, and strengthen sinews and bones. Take it three times each day and at each time take two spoonfuls. It will surely effect a perfect cure." In May, 1887, the plaintiff found the defendants who were also Chemists and Druggists carrying on business in Beach Street No. 3, under the name of

the "Penang Dispensary" were selling bottles somewhat similar to the plaintiff's, containing a mixture for rheumatism on which bottles was affixed a label similar in size and colour to the plaintiff's, having the heading in English arranged as the plaintiff's, and underneath Chinese characters which were precisely in formation and arrangement like the plaintiff's; the only difference being in the English heading in which the word "Dispensary" was used instead of "Medical Store" and the figure "3" instead of "18." The plaintiff having through his Solicitor written to the defendants objecting to their use of this label, the defendants altered their labels by printing the heading in straight lines and differently arranging the Chinese characters. The plaintiff being still dissatisfied began this suit. At the trial it appeared that another Chemist and Druggist of the name of Hagerty who also carried on business in Beach Street under the name of the "New Medical Hall" from 18th February, 1880, and thence continuously to this date had and was selling a mixture of his own for rheumatism in bottles not unlike the plaintiff's with labels affixed thereto like the plaintiff's in design and arrangement, except that it had a line bordering on the four sides of the printed matter, and the name "New Medical Hall" and No. 4 in the heading in English and the Chinese characters were somewhat differently arranged. The plaintiff first became aware of Hagerty's use of this label about four or five years ago, he took no steps to prevent Hagerty so using it, though at the time the plaintiff was objecting to defendant's use of their label, he got his Solicitor to write a letter to Hagerty objecting to his using of the label. Hagerty took no notice of this letter, but no proceedings up to date had been begun against him.

Clutton, for the defendants contended, [1] that the plaintiff's label was not a trade-mark and cited *Sebastian on Trade-Marks*, 3, 49-59; *Singer Manufacturing Co.* v. *Wilson*, 2 L. R. Ch. Div. 434, 440; *Cheavin* v. *Walker*, 5 L. R. Ch. Div. 850, 51; *Linoleum Manufacturing Co.* v. *Navin*, 7 L. R. C. D. 834, and *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. 539; [2] that Hagerty's use of a similar label, and lapse of time, had made plaintiff's label become *publici juris* and cited *Ford* v. *Foster*, 7 L. R. C. D. 611; *Lee* v. *Miller*, Sebastian's Digest of Trade-Mark Cases, 513, and *Seton on Decrees*, 242.

Ross, for plaintiff was requested by the Court to confine himself to the question of Hagerty's user. He contended that exclusive user by the plaintiff was not necessary and user by one other person did not make the trade-mark *publici juris*. By Statute 46 & 47 Vic. c. 57, ss. 74, 76 & 90, the user by less than three persons had not that effect; and though that Act did not apply, the Court might act by analogy. He cited *Ford* v. *Foster*, 7 L. R. Ch. Div. 615, 623, 625 & 632; *Rodgers* v. *Rodgers*, 31 L. T. [N. S.] 287; *Monson* v. *Boehm*, 26 L. R. Ch. Div. 398, and *re* Heaton, 27 L. R. Ch. Div. 570.

Clutton, replied.

Wood, J. The first question I have to determine is whether the plaintiff has or has not a trade-mark in this label. I am of

WOOD, J. 1888.

BLAZE v. MAYNARD & Co.

opinion it is a trade-mark; he has always vendered his article with this particular label affixed on his bottles and his mixture has become known to the public by that label. I consider the defendants' first label is an imitation of the plaintiff's and that defendants intended to pass off their medicine as plaintiff's. I also think though their altered label is not so distinctly like the plaintiff's, yet still it is a colourable imitation thereof. It is a dangerous thing for a person to come into Court with a label of this kind. I have to consider next whether the plaintiff has weakened his case for damages by standing by when Hagerty began to use his label. The plaintiff did not know it at the time and when he did come to know of it he was not aware he had a right to object to it—ignorance of the law however is no excuse. Hagerty's label is not quite such an imitation of plaintiff's as the defendants' are; however, even if it were, I am of opinion that the plaintiff has never abandoned his trade-mark, and the mere fact of Hagerty using one like it does not thereby make the plaintiff's mark *publici juris*. The damages claimed by the plaintiff are excessive, and as the defendants will have to pay heavy costs and besides be restrained by injunction from using their labels, I think the damages I ought to award plaintiff is $300. The injunction will be as to the two labels and in the terms of the prayer of the statement of claim.

Judgment for plaintiff with costs.

RAMSAMY *v.* LOW.

PENANG.

WOOD, J. 1888.

July 16.

It is not sufficient for the prosecution in the case of a charge against a prisoner under Section 13 of the Crimping Ordinance 3 of 1877 to shew that he seduced or attempted to seduce a labourer under contract of service to leave his employer and seek for *employment generally*; before there can be a conviction under that section it must be shewn that the labourer was seduced or attempted to be seduced in order to serve *some particular person*. (Overruled 15 S.C.R. 69)

In prosecutions under the said section, the contract for service should itself be produced; and it is not sufficient to give extrinsic evidence of its terms.

The prisoner Ramsamy [appellant] was convicted by R. N. Bland, Esquire, Magistrate of Nebong Tebal, Province Wellesley, for "attempting to seduce or take from their employment, three labourers who at the time were under contract to labour for a period not less than one month in order to serve some other person without the Colony" under Section 13 of the Crimping Ordinance 3 of 1877. The evidence shewed that the three labourers in question were employed in Caledonia Estate, Province Wellesley, of which the respondent was general manager; that they had served for one year and their contracts had not expired. The contracts themselves were not produced nor was the actual term of service shewn. The prisoner and another man had met the labourers on a bridge some four hundred feet from the estate, and after conversing with them invited them to his house and they went. In the house, they saw five other men up in a loft. At the bridge and again in the house the prisoner asked the labourers if they would like to go to Deli, in Sumatra, as others were going and he had hired a boat for $30 which would be ready to take them at

11 o'clock the next night; that at Deli they could get $8 per month in a pepper plantation and he would send them to Deli, and his companion would go as tindal. The labourers agreed to go and on promising to be ready to start the next night were paid 3 cents each and allowed to return to the estate. They had been seen by the watchman on the estate [Virapen] conversing with the prisoner and going to his house, and on their return to the estate were taken by him to the manager on suspicion that they were about absconding. They subsequently disclosed the arrangement and the charge against the prisoner [appellant] was the result. The prosecution also called the abovementioned five men whose evidence was that they belonged to Gula Estate in Perak, and had run-away and were taken in by prisoner's grass-cutter into the aforesaid house of the prisoner. There was reason to suspect they were the men alluded to by the prisoner as the other men who were going to Deli, and that they were being harboured by him in order to be taken there as labourers in one of the plantations. The five men had been found by the Police in the prisoner's house and brought to the Station where they were afterwards identified by the manager of Gula Estate as his run-away coolies. The formal record of conviction omitted to state that the prisoner "knowingly" attempted to seduce the labourers; it did not state that the Magistrate was a Magistrate "in and for" Nebong Tebal, in Province Wellesley, nor did it disclose the time or place where the offence was committed. Section 13 of the Crimping Ordinance 3 of 1877, is as follows:—

"Any person who shall knowingly seduce or take, or attempt to seduce or take from his service or employment any labourer bound by any contract of service, such contract being for a period of not less than one month, to serve any other person whether within or without the Colony, or who shall knowingly take any labourer while so bound into his service or employment, or who shall knowingly harbour or conceal any labourer who shall have absented himself without leave from the service of such other person to whom he is so bound, whether such service is to be performed within or without the Colony, or who shall knowingly retain in his service any labourer bound under any such contract to serve any other person, whether within or without the Colony, after receiving notice in writing, that such labourer is so bound as aforesaid, shall be liable on conviction to a fine not exceeding twenty-five dollars, or to imprisonment which may be of either description, for any period not exceeding three months, or to both, in respect of each or every such labourer."

The prisoner appealed against the conviction. The Magistrate in stating the case, stated the following "Reasons for the Conviction":—

"1.—There are slight discrepancies in the statements of the three first witnesses [Sababadi, Shedumbrum and Sundrum] *e.g.* with regard to the payment of money to them, but their evidence in the main is strongly corroborated by the fact that five men as mentioned by them were actually found in the defendant's house. 2.—The evidence given by the man Virapen has not been shewn to be untrustworthy. 3.—The defendant called no evidence to support his statement, that the five coolies were in his house without his knowledge. 4.—That the attempt to seduce the labourers from their employment was in order that they might serve 'some other person' may be presumed until the contrary is shewn, from the fact that they were agricultural labourers with no other means of earning a livelihood, and this presumption is borne out by the statements of the labourers themselves."

WOOD, J. 1888.

RAMSAMY v. LOW.

Van Someren, for appellant contended, 1.—That the record of conviction was bad as it disclosed no offence, in omitting to state a guilty knowledge in the prisoner and shew jurisdiction in the Magistrate who, for all that appeared on the conviction might have been a Magistrate of some place which gave him no power to try the case, or the offence might have been committed in any part of the world. 2.—That the evidence of the five men arrested in the house was not admissible as it was an attempt to shew the prisoner was guilty of one offence, the attempting to seduce these three labourers, because he was guilty of another, in harbouring run-away coolies from an estate in foreign territory; and this evidence had a material effect on the Magistrate's mind, as his reasons shewed. 3.—That there was no evidence to bring the case within Section 13 of the Ordinance 3 of 1877, as there was no evidence to shew the contract under which the labourers served, was for more than a month and the original contract had not been produced, but only *viva voce* evidence of its contents, in so far as it was said not to be expired: also as there was no evidence to shew the labourers were being seduced in order "to serve any other person." These words shewed that it was only an offence if the labourer was seduced in order to serve any other person, and that other person should be shewn to exist: evidence of seducing labourers in order to get them away to seek service elsewhere generally did not suffice to bring the case within the section. [He was then stopped by the Court who called on]

D. *Logan*, [*Solicitor-General*] in support of the conviction. He contended the evidence was sufficient to shew the contract was for more than for a month as the labourer had served thereunder a year, and the term was said to be unexpired. That evidence to shew the prisoner intended to take the labourers to work in another estate, was sufficient to shew it was "to serve any other person" within the meaning of Section 13 aforesaid.

Wood, J. The conviction must be quashed on the last objection taken. The words of the section are explicit that the seducing or taking must be in order that the labourer should serve another person. The mere enticing away a labourer from his employer is no offence under the section; it must be done in order that the labourer should serve "any other person," and there must be evidence of that other person either by name or by such description so as to be capable of being identified. The evidence in the present case of taking the labourers in order to get them employment elsewhere generally is not sufficient to bring the case within the section. I am sorry for the result, but the section is clear [*a*.] As regards the other objection that there is no evidence as to the term of the contract, I consider the contract itself which is in writing, must be produced as it might turn out to be illegal or invalid.

Conviction quashed.

[*a*.] This point does not appear to have been taken in the case of *Tio Ang Boi* v. *Hia Ma Lai*, antè p. 230, but there the conviction was for knowingly *harbouring* a labourer who was under contract of service under the *third* alternative of Section 13. —J.W.N.K.

MEYAPPA CHETTY *v.* ONG HONG PEE & ANOR.

In re ONG AH POH.

PENANG.

WOOD, J.
1888.

July 19.

Ignorance of the law requiring the registration of a Bill of Sale to be renewed every twelve months may be "inadvertence" within the meaning of Section 16 of the Bills of Sale Ordinance 12 of 1886.

The entire omission to renew the registration of a Bill of Sale under Section 14, Clause 1, of that Ordinance stands precisely on the same footing as a renewal of registration under an affidavit which does not comply with all the particulars under Clause 2 of the section.

A Judge of this Court has power under Section 16 of the aforesaid Ordinance, if satisfied that the renewal of the registration has been omitted, by "inadvertence, accident, or absence from the Colony" to rectify the registration by extending the time for the renewal thereof, notwithstanding that several months have elapsed and an execution-creditor has seized the property comprised in the Bill of Sale and insisted on his title by Interpleader as against the Bill of Sale.

Re Dobbins' Settlement, 57 L. T. [N. S.] 277 *s. c.* 56 L. J. Q. B. 295, followed.

Interpleader. The claimant was the holder of a Bill of Sale from the defendant, dated 7th May, 1886, which was duly registered No. 1,435, on the 17th May, 1886, under Ordinance 22 of 1870, Section 18. On 1st November, 1886, the new Bills of Sale Ordinance 12 of 1886, came into force, Section 14 of which is as follows:—

"[1] The registration of a Bill of Sale whether executed or registered before or after the commencement of this Ordinance must be renewed once at least every twelve calendar months, and if a period of twelve calendar months elapses from the registration or renewed registration of a Bill of Sale without a renewal or further renewal [as the case may be] the registration shall become void, provided that where a period of twelve calendar months from the original registration of any Bill of Sale has expired before the first day of January, 1887, the registration of such Bill of Sale shall be deemed to be duly renewed if such registration be renewed as in this section is mentioned at any time before the first day of January, 1887.

[2] The renewal of a registration shall be effected by filing with the Registrar a statutory declaration in the form set forth in the second schedule hereto, stating the date of the Bill of Sale and of the last registration thereof, and the names, residencies, and occupations of the parties thereto as stated therein, and that the Bill of Sale is still a subsisting security."

The registration of the claimant's said Bill of Sale had never been renewed. On 25th June, 1887, the plaintiff on a *fi. fa.* seized the articles comprised in the Bill of Sale, and on the claimant thereupon claiming the property, he caused this Interpleader Summons to be taken out and served on the claimants. On the return of the Interpleader Summons on the 10th July, the claimant obtained a postponement of the trial to this day. On the 13th July the claimant took out a Summons in Chambers [which was served on the plaintiff and defendant] for an order rectifying the registration of his Bill of Sale by extending the time for the renewal of the registration thereof under Section 16 of the Bills of Sale Ordinance, 1886. The claimant's affidavit alleged that he was not aware that by legislation subsequent to the date of his Bill of Sale, he was bound to renew the registration of it. On the return of the Summons on the 16th the same

WOOD, J. 1888.

MEYAPPA CHETTY v. ONG HONG PEE & ANOR. *In re* ONG AH POH.

was adjourned by *Wood*, J. to be heard together with this Interpleader. Section 16 of the Bills of Sale Ordinance, 1886, is as follows:—

[1] Any Judge of the Supreme Court on being satisfied that the omission to register a Bill of Sale or a declaration of renewal, or transfer, or assignment thereof within the time prescribed by this Ordinance, or the omission, or mis-statement of the name, residence, or occupation of any person was accidental, or due to inadvertence, or to absence from the Colony, may in his discretion order such omission, or mis-statement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions [if any] as to security notice by advertisement, or otherwise, or as to any other matter as he thinks fit to direct.

[2] Any application for the rectification of the register under this section shall be made in Chambers in a summary way.

On the Interpleader coming on for hearing, *Van Someren*, for the claimant applied on his summons for an order to rectify the registration by extending the time for the renewal thereof. He contended there was no difference in point of law between an entire omission to re-register and the re-registering on an affidavit which did not give all the particulars required by Section 14, Clause 2. *Ex-parte* Webster, 22 L. R. Ch. Div. 136; that ignorance of the law was "inadvertence" within the meaning of Section 16, and the Court had power thereunder to rectify the registration by extending the time even though the right of third parties had intervened. *Re* Parkes, 13 L. R. [Ir.] 85; and notwithstanding that the third parties had insisted on their rights as against the Bill of Sale, by reason of its non-renewal of registration. *Re* Dobbins' Settlement, 57 L. T. [N. S.] 277, s. c. 56 L. J. Q. B. 295; this last case was precisely in point and though it would probably be sought to distinguish it on facts, yet in its legal effect it could not be distinguished.

Adams, for the plaintiff, execution-creditor contended, that to allow renewal of registration at this stage would be to stultify the Ordinance; that *Re* Dobbin was distinguishable as there the Bill of Sale holder *had obtained* an order to rectify *prior to* the title of the trustee in bankruptcy arising, but had omitted to carry out the order by filing an affidavit which gave all the particulars required by Section 11 of the English Statute [41 & 42 Vic. c. 31] corresponding to our Bills of Sale Ordinance, 1886, Section 14; that while he could not contend ignorance of law might not be "inadvertence" under Section 16, yet the Court in the exercise of its discretion would not extend the time under it without saving the vested rights of third parties, in this case the execution-creditor. *Re* McAlister & Co., antè p. 279.

Wood, J. If this was an application made prior to the execution-creditor coming in, I should certainly have extended the time for the renewal of the registration of the Bill of Sale, as I consider ignorance of the law might amount to "inadvertence" within the meaning of Section 16. The application here however, is made after the rights of third parties have accrued and after they have insisted on their rights as against the Bill of Sale. The question is, does the section under these circumstances give

this Court the power to extend the time; and if it does whether I should do it in the present case. In my opinion the question is concluded by the authority of *Re* Dobbins' Settlement, which was not cited when *McAlister's Case* [*a.*] was decided in Singapore, and the omission to register stands under Section 14 on the same footing as a registration with an imperfect affidavit. Following the precedent in that case, and as there can be no doubt of the *bonâ fides* of this Bill of Sale and the claimant's inadvertence to renew the registration of it, I order that the time be extended to Monday next, 24th instant at 4 p.m., to renew the registration thereof. As the execution-creditor has been put to the expense of interpleading by reason of the claimant's laches to renew his registration, I think, as was done in *Dobbins' Case*, he should have his costs against the claimant from the date of his issuing his Interpleader Summons to the 13th instant when the claimant took out his summons for the rectification of the registration. From that time I think the execution-creditor was in the wrong as there was precedent, which he might have found had he searched for it, for the application to rectify; and from that date to this he must pay the claimant his costs.

Judgment for claimant with costs, subject to his filing a declaration for renewal of registration by the 24th at 4 p.m. [*b.*]

REGINA *v.* GREEN.

In a prosecution for keeping an unlicensed ale-house, the prosecution must shew the house was *kept* by the prisoner; evidence of her acts which are consistent with that fact, or with her being merely a *servant* in the place will not suffice.

Semble. The *onus probandi* on such charge, is on the prosecution, to shew the prisoner had not a license.

Municipal Commissioners v. *Chuah Seng & ors.*, 3 Kyshe, 140, considered.

The appellant Rosa Green had been convicted by A. T. Bryant, Esquire, Magistrate, for keeping an unlicensed ale-house under Ordinance 13 of 1872, Section 33, and fined $50. The evidence for the prosecution was to the effect that the prosecutor who was a Lance Corporal in the Police Force, was at about 12 o'clock on the night of 13th March last, walking through Penang Road in company with Corporal Mat Esah and a friend, when coming up to shop No. 535 they found it open. They saw several bottles of beer in the shop, and thereupon entered into the entrance hall thereof, and found it was partly screened off by a curtain on which was reflected the shadow of two persons seated at a table. The prosecutor and his companions pushed the curtain aside and entered; in doing so they saw the appellant pouring beer into a glass which was on the table. On seeing them the appellant took the glass up and walked off with it and the bottle [which still had some beer in it] into an inner room. The prosecutor attempted to follow her into this inner room, but she tried to prevent him; he however forced his way in and on the floor of the room near the door he found a bottle half full of beer

[*a.*] *In re* McAlister & Co., *antè* p. 279.

[*b.*] *Adams* intimated his intention to appeal, but never carried it out.—J.W.N.K.

WOOD, J. 1888.

REGINA v. GREEN.

and two empty beer bottles. The glass was not there. The bottles were taken by the prosecutor to the Police Station, and next day he took out a summons against her. There was no evidence that the appellant was the owner of the shop or kept it, nor was there any evidence that the shop was unlicensed beyond the statement of the prosecutor that it was unlicensed. The appellant produced no license and called no evidence to shew she had one, or that she was not the owner or keeper of the shop. Section 33 of Ordinance 13 of 1872, is as follows:—

"Any person keeping or permitting to be kept any hotel, tavern, punch-house, ale-house, coffee-house, boarding-house, or other place of public resort or entertainment, wherein provisions, liquors, or refreshments are sold or consumed, whether the same be kept or retailed therein or procured elsewhere without a license as required by law or contrary to the terms of such license, shall be liable to a penalty not exceeding one hundred dollars.

The appellant appealed against the conviction.

G. S. H. *Gottlieb*, for the appellant contended, that assuming the facts to be true there was no evidence to prove she kept the house, but some evidence was necessary to shew she did or else permitted it to be kept—"keeping" meant being the mistress of the place. There was also no evidence that liquors were sold there, *non constat* the two people were her friends and she was giving them a friendly drink. There was no evidence any liquors were consumed there. There was no evidence the shop was unlicensed. The prosecutor [the Police] ought to have known all about the license, and there was no reason why they should not have proved its absence. The rule was that as here, when the knowledge of the fact of non-license is equally in the hands of both parties, the prosecution was bound to prove it. *Municipal Commissioners* v. *Chuah Seng*, 3 Kyshe, 140; *Paley on Convictions*, 121-4.

Ross, for the respondent contended, that in the absence of evidence from the prisoner proving the contrary, there was sufficient evidence from the facts proved especially her acting as mistress of the shop and trying to keep the Police out, to shew she was the mistress of the shop and kept it. The place was a shop and several bottles of beer were there; she was serving the two persons seated at the table, and the presumption was, she sold the beer she was helping them to. Proof of consumption was not necessary. The *onus* of proving license was on the prisoner—the affirmative was on her, and she could produce the license if she had one—*Khoo Aing Hong* v. *Meyapah Chetty*, 3 Kyshe, 124. At all events there was no reason to quash the conviction; the evidence of keeping and want of a license was procurable, and the case should if necessary be sent back to the Magistrate for further evidence—Appeals Ordinance 12 of 1879, Section 25.

Gottlieb replied, contending that the case fell within Section 34, Clause 8 of the Appeals Ordinance aforesaid—at all events as Mr. Bryant was no longer Sitting Magistrate the case should not be remitted to him.

Wood, J. I am of opinion that on the facts proved, there is not sufficient evidence of the house being "kept" by the defend-

ant as an ale-house, *non constat* that she was only a servant in the place. I shall therefore remit back the case to the same Magistrate for further evidence, but I would call his attention to the necessity of its being shewn before him—1, that the house is kept by the prisoner; 2, that it is kept by her as an ale-house wherein provisions, liquors, or refreshments are sold *or* consumed; 3, that it is so kept without a license. I do not decide the question on whom is the *onus probandi* of proving the non-existence of a license; I entertain doubts whether it does not lie on the prosecution on the authority of the *Municipal Commissioners* v. *Chuah Seng*, but I am not quite satisfied with that case.

Case remitted.

SEAH LEE & ANOR. *v.* KIAM GUAN.

A person who having a right to a particular trade-mark does not make use thereof for several years during which time another person uses the trade-mark and his manufactures thereby become known as such in the market, cannot afterwards come forward and use the mark or confer on a purchaser from him the right of so using it.

The mere statement on the plaintiff's trade-mark that he carries on business in a particular place for the purpose of procuring the particular article—whereas he carries on the business in another place—is not such a false statement or misrepresentation as disentitles him to relief in this Court.

The nature and facts of this case sufficiently appear in the judgment.

Drew, for the plaintiffs.

Donaldson, for the defendant.

Cur. Adv. Vult.

20th August. *Goldney*, J. This is an action brought by the plaintiffs for an injunction restraining the defendant from selling tea bearing a fraudulent and colourable imitation of the plaintiffs' trade-mark. The defendant appears to have commenced selling tea in Singapore bearing the marks complained of only last year. It is not disputed that the tea sold by the defendant with the exception of the word "Lee" being substituted for the word "Choa" on one of the labels and the words "Ye Hong Chin Kee dealer in different superior teas" in English characters on the label of the boxes, was put up and packed in packets and boxes exactly similar to the plaintiffs' packets and boxes and that such packets and boxes bore labels [with the above exception] identical with those which have been exclusively used by the plaintiffs as their trade-mark in the Singapore market for a period of more than eight years.

It is clear on the evidence that the plaintiffs' teas have become favourably known and sold in the Singapore market by the labels so used by the plaintiffs. By such usage the plaintiffs have in my opinion acquired an exclusive property in the labels used by them as their trade-mark. The principles of Commercial Law upon which the rights of the parties to this cause depend are fully explained in the cases cited at the Bar, viz., *The Leather*

GOLDNEY, J. 1888.

SEAH LEE & ANOR. v. KIAM GUAN.

Cloth Co., Limited v. *American Leather Cloth Co., Limited*, 11 H. L. C. 533; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Johnston and Co.* v. *Orr Ewing & Co.* L. R. 7 App. Cases, 219; *Somerville* v. *Schembri*, L. R. 12 App. Cases, 457. Lord *Watson* in delivering the judgment in *Somerville* v. *Schembri*, says:

> "The interest which a merchant or manufacturer has in the trade-mark which he uses was thus defined by Lord CRANWORTH in the case of the *Leather Cloth Co.* v. *American Leather Cloth Co.* 'The right which a manufacturer has in his trade-mark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory the article to which it is affixed was manufactured.' As soon therefore as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the exclusive property of the firm, and no one else has a right to copy it or even to appropriate any part of it, if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom it belongs."

The defendant has endeavoured to cut down the plaintiffs' right, 1st, on the ground that the difference in the labels already mentioned is an essential difference in the labels themselves; secondly, that the person from *whom* the defendant bought these teas had a right to use these labels equal to the right of the plaintiff; thirdly, that the labels used by the plaintiffs contain such a misrepresentation as disentitles them to any relief.

As to the first point, I think the substitution of the word "Lee" for "Choa" and the omission of the words in English character is a mere colourable variation, which, to use Lord BLACKBURN'S words in *Johnston* v. *Orr Ewing & Co.* "might prevent purchasers being deceived, but which I do not think is such as to prevent its being likely that they would be deceived."

As to the second point a man named Lee You Chim was called who stated that previous to November, 1878, he had been in partnership with Choa Bok, the father of the plaintiff Choa Wang, and that the labels claimed by the plaintiffs as their trade-mark had been used by the said partnership; that on the dissolution of this partnership an agreement was drawn up [which the witness produced] by which it was agreed that the previous agreement of partnership between himself and Choa Bok and the partnership account books should be burnt, and that if the two partners after the dissolution desired to deal in Ngi Heang or Ye Hong tea, each was at liberty to use the *Chop* trade-mark, using with it his own surname to distinguish the difference between them so as to avoid future disputes.

This witness further stated that although he had never until last year shipped any tea to Singapore, he had been in the habit of shipping tea to Cochin-China, using labels similar to those complained of, and that in shipping tea to Singapore with labels identical with the plaintiffs [with the exceptions above mentioned] he was exercising his rights under the agreement of dissolution. I regret to say that I do not put any credence in the evidence of this witness or in the agreement which he produced; but even if there was any truth in the story he relates, and the witness Lee

You Chim had any such right as he claims, I do not think that after standing by for several years, during which time the plaintiffs have earned a reputation for their goods in the Singapore market by selling them under a certain trade-mark, that he [Lee You Chim] can now come forward and place goods of his own on the same market, bearing a trade-mark almost identical with that by which the plaintiffs' goods are known.

Such conduct would in every case raise a question of fraud. I am of opinion that here the fraud has been made out. I have no hesitation in saying that, in my opinion, the labels put upon the boxes and packet of tea sold by the defendant were placed upon them with the intention of misleading the public into the belief that when they purchased the packets of tea sold by the defendant, they were purchasing packets of the plaintiffs' teas. As to the point that the plaintiffs had made false statements which disentitle them to relief, I do not think that the statement on one of the labels that the firm reside in Te Chew for the purpose of procuring Bohea and a choice kind of tea, when in fact they carry on business in Amoy, is such a misrepresentation as to disentitle the plaintiff to the protection of the Court. I am of opinion therefore that there must be an injunction to restrain the defendant selling, or offering for sale in boxes or packets, tea bearing a fraudulent or colourable imitation of the plaintiffs' trade-mark, or in any form calculated to deceive persons buying tea from the defendant into the belief that it is the plaintiffs' tea. Defendant must pay the costs.

REGINA *v.* DORASAMY PILLAY.

A Magistrate in amending a charge under Section 53 of the Criminal Procedure Ordinance 6 of 1873 even if he substitute a different charge for a wholly different offence from that originally charged, does not thereby pronounce a judgment on such original charge, nor does the amendment and substitution operate as an acquittal on the original charge, so as to be a bar to a fresh prosecution on such charge on the same facts.

This was an appeal from a conviction, by C. W. S. Kynnersley, Esquire, First Magistrate, of the appellant, for offering a gratification to the wife of the Apothecary of the General Hospital, Penang, in order that she might exercise personal influence on her husband, and inducing him in the exercise of his official functions to shew favour to the appellant under Sections 162 and 165A. of the Penal Code. The appellant had originally been charged before Walter Egerton, Esquire, Acting First Magistrate, Penang, under Section 214 of the Penal Code for offering the identical gratification, and having been arraigned on the said charge and pleaded not guilty thereto, the Magistrate, on the facts opened by the Detective Officer prosecuting, ordered under Section 53 of the Criminal Procedure Ordinance 6 of 1873, the charge to be amended by substituting therefor charges under Sections 162, 163 and 165A. of the Penal Code. This having been done, at the request of the prosecution, the said acting First

WOOD, J. 1888.

REGINA v. DORASAMY PILLAY.

Magistrate adjourned the case into his Chambers and there heard the evidence and convicted the appellant. That conviction was quashed by this Court on appeal. [*a.*] Thereafter the prisoner was again summoned for an offence under the same Sections 162, 165A., and the case was heard by the First Magistrate as aforesaid when the identical evidence given in Chambers in the aforesaid first hearing was again adduced. On the appellant being arraigned on this occasion, his Counsel pleaded *autrefois acquit* for him, but the plea was over-ruled. The First Magistrate having convicted the appellant as aforesaid, this appeal was brought against that conviction. Section 53 of the said Criminal Procedure Ordinance 6 of 1873, is as follows:—

"Any Court may either upon the application of the prosecutor or accused person, or their Counsel, or upon its own motion, amend or alter any charge at any stage of the proceedings before judgment is given; or, in cases of trials before the Supreme Court before the verdict of the Jury is delivered. Such amendments shall be read and explained to the accused person."

Van Someren, for the appellant admitted the conviction arrived at in Chambers and which was quashed formed no bar to the present charge on the authority of *Regina* v. *Drury*, 18 L. J. M. C. 189, and Ordinance 6 of 1873, Section 69; he however contended the appellant had been placed on his trial under Section 214 of the Penal Code, he had pleaded to the charge and was entitled then to an acquittal or conviction; this was *prior* to the irregularity arising from the adjournment into Chambers. The charge instead of being proceeded with, was amended by being wholly struck out, and a charge under Sections 162, 163 and 165A. substituted therefor. This the Magistrate had power to do under Section 53 of the Ordinance 6 of 1873, but in so doing, he practically acquitted the appellant under Section 214. There was therefore an arraignment, a plea, issue joined, and in effect an acquittal. This took place in open Court and was unreversed. But if so, the appellant had been in jeopardy, and could not be tried on the present charge. On that first charge which resulted in an acquittal as aforesaid, he *might* have been convicted under Sections 162 and 165A., if the charge had been amended or otherwise [Sections 53, 61, 62, Ordinance 6 of 1873], and if the prosecution had adduced the evidence they now had adduced, which they then had and *might* have adduced. *Regina* v. *Sheen*, 2 Car. & P. 635; *Regina* v. *Gilmore*, 15 Cox C. C. 85. [He also raised other points which call for no report].

D. *Logan*, [*Solicitor-General*] for the Crown was stopped by the Court.

Wood, J. The argument for the appellant is based on a fallacy. The learned Counsel has been obliged to contend there was "practically" or "in effect" an acquittal—but an actual acquittal there was none. The charge under Section 214 had been amended and a new charge under Sections 162 and 165A., substituted. This was done under Section 53 of the Criminal

[*a.*] *antè* page 350.

Procedure Ordinance 6 of 1873; but the Magistrate acting under that section and amending the charge even by substituting one offence for another pronounces no judgment on the original charge. The section says the charge if amended must be amended "*before* judgment" and the object of it, it is clear, is that no judgment or finding should be given on the original charge. There being thus no judgment—no acquittal—the defence fails. *Regina* v. *Drury*.

Objection over-ruled. [*a.*]

REGINA *v.* GOH CHOO LAN.

A case which is remitted under Section 34, Clause 4 for hearing "on a *fresh* charge" need not necessarily be sent to, or be heard by, the same Magistrate who heard the original charge. The words "the Court below" in that clause, according to the context and circumstances of the case, may or may not mean the same Magistrate. [*b.*]

Case reserved by WOOD, J, under Section 38 of the Appeals Ordinance 12 of 1879, for the Court of Appeal, as follows:—

"On March 12th, 1888, the appeal came on before me in this case against the conviction by Mr. Bland, Stipendiary Magistrate and Justice of the Peace, and on application by the appellant under Section 34 Sub-section 4, I remitted the case to "the Magistrate" in order that the prisoner might be tried again on a fresh charge.

The prisoner was accordingly tried *not* before Mr. Bland, but before Mr. Kynnersley, Stipendiary Magistrate and Justice of the Peace, and a question arose whether under such circumstances the prisoner had been rightly tried. Mr. Thomas, of Counsel for the prisoner, the appellant, contended that the *original* Magistrate should have tried the case inasmuch as Section 25 of the said Ordinance requires that "if it shall appear to be necessary for "the due determination of the appeal, the Court may order the witnesses "examined, or offered, or named for examination in the Court below in the cause "on either side to be further examined, and may remit the case to *the* "*Magistrate* or Court of two Magistrates for amendment and for further "evidence either for appellant or respondent, and after such amendment so "made or further evidence supplied shall be given by the Court."

Mr. Thomas contends under the circumstances that "the Magistrate" means "the same Magistrate," and that the prisoner having been tried on a fresh charge before a *different* Magistrate such latter proceeding is *ultrâ vires*.

It is doubted whether under the last section, viz., Section 25, the case should be remitted to the same Magistrate, and if so, whether the same rule should apply to questions arising under Section 34, Sub-section 4."

The case now came on for argument before the Full Court of Appeal, consisting of *Ford*, C.J., *Wood*, *Pellereau* and *Goldney*, J.J.

Thomas, for appellant contended, the expression "the Magistrate" in Section 25 above set out, of the Appeals Ordinance 12 of 1879, there could be no doubt meant the same Magistrate; and the expression "the Court below" in Section 34, Clause 4 thereof, meant the same. In Section 32, Clause 1, the same expression "the Court below" was used and could not mean anything else

[*a.*] The case was thereafter remitted to the Magistrate for further evidence on a point calling for no report, and the conviction was eventually affirmed.

[*b.*] See on a different point *Regina* v. *Koomat*, antè p. 386., and *Regina* v. *Khoo Seang Ju*, antè p. 392.

FORD, C. J. WOOD, PELLEREAU & GOLDNEY. J.J. 1888.

REGINA v. GOH CHOO LAN.

than the same Magistrate, and Section 34, Clause 4 itself bore this meaning on the face of it as the clause provided not only for a hearing on "a fresh charge," but also for "*continuing the hearing.*" In the latter case, it could only be the same Magistrate who could "continue the hearing," and form an opinion on it—but the one and same expression "the Court below" appearing in the one and same clause, could therefore only mean, even as regarded the hearing "on a fresh charge" a hearing before the same Magistrate.

D. *Logan*, [*Solicitor-General*] for the Crown, was stopped by the Court.

Ford, C.J. I give no opinion on Section 25 nor on the construction of any other phrases in the Ordinance, except this one which deals with the case being sent down to be heard "on a *fresh* charge." On that part of Section 34, Clause 4, I am of opinion the case need not necessarily be sent to, or be heard by, the same Magistrate who heard the original charge.

Wood, J. I concur.

Pellereau, J. I agree with the learned Chief Justice and my brother Wood. The words "the Court below" have a broader meaning than "the Magistrate." A Magistrate who sits by virtue of his commission, constitutes a "Court." It is not the individual person that is anything. His appointment as a Magistrate and his sitting publicly and judicially makes the "Court." The words "the Court below" then, ordinarily mean any Magistrate so sitting, and need not mean the same Magistrate. But according to the context, the words "the Court below" may obtain a more restricted meaning. If for instance, the case had been remitted "for further evidence" under Section 25, it may fairly be argued that the words "the Magistrate" there, mean the same Magistrate. I don't give an opinion on that section, I only say it may fairly be argued that he is the person called on to hear "the further evidence" and to give his decision, for it would not be fair or just for another Magistrate to do so who had not heard the whole of the evidence. In case of an order therefore, under Section 25 this might be so, but here we are in no such predicament. Here the order was made not under Section 25, but under Section 34, Clause 4, and directs a hearing on a "fresh charge," and there can be no reason why such "fresh charge" should not be heard and decided by a different Magistrate—but still the question remains, would that be legal or illegal under Section 34, Clause 4. That clause is as follows: "If it consider that *the Court below* has improperly admitted or rejected evidence, it shall send back the case with instructions as to the same, and shall direct the Court below *to continue the hearing* of the charge, or to commence *a fresh charge* as the case may require, except as provided by Section 33." Now, as regards that part of the clause which deals with continuing the hearing, it may again be fairly argued it can only be the same Magistrate who can "continue the hearing" and give his decision; but on this point I also refrain from giving an opinion. We have

now to do with an order directing a hearing "on a *fresh* charge;" no such reasoning can apply to such a case under this part of Clause 4, and I am of opinion therefore, such a hearing before a different Magistrate is perfectly legal.

Goldney, J. I am of opinion the appeal should be dismissed on the grounds stated by the Chief Justice.

Appeal dismissed. Conviction affirmed.

STUBBS & ORS. *v.* LOH HOH SENG & ORS.

A person who is an Executor of a Will and also a Trustee thereunder to carry out certain trusts thereby created, at a certain period of his administration may dismiss the character of Executor and assume that of Trustee. Whether he has done so or not, and the time when he did it, is a question of fact dependent on the circumstances of each case.

A party to an illegal or fraudulent contract can derive no benefit from it, and all persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust, will be compelled to restore such trust funds.

A purchase of land with notice that his title was defective, erected buildings on the land and generally improved the land. Another person, who also *had* notice that the title was defective, subsequently purchased from him, but by reason of the building and improvements, gave more for the land than he otherwise would have.

Held, though he did not erect the buildings or make the improvements himself still he was entitled in equity—*notwithstanding the notice he had of the defect in title*—to be compensated for the buildings and improvements.

The non-service of process on a co-defendant is no ground of objection on the part of a defendant to the progress of a suit.

W. *Nanson*, for plaintiffs.

Donaldson, for defendants.

Cur. Adv. Vult.

Goldney, J. In this case the plaintiff as next friend of the grand-children [minors] of William May, deceased, seeks to set aside a Deed, dated the 25th September, 1884, made between Johanna May, Executrix of William May, Rose Jeanette Stubbs and Samuel Stubbs [the parents and guardians of their infant children] of the one part, and Loh Hoh Seng of the other part. This deed purported to convey the unexpired term of the leases of two pieces of land, one containing 7,500 square feet the other 5,400 feet. On the same date the purchaser Loh Hoh Seng mortgaged the said pieces of land to Loh Kim Pong. At the time of the making the said deed and the said mortgage the defendant Loh Hoh Seng was in the employ of the defendant Loh Kim Pong. On the 4th February, 1885, the defendant Loh Hoh Seng sells the lot of land containing 7,500 square feet to the defendant Shaik Madar for $2,000. On the 30th September, the defendant Shaik Madar by his attorney Fatimah sells the said land to the defendant Moorgasa for $2,400. On the 20th June, 1886, the defendant Moorgasa sells the land and the houses he had erected upon it, to defendant Hoosain Fazool Hoosain for the sum of $7,500.

William May, by his Will, dated the 13th October, 1870, after leaving a bequest to his wife the defendant Johanna May and to

GOLDNEY, J. 1888.

STUBBS & ORS. v. LOH HOH SENG & ORS.

his daughter the defendant Rose Jeanette Stubbs, gave all his immoveable property in Singapore to his wife Johanna and his daughter Rose Jeanette Stubbs upon the following trust, "that is to say that my wife Johanna do hold the said property in trust for all and every my present and future grand-children by my daughter Rose Jeanette until the last born child shall have obtained the age of 21 years, when the property shall be sold and the proceeds thereof distributed among my grand-children in equal proportions; and further that until the sale of the property my wife Johanna so long as she remains in a state of widowhood may retain and enjoy the rents, etc." "That in the event of my wife marrying again, etc." "I hereby direct that her powers of Trustee and the benefits provided for her in the preceding clause mentioned shall absolutely cease." "That after my wife's death or upon the occurrence of the contingencies referred to, &c., which disqualifies my wife from acting as Trustee for my grand-children, my daughter Rose Jeanette shall then hold the property in trust for her children, subject to the same directions as to the enjoyment of the rents, etc. That until the sale of the property the Trustee for the time being shall have full liberty of leasing out the property for any period not exceeding 21 years and of improving the property out of the income derived therefrom, that the appointment of my daughter Rose Jeanette Stubbs as Trustee to the property devised to my grand-children shall not take effect till the death of my wife Johanna, etc., that the Trustee shall be at liberty to sell the property and divide the proceeds as directed, when the last born child of my daughter shall be 21 years of age, and she shall not have borne another child during that period." "I appoint my wife Johanna, Executrix of this my Will."

On the 29th September, 1875, probate of this Will was granted to Johanna May the Executrix, who seems to have left entire management of the property to her son-in-law the defendant Stubbs. In September, 1885, negotiations were entered into between the defendant Loh Kim Pong and the defendant Samuel Stubbs for the purchase of the said lots of land.

According to the evidence of the defendant Stubbs, which was not contradicted, the defendant Loh Kim Pong sent the defendant Samuel Stubbs with his clerk, the defendant Loh Hoh Seng to a Lawyer's office to have the necessary conveyance prepared. This conveyance was not prepared, the parties being informed that petition to the Court would be necessary before a sale could be effected. Shortly after this the defendant Loh Hoh Seng came to the defendant Samuel Stubbs and asked him would he sell the two lots cheap, that the defendant Loh Kim Pong wouldn't mind risking buying them without a petition being sent to the Court. $2,500 was the price offered and the defendant, Loh Hoh Seng was to receive $100 commission. Upon this offer being accepted by the defendant Samuel Stubbs, he and the defendant Loh Hoh Seng went to another Lawyer's office and the Deed of the 25th of September, 1884, was prepared and executed. At the time of the execution of the deed the Lawyer indorsed on

the back of the deed, the words following "I, the within named Purchaser, do hereby declare that I bought at my risk the within mentioned land being trust property. Dated at Singapore, this 25th day of September, 1884." A similar indorsement was placed on the Deed of the 4th February, 1885, between Loh Hoh Seng and Shaik Madar.

The defendant Stubbs further stated that when he asked the defendant Loh Hoh Seng why Loh Kim Pong's name was not in the deed, he was told that the defendant Loh Kim Pong, knowing that it was trust property, did not wish his name to appear in the Bill of Sale, and that at the time that he [the defendant Stubbs] executed the deed he knew that there was no power to sell the lands in question and that he received the money. At the time that the deed was executed, the mortgage from Loh Hoh Seng to Loh Kim Pong was also executed.

On behalf of the defendants it was contended, that the defendant Johanna May had never dismissed the character of Executrix and assumed that of Trustee, and that the defendants were *bonâ fide* purchasers for value without notice of any breach of trust, and that in fact there had been no breach of trust as the Executrix had under the Will a power of sale.

The case against the defendants Johanna May, Samuel Stubbs and his wife, Loh Hoh Seng and Loh Kim Pong differs from that against the defendant Hoosain Fazool Hoosain and the other defendants, the authors of his title.

As against the first defendant the plaintiff charges actual notice of the trust and participation in the alleged breach of trust —as against the other defendants constructive notice of the trust. The evidence to my mind is conclusive, and I find as a fact that at the time of the execution of the Deed of the 25th September, 1884, Johanna May had dismissed the character of Executrix and assumed that of Trustee, and that the sale was not for the purpose of the administration of the Estate of the Testator William May, and that the sale was a breach of trust. I also find that the defendants Loh Hoh Seng and Loh Kim Pong were aware of the breach of trust and were parties to it. The real purchaser in my opinion was Loh Kim Pong and not his servant Loh Hoh Seng.

As regards the other defendants I think that I am bound to hold that if they had not actual notice they had constructive notice of the trust. Apart from the deed itself, the indorsement upon the deed that the purchaser bought at his own risk the within mentioned land, being trust property, could not fail in my opinion to have given each successive purchaser notice of the trust.

Finding as I do that the sale of the 25th of September, 1884, was a breach of trust, and that the defendants all of them either had actual or constructive notice of the trust, and of its breach, the rules of the Court apply, viz.: that no party to an illegal or fraudulent contract can derive any benefit from it, and that all persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust will be compelled to restore such trust funds. *Gray* v. *Lewis*, L. R. 8 Eq. 526.

GOLDNEY, J. 1888.

STUBBS & ORS. v. LOH HOH SENG & ORS.

As regards the defendant Hoosain Fazool Hoosain a difficulty arises, as since the sale of the 25th September, 1884, and previous to its sale to the defendant Hoosain Fazool Hoosain, some houses were built upon the land and in consequence of these houses, the defendant Hoosain Fazool Hoosain in purchasing the land paid a largely increased price. I think this defendant is entitled in equity, as he claims in his statement of defence, to have the value of the said buildings and improvements estimated and secured or paid to him or to purchase the interest of the plaintiff in the land at the value thereof irrespective of the value of such buildings and improvements and for this purpose there must be an enquiry. One other point remains. The defendant Shaik Madar who has been made a party to the suit being out of the Colony has not been served with these proceedings. It was urged on the part of the defendants that this suit should in consequence be dismissed for want of parties. I do not think that the non-service of the defendant Shaik Madar with these proceedings, whatever it may be to the defendants or some of them, is important so far as the rights and interests of the plaintiff are concerned. If his presence before the Court was of importance to any of the defendants, it was open to them to take such steps as might be necessary to secure this object. The defendant who perhaps is most concerned, Moorgasa, admits all the allegations contained in the statement of claim and offers no defence to them. I think therefore that the plaintiff is entitled to succeed in this action, and to have the relief he claims with costs.

Judgment for the plaintiff with costs. The sale of the 25th September, 1884, must be set aside as fraudulent and void as well as the mortgage of the same date to Loh Kim Pong; the respective conveyances to the other defendants must be cancelled and the respective properties be re-conveyed by the respective defendants to Johanna May.

Let an enquiry be made by the Registrar as to what improvements upon the land now in possession of the defendant Hoosain Fazool Hoosain have been effected, and what sums if any, have been expended by the defendant Moorgasa or some other and what defendant on account of such improvements, and what is the present value of the said land together with such improvements, and what was the value of the said land immediately before such improvements were made and let an account be taken of the rents and profits with all proper allowance received by the defendants respectively from the said land since the said improvements have been made. And let an enquiry be made whether it will be proper and for the benefit of the plaintiffs that the properties should be sold, and if so, in what manner and upon what terms, and if not, what should be done in respect thereof. The question of the defendants' right or rather of those to the life interests not to be affected by the judgment. Further directions.

JAYAH BIN KACHI & ANOR. *v.* SAHRIA & ORS.

MALACCA.

GOLDNEY, J.
1888.

Sept 26.

The Malacca Lands Ordinance 9 of 1886, does *not* make registration under Section 6 thereof, conclusive proof that the person whose name is so registered, is the owner of the land therein referred to.

To oust therefore, the jurisdiction of the Supreme Court by Section 9 of the Ordinance from entertaining a suit for the recovery of the land, it must be shewn that the party objecting to the jurisdiction is a "customary land-holder" in respect of the land, and that the Collector of Land Revenue had, on his application, and after due publication of notice and due enquiry, made an order declaring that the applicant was so entitled, and such order had been registered under Section 6 by his directions, and a copy thereof furnished to the applicant.

The mere production of the Register, shewing that the party objecting to the jurisdiction is therein registered as the owner of the land—such registration being undated and unsigned—is not sufficient.

This was an action in ejectment brought for the recovery of certain lands in Malacca. The defendants were registered in the Register kept at the Office of the Collector of Land Revenue, under Ordinance 9 of 1886 as the owners of the lands. The entry or registration was without a date and had no signature or seal affixed thereto—nor did it shew that the requirements under Section 6 of the Ordinance had existed or been complied with. The further facts sufficiently appear from the judgment of the Court below. The sections material to this report are as follows:—

"3. .....

"Prescribed" means prescribed by rules made by the Governor in Council under this Ordinance.

"Customary land-holder" means any person who is in lawful possession according to local customary tenure of land in Malacca which was cleared and occupied by him or by the person under whom he claims by transfer or succession before the 24th day of November, 1876, and "customary land" means any such land so lawfully held as aforesaid.

.....

4. A customary land-holder shall be deemed to have a permanent heritable and transferable right of use and occupancy in his customary land subject only:

[*a*] to the payment of all such rent or assessment as may from time be imposed in respect of customary land under this Ordinance;

[*b*] to the reservation in favour of the Crown of all mines. .....

6. Any person being in possession of any land and asserting that he is a customary land-holder in respect thereof, and any person who within three years after the death of a customary land-holder claims to be entitled by succession to customary land which was in the possession of such deceased land-holder at the time of his death, may apply to the Collector of Land Revenue to make an order declaring that the applicant is so entitled, and the Collector of Land Revenue if it appears to him after a notice of such application has been published for such period and in such manner as may be prescribed, and after such enquiry as the Collector of Land Revenue may think fit to make that the applicant is so entitled shall make an order to that effect and enter the same in a register to be kept for that purpose and furnish the applicant with a copy thereof.

7. An appeal shall be from any order made by the Collector of Land Revenue under the last preceding section to such Officers and subject to such limitations as to time and such other conditions as may, from time to time, be prescribed.

Provided also, that in all cases after the expiration of the period hereinafter allowed for an application to the Supreme Court if no such application has been made, the Governor may call for and review the proceedings if he thinks fit to do so, and pass such order thereon consistent with the provisions of this Ordinance as he thinks fit.

GOLDNEY, J. 1888.

JAYAH BIN KACHI & ANOR. v. SAHMIA & ORS.

9. Every order made by the Collector of Land Revenue under Section 6 hereof, or by an Officer to whom appeal is made under Section 7 hereof, shall be binding on all parties and shall not be set aside or varied except in the manner in this Ordinance expressly provided.

Provided always that it shall be lawful for any person who conceives that a right to or interest in land which he claims to have is injuriously affected by any such order to move the Supreme Court within three months after the registration of such order to quash the same and the Court shall try the question whether such order be or be not inconsistent with the rights of the party moving; and if the said Court shall decide that the said order is inconsistent with such rights the same shall be quashed by the said Court and shall be of no effect.

Except as herein expressly provided no Court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by this Ordinance to the Collector of Land Revenue."

J. P. *Joaquim*, for plaintiffs.

R. W. *Braddell*, for defendants.

Cur. Adv. Vult.

October 12th. *Goldney*, J. This is an action to recover possession of certain land in Malacca. The facts are shortly as follows. The plaintiffs claim the land as purchasers at public auction from the Administrator *de bonis non* of Hajee Mat Tahir. Hajee Mat Tahir died in 1886, leaving a Will, of which his son Abdul Samat was executor. Probate was granted to Abdul Samat on 15th November, 1886. Shortly after probate was granted to Abdul Samat he died, and on 28th July, 1887, Letters of Administration *de bonis non* were granted to his brother Hajee Mahmat. At the time of his death Hajee Mat Tahir was in possession of the Title Deeds of the land in dispute, and was himself paying to the Government the quit-rent to which this land was subject. The defendants who were in possession of the land at the time of the commencement of this action claim the land as their own, alleging that they purchased the land from Hajee Mat Tahir and paid him the purchase-money, together with certain annual sums towards the quit-rent; they also claim that the land is theirs by prescription.

After taking a considerable time to consider this case, I am compelled to come to the conclusion that none of the defendants have made out their right to possession, and that their possession is not good as against the plaintiffs. I come to this conclusion with regret, as I cannot help thinking that there very likely may have been some agreement with Hajee Mat Tahir about the purchase of the land, but the evidence of such an agreement is not in my opinion sufficient to upset the title which the plaintiffs have acquired.

Judgment for plaintiffs with costs.

The defendants appealed, in *formâ pauperis*, against this judgment.

3rd September, 1889. The Appeal now come on for hearing before the Court of Appeal, consisting of *Wood*, Acting C.J., *Pellereau*, and *Goldney*, J J.

Shearwood, [R. W. *Braddell* with him] for the appellants contended that by Section 4 of the Ordinance the "customary landholder" had a permanent heritable and transferable right of use and occupancy of his customary land, subject to certain rights in

favour of the Crown, which did not arise here. By Section 6 any person being in possession of any land and asserting that he is a customary land-holder may apply to the Collector of Land Revenue to make an order declaring that he is so entitled, and the Collector—after due publication of notice and such enquiry as he may think fit to make—is to make an order that the applicant is so entitled, and to enter the order in a register to be kept for that purpose, and furnish the applicant with a copy thereof. An appeal lay against this order, but in the mode and time provided for by Section 7. Under Section 9 the order, original, or on appeal, is to be binding on all parties, but any person thinking himself injuriously affected by the order, whether original, or on appeal might move the Supreme Court within three months after registration of such order to quash it—but except as thus expressly provided, the Supreme Court is to exercise no jurisdiction as to any claim or question in respect to the land. The appellants were duly registered under Section 6, and the register was produced—it did not shew any "order," but there was nothing in the Ordinance which required the order to be in writing. Rule 1 of the Rules made pursuant to the Ordinance, prescribed the form of the order to be registered, and the registration was in that form and was conclusive evidence of an order made. A copy of the order had not been given to the applicants owing to impending litigation to contest their title. The plaintiffs in his action [the respondents]—proper course was to appeal from the Collector's order, as provided by Section 7—or to the Supreme Court within three months from the date of registration. Again, in coming before the Supreme Court, they ought to have come by motion and not by issuing a writ of summons in ejectment. The Court could only exercise jurisdiction as provided by Section 9. The appellants were "customary land-holders" claiming by transfer, through such a holder. [He then went into the facts to shew there was such a transfer, and also raised other points which turned on the facts, and are therefore omitted in this report.]

Everard, for respondents, was not called on.

The Court [*Wood*, Acting C.J., *Pellereau* and *Goldney*, J.J.] held, that the Court had jurisdiction to entertain the suit—that the mere entry in the Register proved nothing. It was not dated nor signed, and might have been made by any clerk. It did not prove it was made by the Collector, or that any order had been made, or when made. It was not necessary therefore for the plaintiffs to adopt the course provided by Section 7 or 9, and they were justified in resorting to their Common Law remedy. Section 9 did not deprive the Court of its jurisdiction, as it had not been shewn that the appellants were "customary land-holders" within the Ordinance, and for whose protection alone, the Ordinance was passed. The mere registration did not prove they were such holders, and conferred no title—and the evidence they adduced to establish the transfer to themselves had been discredited in the Court below, and there was nothing to induce this Court to disagree with that finding.

Judgment affirmed with costs.

ARMOOTAH PILLAY *v.* FATIMAH BEE & ANOR.

PENANG.
—
PELLEREAU, J.
1888.
——
Sept. 28.

Although by the joint effect of Sections 153 and 107 of the Civil Procedure Ordinance 5 of 1878, a plaintiff who makes default in delivering his reply to the defendant's statement of defence thereby closes the pleadings and is deemed to admit the facts stated in the statement of defence, the Court has power under Sections 8 and 153 of the Ordinance even at the trial of the case and long after the expiration of the time within which such reply should have been delivered, to extend the time to enable the plaintiff to file and deliver his reply on payment of defendant's costs incident to such default.

Eaton v. *Storer*, 22 Ch. Div. L. R. 91, followed.

A person who is turned out of possession of lands on which he under the belief the lands were his, has made improvements, is entitled to sue *as plaintiff* in equity for compensation on account of such improvements. The right to claim compensation for improvements is *not limited* to a claim by a defendant against a plaintiff who is seeking equity.

Edlin v. *Battaby*, 2 Lev. 152. followed.

Story's Eq. Jurisdiction, Sections 799 b. [n] and 1238, not followed.

The fact that such plaintiff [in a previous suit brought against him by the defendant who was then as plaintiff seeking equity to have certain conveyances of the land declared void and inoperative] did not claim compensation for the improvements as he might have done and had an opportunity of doing does not estop him from subsequently as plaintiff suing in equity for such compensation.

Ignorance that the Statute Law of the Colony requires a Deed of Conveyance by a married woman to be acknowledged before it can be operative, does not amount to constructive notice of the Deed being inoperative. The maxim *Ignorantia juris non excusat* has no application to such a case.

Seaton v. *Seaton*, 36 W. R. 865, followed.

The Court does not generally act on the uncorroborated though uncontradicted evidence of a plaintiff against the estate of a deceased person.

This was a suit to have it declared that the plaintiff was entitled to compensation for permanent and substantial improvements *bonâ fide* made by him on lands from which he had been turned out and for an account thereof, and for reimbursement of certain mortgages on the said land which he had paid off.

The case was heard on the 19th, 24th, 25th, 26th, 27th September and on this day,

The facts giving rise to the suit were as follows: In 1859, one Haleemah, the defendant's intestate and a Mahomedan married woman, by Deed registered No. 745 of 1858-59, in consideration of $300 purported to convey to her husband one Saboor Ally, the lands aforesaid, which were situate at Dhoby Ghaut, otherwise called Datoh Kramat. This Deed was never acknowledged by her as required by the Indian Act 31 of 1854. Saboor Ally shortly after the conveyance, mortgaged the land to a Chinaman and subsequently the said Saboor Ally and the plaintiff redeemed this mortgage and executed a new mortgage to one Mahomed Noordin. This latter mortgage they redeemed and re-mortgaged the land to one D. C. Presgrave, and so on they continued redeeming and mortgaging the land each time increasing the amount advanced on the mortgage, until in 1883 when the plaintiff finally paid off the last mortgage and set the land free of incumbrances. The plaintiff's allegation was that these several mortgages were made for the benefit of the said Saboor Ally and that he himself was only a surety in them. Haleemah and Saboor Ally had both died in the latter end of 1883. The defendants, as administrators of Haleemah, alleged the mortgages were effected for the benefit of the plaintiff himself and he had the use of the money for the

carrying on of Government contracts he held. The plaintiff alleged that the said Haleemah had requested him to join in the mortgage to Mahomed Noordin, but he had, previously to her so requesting him, agreed with Saboor Ally to do so for him. This evidence of the plaintiff was uncorroborated, but [beyond being denied by the defendants who had no personal knowledge of the transaction] stood wholly uncontradicted. In 1870, the plaintiff purchased half the land aforesaid from Saboor Ally and a Tamil document was drawn out and executed by Saboor Ally, Haleemah and one Kader Mydeen her son, in favour of the plaintiff, which being translated, was as follows :—

"On the 27th day of April, 1870, this agreement was made and executed by Saboor Ally, Oil-monger of Penang Road, his wife Haleemah and his son Kader Mydeen and delivered it unto Armootah Pillay of Cross Road, in Penang, a Cart-contractor to the Municipality, as follows: The grant which is in my name and in which Armootah Pillay is also a partner is mortgaged to Mr. Presgrave for a sum of $300. It is therefore to be understood that as soon as the said amount is re-paid and the grant is released, then I will make and deliver to you a grant for half the piece of land in your name; we will not dispute the portion on which you build your house, and in case we dispute it or fail to make and deliver to you the grant as aforesaid, we hereby agree to pay you whatever sum it may cost you for the building of that house; but in case the delay for making the grant is caused by you, you will pay me a sum of $500. Thus the said Saboor Ally, his wife Haleemah and his son Kader Mydeen write and deliver this agreement."

After this purchase, the defendant, under the belief the half of the land was then his, built a house on it and filled and raised the land generally. Early in 1883, the plaintiff purchased the other half of the land from the said Saboor Ally, who by Deed No. 108 of 1883, purported to convey the whole land to him. Haleemah saw him build his house on the first half, but never interfered with him; it was accepted by both parties to this suit that she was under the belief the land had been effectually sold and conveyed by her and did not know acknowledgment of her Deed of Conveyance was necessary. When the plaintiff acquired the other half, Haleemah was at Deli, in Sumatra, where she shortly after died. The plaintiff after he acquired the second half of the land from Saboor Ally improved that also by filling in and raising the land. After the death of Haleemah and Saboor Ally, the defendants as the administrators of Haleemah, in 1885 brought a suit in equity in this Court against the plaintiff claiming that the land conveyed by Haleemah to the said Saboor Ally was subject to a parol trust or arrangement in her favour and the said plaintiff had notice thereof—and charging that the Conveyance No. 108 of 1883 was fraudulent: they also charged that the Conveyance from Haleemah to Saboor Ally was inoperative, but on their pleadings did not shew how it was so. At the trial of that suit, they maintained it was inoperative, first as a wife could not convey to her husband, and next because it had not been acknowledged under the Indian Act aforesaid. The Court by its decision negatived the parol trust or arrangement and the Conveyance No. 108 of 1883 to be fraudulent. It expressed no opinion on the first of the two grounds relied on for the Deed of

PELLEREAU, J. 1888.

ARMOOTAH PILLAY v. FATIMAH BEE & ANOR.

Conveyance of 1859 by Haleemah being inoperative, but on the second ground held the Conveyance was inoperative for want of the acknowledgment [*a.*] The plaintiffs in that suit, the defendants here, thereupon turned the defendant [the plaintiff here] out of possession of the whole land and sold the same as Haleemah's estate and thus got the benefit of the improvements which the present plaintiff had made on the land. The defendant in that suit [the present plaintiff] though his statement of defence ended with a claim for a dismissal of that suit or "further or other relief as the nature of the case might require" did not at the trial claim compensation for his improvements as he might have done. But after being turned out of possession as aforesaid, and the land and building sold, he commenced [14th January, 1888] the present suit against the former plaintiffs [the now defendants] for compensation [as stated above] for such improvements and reimbursement of the moneys paid by him in discharge of the aforesaid mortgages. The now defendants among other things in their statement of defence denied the plaintiff's facts and submitted that he had no right in law or equity to sue for compensation for improvements, and that as he had the opportunity to claim it in the former suit, and had neglected to do so, he was now estopped from claiming it. They also pleaded the Statute of Limitations. This statement of defence was delivered on 27th March, 1888. No reply was filed by the plaintiff thereto up to the hearing of this cause. Notice of trial was given by the defendants under Section 319 of the Civil Procedure Ordinance, 1878. On the plaintiff at the hearing tendering evidence in support of his claim,

Ross, [*Van Someren* with him] for defendants objected, contending as the plaintiff had not replied within six weeks, the pleadings were closed under Sections 153 and 207, and he must be deemed to have admitted the facts in the statement of defence—Section 207; and the Court could not now extend the time to enable him to file his reply. It would be practically allowing an amendment on a point now admitted. They referred to *Litton* v. *Litton*, 3 L. R. C. D. 793; *Inmsden* v. *Winter*, 8 L. R. Q. B. Div. 650; *Pascal* v. *Richards*, 44 L. T. [N. S.] 87; *Wilson on the Judicature Act*, [3rd Edition] 273, 286, and 6th Edition, 241, 270, Order 29, Rule 12 [1881]; Order 27, Rule 13 [1883] and *Collette* v. *Goode*, 7 L. R. C. D. 842.

Thomas, [*Clutton* with him] admitted the validity of the objection, but applied for extension of time to enable them to file a reply; they referred to Civil Procedure Ordinance, 1878, Sections 153, 184; *Eaton* v. *Storer*, 22 L. R. C. D. 91, and *Budding* v. *Murdoch*, 1 L. R. C. Div. 42.

Van Someren, replied.

Pellereau, J. I have looked carefully into our Civil Procedure Ordinance and I find the following sections. Section 12 which applies to cases where the provisions of the Ordinance have not been complied with and though not applicable to the present case yet I quote, as it winds up with the words "but such proceedings

[*a.*] See *Fatimah & anor.* v. *Armootah Pullay*, antè, p. 225.

shall be amended or otherwise dealt with in such manner and upon such terms as the Court shall think fit so as to secure substantial justice." I see from these words that where certain omissions take place, and there has been a non-compliance with the provisions which exist in the Ordinance, the principle is for the Court to seek to secure to the party "substantial justice" and not to be tied down by mere technicalities. This principle I find underlies the other sections of the Ordinance. Section 10 requires that the "justice" of the case should be the object to be attained and when parties are before the Court, if "justice" requires an adjournment the Court may adjourn the case—the Court being careful to see that in seeking to do justice to the one side, injustice should not be done to the other. I don't think there is any difference between the expression "justice" in the one section and "substantial justice" in the other. Then Section 9 again requires "justice" to be the one thing to be looked for. It is well-known that formerly by means of special demurrers and technical objections justice was denied except to those who had means. In 1852, the Common Law Procedure Act was passed and it introduced a new line of thought altogether, the intention being to do justice between the parties apart from technicalities. The Judicature Acts on which our Civil Procedure Ordinance is founded, extended the idea still further and sought to avoid all possible technicalities. It may not have quite succeeded, but that is the principle underlying the enactment, and is the one the Court should carry out as far as possible. With that view, our Legislature has, in respect to this question of time, by Section 8 provided that time may be extended even *after* it has expired. This being so, I can see no reason why this Section 8 should not apply to cases within Section 153; but it would perhaps appear from Section 153 itself, as if the Legislature intended that in cases of reply especially the Court should have the power to extend the time. This I say may be argued from the language of Section 153 itself, but I believe myself it is mere tantalogy for the Legislature had already by earlier sections provided generally for extension of time which are applicable to all cases and stages. The whole economy of our law then is, justice to all parties—substantial justice. Procedure is but a road to justice—to guide Judges and parties thereto, not to obstruct them. Unless therefore there is anything in our law, as explained by the context or decided cases, the duty of this Court is to carry out the real economy and broad principle of the enactment. Is there then anything in the context to shew me I cannot or ought not to grant an extension of time? I can find none. The facts giving rise to the present objection are these: Mr. Thomas, Solicitor for the plaintiff, through forgetfulness, has omitted to file a reply to the statement of defence. If I refuse to extend the time the plaintiff will be deemed to admit under Section 207 the facts stated in the defence, notwithstanding that those facts are quite inconsistent with the facts alleged by the plaintiff in his statement of claim. I would in fact be compelling him to admit by a mere technicality the very facts he denies. By

PELLERAU, J. 1888.

ARMOOTAH PILLAY v. FATIMAH BEE & ANOR.

Section 184 I find amendments are to be allowed in order to raise "the real questions or question in controversy"—the merits of the case. I do not see how I shall be acting contrary to law if I extended the time and allowed the amendment. I think I shall by doing it, be bringing forward the merits of the case, as I consider the pleadings as they stand do not raise the real question in controversy. As to decided cases I think none of those cited except one bear on the point; that one *Eaton* v. *Storer* though not on all-fours still affords a guiding principle. In that case, there had been greater negligence on the part of the plaintiff in not filing his reply than here, but *Jessel*, M. R., says:

> "According to the usual practice of the Court the plaintiff's application ought to have been granted by the Vice-Chancellor. The plaintiff was out of time and in that case if a motion is made for judgment on admissions in the pleadings, or if the analogous step is taken of a motion to dismiss for want of prosecution, the usual course is to give the plaintiff time to take the next step upon his paying costs, which is a sufficient punishment and will prevent the rules from becoming a dead letter. This course will not be departed from unless there is some special circumstance such as excessive delay. In the present case there was no extraordinary delay, the original time for delivering reply not having expired till the 25th of July. The application ought to have been granted on the terms of the plaintiff paying the costs of it."

It is true there it was a case of motion for judgment whereas here we are at the trial, but that fact cannot in my judgment make any difference. I think therefore, that if I extend the time and give leave to the plaintiff to amend by filing a reply I shall be meeting the justice of the case—I shall be raising the real question in controversy—I shall not be acting contrary to law, but consistently with the principle laid down in the case I have mentioned. I shall therefore extend the time for the plaintiff to file his reply, and give him leave to do so within eight days. The costs of this argument and of the amendment must be paid by the plaintiff to the defendants.

Order accordingly.

The plaintiff within the eight days filed and delivered a reply which was only a joinder in issue. The further hearing of the case was then proceeded with. At a late stage in the trial the plaintiff obtained leave to amend his statement of claim by setting out the contract of 1870, and claiming relief thereon by way of an alternative claim.

Ross, [*Van Someren* with him] for the defendants contended, I.—the plaintiff was not entitled to reimbursement of the moneys paid by him on the mortgages as no benefit was shewn to have accrued to Haleemah by those mortgages, and the plaintiff's own account of the transactions shewed they were not made at her request: but if there was, then the plaintiff's evidence in support of a claim against the estate of a deceased person was uncorroborated and this Court would not act on it. *Rogers* v. *Powell*, 38 L. J. Ch. [N. S.] 648; *Finch* v. *Finch*, 23 L. R. Ch. Div. 267; II.—that a claim for improvements could only be made *against* a plaintiff seeking equity on the principle that he who sought equity should do equity. No case had ever decided a person, as plaintiff,

could enforce such a claim, when the defendant was no longer seeking equity—2 Story's Eq. Jur. §§. 799a, 799b, & note, and §§. 1236-1239; *Earl of Oxford's Case*, 2 W. & T. L. C. in Eq. 548, 562; *Neesom* v. *Clarkson*, 4 Hare 97; *Leslie* v. *French*, 23 L. R. Ch. Div. 554-56; III.—the plaintiff had an opportunity in the previous suit of claiming compensation for the improvements, but neglected to do so; he was therefore estopped. *Greathead* v. *Bromley*, 7 T. R. 455; *Henderson* v. *Henderson*, 3 Hare 114, 115, *per* WIGRAM, V.C., *Nelson* v. *Couch*, 15 C. B. [N. S.] 108, per WILLES, J., *Newington* v. *Levy*, 5 L. R. C. P. 607, affd. 6 L. R. C. P. 180; *Hall* v. *Levy*, 10 L. R. C. P. 154; *Shedumbrum Chetty* v. *Adagappa Chetty*, 1 Kyshe, 663; *Brunsden* v. *Humphrey*, 11 L. R. Q. B. Div. 712; reversed 14 L. R. Q. B. Div. 141; *Phosphate Sewage Co.* v. *Molleson*, 4 L. R. App. Ca. 801, per CAIRNS, L. C. Here the plaintiff had in his statement of defence in the former suit claimed "further and other relief." *Serrao* v. *Noel*, 15 L. R. Q. B. Div. 549. The case of *Davis* v. *Hedges*, 6 L. R. Q. B. 687 and *Hindley* v. *Haslam*, 3 L. R. Q. B. D. 481, were distinguishable, as here the claim for compensation was involved in the question raised in the former suit; the plaintiff in the first suit could not have got equity without making compensation if it had only been claimed.

Thomas, [*Clutton* with him] for the plaintiff contended, I.—the plaintiff's evidence was corroborated by the agreement of 1870, and the fact that the house was standing on the land; II.—no case had decided a plaintiff was not entitled in equity to sue for compensation—*Earl of Oxford's Case*, 2 W. & T. 548, and *Peterson* v. *Hicksman*, there quoted, shewed he could; III.—there was no estoppel as the causes of action were different and the same evidence would not suit both cases—*Seddon* v. *Tutop*, 6 T. R. 607; *Kitchen* v. *Campbell*, 2 Wm. Saund. 827. The cases cited for the defendants had no application, except the last two which were authorities for shewing there was no estoppel.

[*Pellereau*, J. during the arguments referred to *Edlin* v. *Battaby*, 2 Lev. 152; *Walley* v. *Walley*, 1 Vern. 486; *Seaton* v. *Seaton*, 36 W. R. 865; *Hanson* v. *Keating*, 4 Hare, 6; *Swan* v. *Swan*, 8 Price, 518; Sugden on V. & P. [13th Ed.] 614; 2 Spence's Eq. Jur. 304, 5; 2 Taylor on Ev., § 1702; and *Hunter* v. *Stewart*, 31 L. J. Ch. [N. S.] 346.]

Ross, replied, contending *Edlin* v. *Battaby* was distinguishable, as there the plaintiff had not been turned out of possession and he still had a lien on the land, and it ended in a compromise. Another case in which a plaintiff came into equity for compensation was *Lord Cawder* v. *Lewis*, 2 Y. & C. Ex Eq. 427; but neither in that case was it shewn the plaintiff had a decree—all he got was an *interim* injunction; the case also was different as it was that of a principal and agent and a fiduciary relationship therefore existed between them; Sugden on V. & P. 615, citing *Needler* v. *Wright*, Nelson Ch. Rep. 57, was in the defendants' favour. On the question of estoppel this case fell within § 1702 of Taylor.

Cur. Adv. Vult.

PELLEREAU, J. 1888.

ARMOOTAH PILLAY v. FATIMAH BEE & ANOR.

October 1st. *Pellereau*, J. In this case the plaintiff Armootah Pillay prays that the Court will order that an account be taken of the permanent and substantial improvements made and buildings erected by him upon the land which has been decided to belong to the representatives of Haleemah deceased, situate at Datoh Kramat, in Penang, comprised in Deeds registered No. 746 of 1858-59 and No. 108 of 1883 respectively, by and with the consent and acquiescence of the said Haleemah deceased, or of her husband Saboor Ally deceased, on her behalf and for her benefit on the land belonging to her—and also of certain payments made by the plaintiff in discharging the incumbrances on the said land and the assessment and quit-rents due thereon, by and with the consent and acquiescence of the said Haleemah or her said husband on her behalf, and of all payments made by the plaintiff to the creditors of the said Saboor Ally, by and with the consent of the said Haleemah and for her use and benefit, and also of all interest accrued or accruing thereon up to the date of this suit; and he also prays for an order that any sums found due upon the taking of such accounts for the matters mentioned, might be directed to be paid by the defendants to the plaintiff, or declared to be a charge on the said land, and for such further or other relief as the nature of the case might require. Two questions arise on this claim—the first is, whether the plaintiff is entitled to be re-paid the sums paid by him on mortgages of the land in question. On this branch of the case, I can find nothing in the evidence from which I can come to the conclusion that Haleemah derived any benefit from these sums. Saboor Ally and the plaintiff it appears used to go to certain persons and borrow money on the mortgage of the land, and the plaintiff used to pay off these mortgages; but such evidence as alone can bind Haleemah,—namely of a request by her from which a promise to pay might be implied,—is entirely wanting. It is true the plaintiff says she did request him to borrow the money in order to enable Saboor Ally to pay off the first mortgage to the Chinaman, but he himself says he had agreed to get Saboor Ally the money *before* Haleemah made the request, and it appears to me that he did not obtain the money for Saboor Ally because she had requested him. The payment by him cannot therefore be coupled with any request by Haleemah. Besides, the evidence of the plaintiff in support of this claim against Haleemah who is dead, stands uncorroborated, and it cannot therefore justify this Court in allowing the claim. There is, no doubt, the act of 1870, but I cannot see in it any promise by Haleemah to re-pay these sums. As I have said there is certainly no evidence that it was for her benefit and on this part of the case, judgment must be against the plaintiff.

It is unnecessary to decide on the defence raised as to the Statute of Limitations, which, if I understand it rightly, was only raised as to this part of the plaintiff's claim; the claim for improvements arising only lately, the Statute is inapplicable.

The second branch of the plaintiff's claim is with regard to compensation for permanent and substantial improvements to the land in question. It was argued for the defendants that as to

this claim our law does not give any right to a plaintiff in equity to recover such compensation. It was admitted that as defendant in the former suit he might have made the claim, but not having done so, it was argued he could not as plaintiff, sue for it. If this be so, the consequence would be that the representatives of Haleemah having got the land, though the plaintiff might have in good faith improved it believing he had a good title to it, would take from him the land and have also the benefit of his improvements without paying for them, and the excess or enhanced value given to the land by the plaintiff's acts, would be lost to him. This argument seems obviously unjust; but if it is in accordance with the principles of our law and equity, the private opinion of a Judge must give way to it. I have therefore thought it my duty to ransack all the authorities to see what our law is. *Story* was cited and certainly it seems as contended, the right to compensation is by him limited to a defendant against whom a plaintiff is seeking equity, and the text is based on the principle that whatever is planted in the soil becomes part of the soil and goes with it, unless claimed against a plaintiff who is seeking equity. Besides Mr. Justice STORY'S work, there is another authority which I have found, in which the law is also so stated. In *Colvin* v. *Hartwell*, which came before the House of Lords in 1837, and is reported in 5 Cl. & Fin. p. 523, at page 522, the Earl of DEVON, says:

"My difficulty is to find upon what known principle of Equity the decree of the Courts below is to be supported. It is a fallacy to apply to this case the principle that 'he who comes for equity must do equity.' I conceive the true meaning of that maxim only to be this, that a man who comes to seek the aid of a Court of Equity to enforce a claim must be prepared to submit in *that* suit to any directions which the known principles of a Court of Equity make it proper to give. It may not be equitable in the popular sense of the word, that is, it may not be fair as between man and man, that the Indians.....

It was a case between merchants in India and merchants in England, and to distinguish the one from the other his Lordship speaks of the merchants in India as "Indians."....

..... "should have taken the disposition of the dividends of the stock out of the hands of those who were the creditors in England in order to make them available in the way of security to their creditors in India. But the question comes back to this, is there any principle or rule of a Court of Equity which prevents their doing this? I, for one, do not see my way to the conclusion that the house in London had *such a lien or right* to the funds in question as to prevent it."

The facts of that case were these. A certain firm of Sarkies and others in India had dealings with a firm of merchants in England. The merchants in India were possessed of certain English stock and sent a power of attorney to the merchants in England to receive the dividends there on their behalf. They afterwards became heavily indebted to the English firm and others and made an assignment for the benefit of their creditors of all their property including the stock and dividends. The English merchants claimed to hold the dividends they had received under

PELLERAU, J. 1868.

ARMOOTAH PILLAY v. FATIMAH BEE & ANOR.

the power of attorney towards payment of the debt due to them. It was held by the House the Lords reversing the judgment of the Vice-Chancellor and Lord Chancellor that they had no lien or right of retainer to enable them to do so. In this case it may be noticed that the retainer is called a "lien or right"; but whatever the right may be called, the Earl of DEVON in enunciating the principles of Equity in respect to that right, limits it to a claim by *a defendant* in "*that* suit." Now, in that case the defendant did not obtain what he sought; his right was negatived. It was decided that he had not the equity he claimed. If he had it, no doubt according to the principles laid down by the Earl of DEVON, he would have got it. The case however does not decide that if he had the right or lien, but had come in as a plaintiff, he would have been non-suited or his Bill dismissed. I have seen no authority in which the equity is refused because asked for by a plaintiff. In the case of *Hanson* v. *Keating*, 4 Hare, pp. 6—7, WIGRAM, V. C. in a very clear judgment says equity does not give a right to a defendant because he is defendant, but because the right exists by virtue of the principles of equity and quite apart from the position of the parties to the record. That was the case between a mortgagor and mortgagee and although the origin of the right there claimed might have rested on the maxim that equity would not grant relief to a person who sought equity unless he did equity, yet when once the right was recognised, it became a right which he might enforce by suit. The case of a wife's equity to a settlement [*Lady Elibank* v. *Montolieu*, 1 Wh. & T. L. C. in Eq.] is another instance of the kind. What was originally the right of a person as a defendant became in time his in equity, whenever he asserted it apart from his position on the record. In *Neesom* v. *Clarkson*, 4 Hare 97, which was a case of improvements and was cited in the argument, WIGRAM, V. C. repeats his opinion that equity is not dependant on the position of the parties to the record, he says [p. 100-101]:

"The ground that I went upon certainly was that the mistake was one against the consequences of which the Court ought to relieve the husband and those who claimed under him, to the extent to which a stranger paying off the vendor's lien would have been entitled to charge the estate. I thought they were entitled to this relief in a suit in which the heir of the wife was the plaintiff on the ground that the plaintiff who would have equity must do equity. That, as I have often had occasion to say, is a rule of unquestionable justice, but which decides nothing in itself; for you must first enquire what are the equities which the defendant must do and what the plaintiff ought to have. It may be that the doctrine of retainer cannot strictly be applied except in cases where the party claiming the right of retainer is a defendant or is in some form the party charged in the suit; but unless that state of things in any respect qualifies the rule, I think it may be generally said that unless the equity which the defendant claims from the plaintiff is one which the defendant might enforce by bill, it is not a term which the Court has a right to impose on the plaintiff. The Court is bound to look into the position of the parties and see what their relative rights are and having ascertained them, it tells the plaintiff that it will not give him what he seeks unless he submits to give the defendant what the defendant might in equity have asked, but has not asked at least by any distinct suit from the plaintiff. In his character of defendant, the only relief he can have is the dismissal of the Bill; but the Court obviates that difficulty of form by giving the plaintiff

what he is entitled to, only on the condition that he submits to give the defendant what the defendant might equitably require. That is my view of the rule and is what I acted upon in this case."

I have found no authority, though I have ransacked them as much as I could, to gainsay these principles; and as above stated I have not been able to find any case which says a plaintiff is not to be entitled in equity to compensation for improvements simply because he is plaintiff and not defendant. The case in the House of Lords to which I have referred does not decide the point; no case has been produced or can be found which deprives him of his right. A case however has been found, that of *Edlin* v. *Battaby*, 2 Lev. 152, in which the right was *given* to a *plaintiff* who sought compensation for improvements, and the case therefore shews the right to such compensation need not have been invoked in the original suit between the present parties. The facts in that case were these: the plaintiff had purchased a term of years from the Executor of one Bray under the belief he had a good title, expended £250 in erecting buildings on the land. The defendant, the Administrator of Bray's widow, to whom the term had been bequeathed by Bray's Will, sued the plaintiff in ejectment, and recovered the term. Before execution was taken out and the defendant put into possession, the plaintiff sued him in equity for relief against that judgment until the expenditure had been paid him; and although he was plaintiff in that suit, relief was granted him in respect to the improvements made by him. Mr. Ross for the defendants here has properly argued that in that case as execution had not taken place, the plaintiff who sought the aid of the Court of Equity was still in possession of the land and had not therefore lost his right of retainer or lien—but that was not the ground of the decision; the right was given by the Court not because the plaintiff was still in possession, but because he had been a long time in possession and during that time had no notice of the dormant title but *bonâ fide* made improvements, believing the land to be his. In *Lord Cawder* v. *Lewis*, 2 Y. & C. [Ex. Eq.] 427, possession of the land had gone. Lewis had commenced a second action for mesne profits and Lord CAWDER applied to equity in order to obtain something for his improvements and it was allowed him. I find therefore no case which lays it down that if the person making the improvements comes as plaintiff he is not to have them. On the contrary, I find these last two mentioned cases in which the right was given to plaintiff, and I find the judgments of WIGRAM, V.C., in two other cases in which he states in equity it is quite immaterial what the position of the parties to the record is. It has not been clearly settled by the cases whether this right to compensation is a "lien," and I do not decide whether it is or is not; but I find the right to compensation exists. The right is based in fairness and equity and not to be modified by the position of the parties to the record.

But there must be good faith on the part of the person claiming for the improvements, and the improvements must have been made by him under the belief that the land was his.

PELLERAU, J. 1888.

ARMOOTAH PILLAY. v. FATIMAH BEE & ANOR.

Rennie v. *Young*, 2 De G. & J. 136 clearly shews he must not be aware the land is not his—he must be ignorant of the real state of his title. Lord Justice TURNER in that case, says [p. 142]:

"What case then, is there in equity against the Youngs? Either they were under a contract with the plaintiff or they were not. If they were, the plaintiff's remedy is at law. If they were not, then the only circumstances on which an equity can be founded is, that they allowed the plaintiff to put his machinery into a ship which legally belonged to them. But the plaintiff does not say that he did not know that the ship belonged to them. If a man places his property on the land of another person with full knowledge of that person's title, how can the fact that the landowner assented to its being placed there, give an equity to have it restored? If it did, the doctrine would come to this, that whenever a man lays out money on another person's land with the consent of the owner, he has an equity to have it re-paid.

This is but proper, for it would not be fair that a man should be allowed to go and build on another's land with full knowledge that it is not his and claim compensation for it—the true owner may be a poor man and unable to pay the compensation, and is he to lose his land because he cannot pay? This being so then, I have to see in the present case whether the plaintiff acted in good faith. He knew Haleemah was a married woman, but does the fact that one of the contracting parties is relatively incapacitated to contract, make the other's acts otherwise than *boná fide?* In *Walley* v. *Walley*, 1 Vern. 486, the defendant had notice that one of the parties was an infant, yet his claim to improvements was allowed; the case of a married woman I think stands on a similar footing—she, like the infant is under disability, but she may never claim her rights—she, like him, [until the recent Infant Relief Act at home] might, when the disability is removed, ratify her acts. I cannot therefore say that because the plaintiff knew Haleemah was a married woman, he was not acting in good faith [*a*]. But in this case there is more. Haleemah sells the land to Saboor Ally, and of the act of 1870 she and he enter into an agreement with the plaintiff not to dispute his title and improvements. The plaintiff therefore might well have supposed she had power to convey the land as she did, and that all along she was authorised by her husband. True, there is the Indian Act which requires an acknowledgment, before a Deed by a married woman can be operative, but although every one is presumed to know the law yet as a fact the plaintiff was ignorant of that law. Now, the House of Lords has, in the case of *Seaton* v. *Seaton*, 36 W. R. 865, decided so recently as August, 1888, clearly laid down that ignorance of the law does not prevent *boná fides* existing. Lord FITZGERALD, says [p. 869]:

"Mr. Marten urged that she [Mrs. Seaton] had knowledge of the settlement and must be taken to have been aware that it was, as to her, inoperative, and that she had a legal right to repudiate and put it aside. That is to say, she must be taken to have had in her mental view the solution of the difficulties which puzzled and misled the Vice-Chancellor, which occupied so much of the time of the Court of Appeal, and are now brought up to this House for final decision. It is true that one of the maxims of the law is *Ignorantia juris non excusat.* Mr. Marten did not so put it in terms, but his

[*a*.] See however *Nain Boon Keow* v. *Letchman Chetty & anor.* antè p. 85.

argument amounted to and was based on that. The true meaning of that maxim is that parties cannot excuse themselves from liability for all civil and criminal consequences of their acts by alleging ignorance of the law, but there is no presumption that parties must be taken to know all the legal consequences of their acts, and especially where difficult questions of law or of the practice of the Court are involved. Lord WESTBURY in *Spread* v. *Morgan*, 11 H. L. Ca. 588, dealing with a question of election, thus put it: 'It is true, as a general proposition that knowledge of the law must be imputed to every person, but it would be too much to impute knowledge of this rule of equity' [the rule which applies to election] 'as a question of intention implies knowledge.'"

Mr. Ross for the defendant has in fact admitted that he cannot contend against this point. In the present case the application of the Indian Act to Mahomedan and Hindu married women is founded on a decision of Sir WILLIAM HACKETT in this Court [*a*]; the principle on which the Act proceeds is the unity of husband and wife, and although there may not be that unity between a Mahomedan or Hindu married woman and her husband, I felt bound in the previous case to follow the decision of Sir WILLIAM HACKETT; I am not sure if the point was argued over again in the Court of Appeal what the decision of that Court would be. But it can be said because a judgment of this Court has so applied the Indian Act to Mahomedan married women, that the plaintiff here must have known it, and could not have acted in good faith when he bought and possessed the land? I think it cannot. I therefore hold he acted in good faith and is entitled to obtain compensation for his improvements.

Next comes the question of estoppel, and it is one on which I have had some difficulty. The plaintiff in this case was defendant in the previous case, and might in that case have raised his present claim for compensation for the improvements. I have found the authorities intricate and somewhat difficult to reconcile, but I think the safest course is for me to rely on the principles laid down in *Taylor on Evidence*, Section 1702, which is as follows:—

"On the other hand it has been laid down as a general rule which is recognised alike in all Courts that where a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to point upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time."

It is also laid down by Lord WESTBURY in *Hunter* v. *Stewart*, 31 L. J. Ch. [N. S.] 350:

"That one of the criteria of the identity of two suits in considering a plea of *res judicata*, is the enquiry whether the same evidence would support both. But in the present case the evidence required to prove the allegations

[*a*] *Kader Meydin* v. *Shatomah*, Woods' Oriental Cases, 42; s. c. Str. L. R. 260. —J.W.N.K.

PELLERAU, J. 1888.

ARMOOTAH PILLAY v. FATIMAH BEE & ANOR.

in the first bill would not sustain any of the material allegations in the second, and the evidence given in the second suit would not be receivable for want of proper allegations in the first. In equity the plaintiff must recover *secundum allegata et probata*; but here the allegations and equity of one bill are different from the allegations and equity of the other. It may be admitted that the case made by the first bill was insufficient to bind the Company consistently with holding that the case made by the second bill is sufficient to bind the Company; and this is the result not of new evidence, but of the allegation and proof in the second suit of an entirely different series of acts and conduct on the part of the Company. It is a different equity. It is indeed true that the case made by the second bill must be taken to have been known to the plaintiff at the time of the institution of the first, and might have been then brought forward, and it may be said therefore that it ought not now to be entertained; but I find no authority for this position in civil suits, and no case was cited at the Bar, nor have I been able to find any in which a decree of dismissal of a former bill has been treated as a bar to a new suit asking the same relief, but stating a different case, giving rise to a different equity."

I think these two quotations embrace the principles which may be fairly applied to this case. In applying them I have to see whether the issue raised here was raised and decided in the former case; whether the plaintiff as defendant there, not merely *might* but also *ought* to have brought this claim then, and whether the evidence called for on the issues raised there, could support the issue in the present case. The plaintiff in the former suit claimed that the Conveyance by Haleemah to Saboor Ally was fettered with a trust and that the conveyance from Saboor Ally to the present plaintiff was fraudulent. The evidence necessary to support or defend that claim of trust and fraud was not the same as to prove the claim for compensation for improvements—certainly not. Another issue was however raised; a point of law which was not clearly disclosed in the pleadings, but only raised at the trial on the conclusion of the evidence on both sides though we now know it was from the outset in the then plaintiff's mind, viz., that Haleemah being a married woman, her Conveyance was a nullity for want of an acknowledgment. But the evidence was confined to the alleged trust and the marriage of Haleemah, but that is not the same evidence as is required to support the claim for improvements. It is true the claim for recovery of the land in a manner involved the improvements for which the present claim for compensation is made, but it was not "part of the.....contest" as mentioned by Taylor. Did the former issues *necessarily* involve the present claim? Taylor says, the subject-matter of the litigation must be the same. The present claim does not appear to me to have been the subject-matter of the litigation in the former suit. The right to compensation I have held is a distinct right which the plaintiff might enforce—it is a right independent of lien—but is a right which does not arise till after judgment in the previous case—it is a right consequential upon but not incidental to the decision of the issues in the previous case. As I have said, there was nothing in the pleadings in the former case to shew the plaintiffs rested their case on the Indian Act. The plaintiff here might well say that he then relied on a favourable decision on the question of the alleged trust on which he in fact won, and on the question of fraud which he also won. He lost

that case on the Indian Act which was not fairly brought to his notice, and which it is admitted was intentionally not stated clearly for fear of his adducing unfounded evidence as to Haleemah's marriage. The point in fact was clearly taken only after the evidence had been concluded, I do not think therefore that it can be held he had a fair opportunity of bringing forward his evidence, and claim in respect to the improvements; but even if he had I do not think the evidence in the present case was the same as was adduced in the former case, and there is no identity in the subject-matter of the two suits so as to justify any argument that the one involved the other expressly or impliedly. I hold the plaintiff had a distinct right which he could enforce by an independent suit and was not *bound* to have brought it forward in the previous action. I therefore rule there is no estoppel.

It will be noticed that I have not as yet given any judgment on the amended claim founded on the contract of 1870. In the pleadings in this case, as they originally stood, no mention is made of that contract; it was clearly mentioned only in the course of Mr. Clutton's argument when he said Mr. Thomas had relied on that contract or intended so to intimate when he was addressing the Court. I thereupon suggested an amendment of the pleadings which has been made, but only completed after Mr. Ross had begun his reply. Against the amended claim, based on this contract, the defendants have pleaded various objections which raise delicate points, and Counsel for the plaintiff have not had an opportunity to argue on them as they had no right of reply; I think the questions cannot be said to have been fully argued, and under the circumstances I would be deciding on an issue not fully gone into, and I therefore abstain from giving an opinion thereon. The claim in this respect is an alternative one, and as I have given judgment for the improvements independently of the contract, it is needless for me to express an opinion thereon, and for the plaintiff at present to press for more. The result will be as follows: Judgment against the plaintiff on his claim for reimbursement of moneys paid on the mortgages—Judgment for plaintiff on his claim for compensation for permanent improvements—also on the question of estoppel or *res judicata*. The Court does not decide the questions raised by the amendment. Order that the case be referred to the Registrar to take an account of the improvements and enhanced value, also of the rents and profits received by plaintiff and derived from the land, whether as rents, income from quarries, cultivation, or otherwise. The rent of the house he has built will also be considered, as by renting the house he rents the land, but this will be more fully examined on the taking of the account. Considering that the plaintiff has lost on one issue out of three, and might, had he been more diligent, have claimed for improvements at the close of the previous suit, and the present suit would have then been unnecessary—but also considering that the plaintiffs in the first suit did not clearly disclose their claim, I think it would be fairest for me to decide that as regards the costs of this case, each party oshuld pay his own costs up to this day.

Decree accordingly.

JOHNSON *v.* McLARTY & ORS.

PENANG.

WOOD, J.
1888.

November 5.

To bring a person within Section 415 [cheating] of the Penal Code, it is necessary to shew that he intended to cause damage or loss to the person he was deceiving.

Where therefore the prisoner, belonging to a Foundry Company was desirous of procuring certain firebars from the prosecutor's firm, a rival Foundry Company, but knowing the prosecutor's firm would not supply them to his [prisoner's] firm, he went to the prosecutor and ordered the firebars, telling the prosecutor they were wanted by one A. H. [which was false]—but on the firebars being subsequently manufactured, the prisoner asked for them and offered to pay prosecutor their costs, but the prosecutor then for the first time suspecting they were not wanted by A. H. did not deliver them or take payment, and having afterwards found from A. H. that the prisoner's statement was false, prosecuted him for cheating, and the Magistrate convicted the prisoner under Section 417 of the Penal Code.

Held, on appeal, the conviction could not be sustained, and it was accordingly quashed.

The appellant [Johnson] was an employé in the "Straits Foundry Company" of which one Boon Chan was the principal partner. The respondents were partners carrying on business as the "Penang Foundry Company." The Straits Foundry Company were desirous of procuring certain firebars, and being unable to mould them themselves, but knowing the respondents' firm would not do it for them, the appellant went to the respondents' foundry with patterns of the firebars and ordered the respondents' foreman to make 12 firebars like the patterns telling him they were for one Ah Heng, a shipowner and builder. This statement was false and was known to the appellant to be false. The respondents' firm had had large dealings with Ah Heng and believing the appellant's statement, manufactured the firebars. When ready the appellant called for them and offered to pay the respondents' firm the amount they would charge for them. As Ah Heng had previously taken delivery of his manufactures on credit, the respondents' firm suspected there was something wrong; they therefore did not deliver the firebars nor took payment therefor. Subsequently, finding from Ah Heng that the appellant's statement was false, they gave the appellant in charge to a Police Officer and then prosecuted him for cheating under Section 417 of the Penal Code. The Magistrate, W. C. S. Kynnersley, Esquire, convicted the appellant and sentenced him to one month's simple imprisonment: he now appealed. Sections 415 and 417, are as follows:

"415. Whoever, by deceiving any person, fraudulently or dishonestly induces the person deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do, or omit to do, anything which he would not do, or omit if he were not so deceived *and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property*, is said to cheat."

"417. Whoever, 'cheats' shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

Van Someren, [*Thomas* with him] for appellant contended, the case did not fall within Section 415 as there was no delivery of the firebars, nor was the act done by the respondents in con-

sequence of appellant's false statement, an act which caused "damage or harm" to their firm—the appellant having been ready to pay them what they asked for the firebars.

D. *Logan*, [*Solicitor-General*] contended, there was evidence to support the conviction as the appellant's act *might* injure the respondents' *business*.

Wood, J. There is no evidence to support the charge that the defendant "intentionally induced the person so deceived to do, or to omit to do, anything which he would not do, or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property." The appellant here intentionally induced the prosecutors [respondents] to believe they were making firebars for Ah Heng and not for another person,—but he *never intended* to cause *damage or loss* to the prosecutors, being ready to pay for the bars when made. It has been urged by the Solicitor-General that the appellant's act might injure the prosecutors in their business, but I consider that, a damage, which, even if shewn to exist, is too remote to be within the meaning of Section 415 of the Penal Code. The conviction is therefore quashed.

Conviction quashed with costs.

CHIN BENG LEANG & ORS. *v.* MUNICIPAL COMMISSIONERS.

The Municipal Commissioners have no power under Section 129 of the New Municipal Ordinance 9 of 1887, to issue a notice to an owner or occupier of a house to remove obstructions in open arcades or verandahs; and the mere non-compliance therefore with such a notice does not bring the owner or occupier within the section.

The Municipal Commissioners have no power to enforce public passage over an arcade or verandah by requiring under Section 129, the removal of obstructions thereon, which obstructions have existed anterior to the old Conservancy Act XIV. of 1856.

A conviction for "maintaining" such an obstruction by merely not complying with a notice as above, was therefore quashed.

The appellants who were respectively Trustees of three Kongsi houses, Nos.* 22, 30, and 36, King Street, had been convicted by G. C. Wray, Esquire, Magistrate, for *maintaining* after notice from the Commissioners to remove the same, a brick wall on the five-foot path of the said houses, and so causing an obstruction to the passage of the public thereon, under Section 129 of the Municipal Ordinance 9 of 1887.

The evidence shewed that the Municipal Inspector having inspected the premises in question and found a brick wall in each house in the five-foot way which caused an obstruction to passers-by, reported the matter and received instructions to issue a notice to the owners or occupiers to remove the walls within 7 days. This he did and served them on the appellants on 8th August last. On the 15th September on again inspecting the premises, he found the obstructions still existed; and on reporting same, he was directed to prosecute the appellants. In cross-examination the Inspector admitted he had known these walls to exist *for eleven years* in the same condition as they now were and the obstruction had existed all that time. He stated however,

WOOD, J. 1888.

CHIN BENG LEANG & ORS. v. MUNICIPAL COMMISSIONERS.

the walls could be removed without damaging the buildings. The accused in their defence produced their Title Deeds which shewed their lands extended right up to King Street as their Eastern boundary, so that the soil of the alleged five-foot path was their property. They also called a witness who stated that he had been in Penang for *sixty years*, and he then knew these premises, and the walls in question *were there when he first came*, and were there just as they were on the day he gave his evidence.

The appellants on being convicted as above stated, and fined 50 cents and costs, appealed. The appeal now came on for hearing.

Van Someren, for appellants contended, the conviction could not be supported. The Magistrate's idea was that because the appellants had not pulled down the walls after receiving notice from the Commissioners, they were guilty of "maintaining" the wall and were punishable under Section 129. The walls however, were shewn to have been in existence over sixty years, and the appellants had done nothing to them since the new Ordinance. By Section 269 no person was liable to be punished for any offence under the Ordinance unless complaint was made within three months of its commission. The Magistrate had thought that as the prosecution was begun within three months of the Commissioners' notice to pull down that was sufficient. That notice however, was mere waste paper; the Commissioners were not authorised by the Ordinance to issue such a notice. When they were empowered to issue notices, the sections clearly said so, *ex. gr.* 118, 245, 247, &c. The appellants not complying with the notice did not therefore make them liable. Further, from the evidence it was clear the soil of the alleged foot way was in the appellants, and as these walls had existed over sixty years as an obstruction to passage, it could not be said "to create obstruction or inconvenience to the passage of the public," as the public for over sixty years *never had it*. Whatever might be the rights of the Commissioners to the five-foot paths constructed subsequently to the new Ordinance, or even to the old Conservancy Act XIV. of 1856, as amended by Ordinance 2 of 1879, it was clear they had no right to enforce passage for the public over verandahs or arcades adjoining a public street by requiring the removal of obstructions existing therein long prior to that date.

D. *Logan*, [*Solicitor-General*] admitted he could not support the conviction.

Wood, J., said, as the Commissioners had no authority to issue the notice of 8th August, that document could not make that punishable which would not otherwise be punishable; that as these walls had been in existence for a period anterior to the old Municipal Act, and caused the same obstruction as they now did, the Commissioners had no power to enforce public passage by causing their removal, and the case was not within Section 129. The conviction must therefore be quashed.

Conviction quashed.

CHONG AH NAI *v.* PUTEH.

PENANG.

WOOD & PELLEREAU. } J.J.

NOV. 12.

A plaintiff who has recovered judgment in an action for a malicious prosecution is entitled under the joint operation of Ordinance 22 of 1870, Section 3, Clause 7 and the Civil Procedure Ordinance 5 of 1878, Section 425, if he desire it, without any application to the Court, to issue a *Ca. Sa.* for the arrest and imprisonment of the defendant for the non-payment of the judgment and costs.

Abud v. *Riches*, 2 L. R. Ch. Div. 529, and *Ferguson* v. *Ferguson*, 10 L. R. Ch. Div. 662, distinguished.

The plaintiff had in a small cause recovered $100 damages against the defendant for a malicious prosecution besides costs of suit. The defendant not having paid up damages or costs the plaintiff's Solicitor applied to the Registrar for a *Ca. Sa.* under Clause 7, Ordinance 22 of 1870, Section 3. The Registrar considered he could not issue the writ without an order of Court.

G. S. H. *Gottlieb*, for the plaintiff now moved for an expression of opinion by the Court on the point, and that the Registrar be directed to issue the writ without any application to the Court for it. He contended that existing rights for enforcing the judgment of the Court were saved by the Civil Procedure Ordinance 5 of 1878, Section 425; that the *Ca. Sa.* was a Common Law writ a plaintiff had prior to the abolition of imprisonment for debt by the Debtors' Ordinance 22 of 1870, Section 1, but that section exempted certain cases from its operation and among these by Clause 7 imprisonment for non-payment of a judgment in an action for a malicious prosecution. He referred to 1 Arch. Q. B. Prac. [13th Ed.], 602—5. Prior to the Ordinance of 1870, a *Ca. Sa.* was issued on the mere application of the party like a *fi. fa.* was and is now issued—the right to have the debtor imprisoned being saved under Clause 7, Section 3, of that Ordinance, the writ of *Ca. Sa.* and mode of procedure to obtain it remained also. Clause 7 was not to be found in the corresponding English Act.

[*Pellereau*, J. referred to the cases of *Abud* v. *Riches*, 2 L. R. Ch. Div. 529, *per* JESSEL, M. R., and *Ferguson* v. *Ferguson*, 10 L. R. Ch. Div. 662, *per* JAMES, L. J.]

Gottlieb, submitted those cases were inapplicable as they were cases of attachment and turned on a rule not to be found in our Ordinances. The right to a *Ca. Sa.* being an existing right in 1878, was saved by Section 425, before referred to.

Mr. Harwood, the Registrar, was heard and he stated that he had doubts as to issuing the *Ca. Sa.* as the proviso in Section 3 of the Debtors' Ordinance, 1870, provided that the term for imprisonment in the excepted cases should not exceed one year, and unless there was an application to the Court for the writ and the Court stated for what period the defendant was to be imprisoned, how was he to know what period to state in the writ. The proviso implied a discretion as to time and as it gave it to no one in particular it was to be exercised by the Court on motion.

Wood, J., said the cases of *Abud* v. *Riches* and *Ferguson* v. *Ferguson* were valuable as shewing the procedure in England for an attachment under the Debtors' Act of 1869, but besides being for an attachment and not a *Ca. Sa.* they turned on an express

WOOD & PELLEREAU. } J.J. 1888.

CHONG AH NAI v. PUTEH.

rule that no attachment could issue without application to the Court, a rule not to be found in our Ordinances. Those cases must therefore be laid aside in considering the present question. At Common Law a plaintiff was entitled without any application to the Court, in all cases to issue his *Ca. Sa.* for the arrest and imprisonment of his debtor—that rule had been broken into by the Debtors' Act which abolished imprisonment for debt, but excepted certain cases from its operation. Among those excepted cases was the case of a debt on a judgment recovered in an action for malicious prosecution. Such a judgment-debt was previously exforced by a *Ca. Sa.* if the plaintiff desired to have his debtor imprisoned. Imprisonment on such a judgment-debt was excepted from the general abolition, the *Ca. Sa.* therefore remained in respect of such a case. By the old rule the *Ca. Sa.* was issued on the mere application of the party wanting it; there was nothing in our Ordinances to say he should not have it, or should not have it except in a particular way. His Common Law right to have it on his mere application therefore stood, and was an existing right within Section 425. The plaintiff in this case was therefore entitled to have his *Ca. Sa.* without any application to the Court.

Pellereau, J., said he had some doubts when the matter was first mentioned to him, and he had thought the point of sufficient importance to ask his learned brother to sit with him and decide it. That doubt of his had arisen from the decision of *Jessel*, R. M. in *Abud* v. *Riches*. Having however conferred with his learned brother and considered the question more closely he had come to the same conclusion as he had though not without some doubt. The policy of the Debtors' Act was the abolishing of imprisonment for the debt, the cases had decided that the Debtors' Act was as applicable to cases in Chancery as to those at Common Law. The Master of the Rolls in the case of *Abud* v. *Riches* said the application there was for an attachment and turned on a rule *which was analogous to the Debtors' Act.* That rule we had not got, but the Act we had; and he felt if *Jessel* was right in the analogy he drew, then, as an application had under that rule to be made to the Court before an attachment could issue, the plaintiff must under our Debtors' Act apply to the Court before a *Ca. Sa.* could issue. But as stated he thought on full consideration that that expression of the Master of the Rolls might well be limited not to the mode of procedure, but to the cases or circumstances under which imprisonment was allowed by the Debtor's Act. If this was so as he thought it was, the case of *Abud* v. *Riches* presented no difficulty in considering the present question. The case of *Ferguson* v. *Ferguson* was not a decision, but the mere expression of a doubt on the part of JAMES, L.J., and therefore was still less an authority on the point. The authorities shewed the plaintiff at Common Law was entitled to his *Ca. Sa.* as a matter of course and of right. Imprisonment had been done away with, but not in all cases. An action for malicious prosecution was one of these. Imprisonment therefore for non-payment of a judgment in such an action remained. The mode of enforcing that imprisonment used to be by a *Ca. Sa.*, the mode of enforcing it under the Debtors' Ordi-

nance was not mentioned. The old mode however had not been taken away. The old mode, the *Ca. Sa.*, therefore remained and must be issued in the same way as it used to be issued, prior to the Debtors' Ordinance on the simple application of the party wanting it. It was an existing right within Section 425 of the Civil Procedure Ordinance. The point suggested by the Registrar presented no difficulty. In a case he [the learned Judge] found in *Fisher's Digest* [*a.*] it was stated that the period of imprisonment need not be stated in the writ, but might in a foot-note be stated not to be extended beyond a year for the information of the debtor. At the end of that time or earlier if he was so advised the debtor could apply for his discharge from prison; if he omitted to make his application he might have to be there for life, but it was he who was to move. The point would then come up for the consideration of the Court and the opportunity given for the Court to exercise its discretion under the proviso in Section 3 on his application. Under the circumstances he [the learned Judge] thought the Registrar should have issued the *Ca. Sa.* when the plaintiff applied for it. [*b.*]

CASHIN *v.* MURRAY.

The marginal notes to sections in our local Ordinances, being in this Colony always read with the Bill, are part and parcel of the Ordinance [*c.*]

The Municipal Commissioners have no authority by a general direction, to confer on their President the power of exercising the powers and descretions vested in them by Ordinance 9 of 1887, *e.g.* the directing of prosecutions for offences under the said Ordinance.

The appellant Cashin was owner of property within the township of Singapore; the respondent Murray was a Municipal Inspector in the employ of the Municipal Commissioners of that town. The appeal was against the decision of S. Leslie Thornton, Esquire, Acting First Magistrate. The rest of the facts giving rise to the appeal sufficiently appear in the judgment.

W. *Nanson*, for appellant.

Drew, for respondent.

Cur. Adv. Vult.

December 18th. *Ford*, C.J. This is an appeal upon various grounds from the decision of the Magistrate, convicting the appellant of having built in the months of July and August last, certain walls and buildings in Cashin Street, not walls strictly built of bricks throughout, well-bonded together with freshly made mortar, as required for houses so situate, under the Rules and Provisions of Indian Act XIV. of 1856, Ordinance 2 of 1879, Ordinance 9 of 1887, and Ordinance 1 of 1888.

The first ground of contention that the President of the Municipality had no jurisdiction to direct a prosecution, except

[*a.*] *Esdaile* v. *Visser*, 13 L. R. Ch. Div. 421?

[*b.*] See *Hermitage* v. *Kilpin*, 9 L. R. Ex. Div. 207-8, *per* CLEASBY & POLLOCK, B.B.

[*c.*] But see *per Goldney*, J. *in Regina* v. *Khoo Kong Peh* [17th October, 1889] *infrà*.—J.W.N.K.

FORD, C. J. 1888.

CASHIN v. MURRAY.

under the provisions of Section 265 of Ordinance 1 of 1888, was the only one argued before me, it being evident that if the appellant succeeded upon this point there would be no need for going into the other questions.

The facts of the case as proved or admitted are, that the President did direct a prosecution in writing, without any direction or approval from the Commissioners either by bye-law or otherwise, unless such direction or approval was rendered unnecessary, or to be implied from Sections 258, 244 of the Ordinances. The various sections are as follows:—

Notices.

244. Notices orders and other documents under this Ordinance may be in writing or in print or partly in writing and partly in print and where any notice order or document requires authentication by the Commissioners the signature thereof by the President shall be sufficient authentication.

Subject to control by the Commissioners powers of Commissioners may be exercised by the President.

258. Subject to the provisions of this Ordinance and of any bye-laws made under this Ordinance for the regulation of the exercise by the President of the duties of his office the President may exercise in the name and on behalf of the Commissioners all or any of the powers and discretions which by this Ordinance are vested in and exerciseable by the Commissioners.

Commissioners may direct prosecution.

265. The Commissioners may direct any prosecution for any offence against the provisions of this Ordinance or of any rules or bye-laws made thereunder and may order the expenses of such prosecution to be paid out of the Municipal Fund and no such prosecution shall be instituted except by the direction or with the approval of the Commissioners.

Like a good many other Acts of Parliament, these clauses are not framed so that "he who runs may read," but so much I think is clear that Section 244 has reference only to acts which have been authorised by the Commissioners, the notice, order or document emanating which would ordinarily require their signature. In this case the President's signature is a sufficient authentification of the document; it need not be signed by the Commissioners, but that this cannot extend to authorising the acts to which the documents relate, apart from the President's power to do therein, is I think clear.

The other of the two cited Clauses, 258 is certainly a little ambiguous, but under any circumstances I should be slow to let an ambiguous clause over-rule a clause so clear and direct as 265. And the more so as, if I constructed its ambiguous terms in favour of the respondent, I should produce the extraordinary result of giving the President really absolute power to do as he pleased, and render Section 244 meaningless whenever he so desired. Such a power to be maintained should be given in express terms if at all. I am further relieved from such a construction by the consideration of the marginal note to Clause 258 which in the Colony, being read with the bill is a part of the Ordinance, although this is a more doubtful point in construing English Acts of Parliament [*a*]. That note has it:—"Subject to

[*a*.] See *Re Venour's Settled Estate*, 2 L. R. Ch. Div. 522, 525, and *Sutton* v. *Sutton*, 22 L. R. Ch. Div. 511.

the Control of the Commissioners" and therefore it seems to me, that only by a bye-law or some other way can the Commissioners delegate the powers in suitable cases given to them by Section 265; but improperly they thought by a general direction to relieve themselves and confer on the President the power of instigating the petty class of prosecutions of which the present is an instance.

At the time of this prosecution no such power had been given, and I must therefore set aside this conviction.

Conviction quashed.

MICHELL *v.* FRENCH.

Rule 211 of the British Consular Court in Bangkok, requires the Consul to exercise a discretion, as to whether he will file or not a power of attorney given by a suitor in the Court to a Barrister to appear for him as Counsel in a cause—and his exercising that discretion and filing or refusing to file the power is not merely a ministerial act.

The law to be deduced from the existing authorities on the subject is, that upon grounds of general public convenience a Judge is not liable in the form of an action for damages for acts done or words spoken in his judicial capacity, unless such acts or words are done or uttered without jurisdiction and with knowledge of such want of jurisdiction. The principle also covers things omitted to be done.

Although the form of a special plea is the usual one by which a defence that the defendant acted judicially is raised, yet when the facts in the statement of claim shew a state of things upon which the legal question can be at once raised, a demurrer thereto is not only allowable, but the better form of proceeding.

An amendment which will amount to a different state of facts from those in the statement of claim and disclosing a new cause of action—and fresh facts being admittedly intended to be inserted without reference to the plaintiff who is out of the jurisdiction—will not be allowed.

This was an action to recover $50,000 damages for assault and trespass, and for an injunction. The statement of claim alleged that the plaintiff was a Barrister of the Middle Temple, resident in Bangkok, having special leave from the King of Siam, to carry on private practice as a Lawyer; that the defendant was the British Consular Judge at Bangkok, and an action was pending before the Consular Court in which one Sultan Mydeen was a party; that the plaintiff appeared as Counsel for the said Sultan Mydeen, and in pursuance of Rule 211 of the Consular Court, applied to the defendant to file a power of attorney from the said Sultan Mydeen empowering him to appear as his Counsel in the cause; that the defendant refused to file the power, and on the plaintiff insisting on being heard, the defendant ordered him to be removed from the Court which was accordingly done. This was the trespass and assault complained of, and in respect of which the damages were claimed, and the injunction was prayed to restrain the defendant from repeating the said trespass and assault.

The defendant demurred to "so much of plaintiff's claim as has reference to his acts and omission in his capacity of Judge of the Consular Court."

The case was heard on the 8th January and on this day.

Bonser, [*Attorney-General*] for the defendant, in support of the demurrer, contended that what was done by the defendant

FORD, C.J. 1889.

MICHELL v. FRENCH.

was done in his capacity of Judge, and that it was not possible to separate his duties as being ministerial merely as regarded the filing of the power of attorney, and judicial as to hearing the cause. That an action did not lie against a Judge for any act or omission of his done judicially; nor could an injunction be issued against him. He cited *Day* v. *Brownrig*, 10 L. R. Ch. Div. 302; 1 Daniel Ch. Prac. 527; *Floyd* v. *Barker*, 12 Coke 23; *Bushell's Case*, 1 Mod. 119; *Hammond* v. *Howell*, 2 Mod. 219; *Gronveldy* v. *Bouwell*, Salk. 395; *Mostyn* v. *Fabrigas*, 1 Smith's L. C. 668; *Pulido* v. *Musgrave*, 5 L. R. App. Ca. 102; *Garnett* v. *Farrans*, 6 B. & C. 611; *Calder* v. *Halket*, 3 Moo. P. C. C. 28; *Taafe* v. *Downes*, *ibid* [note]; *Houlder* v. *Smith*, 9 L. R. Q. B. 170; *Adolphin* v. *Ellis*, 14 Q. B. 841; *Tozer* v. *Child*, 6 E. & B. 289; *Ashby* v. *White*, Ld. Raymond, 938; *Kemp* v. *Neville*, 10 C. B. [N. S.] 523; *Fray* v. *Blackburn*, 3 B. & S. 576; *Munster* v. *Lamb*, 10 Q. B. Div. 588; *Scott* v. *Stanfield*, 3 L. R. Ex. 220; *Willis* v. *McLachlen*, 1 L. R. Ex. 376; *Queen* v. *Jordan*, 36 W. R. 589, affd. *ibid.* 797.

Groom, for the plaintiff in support of the statement of claim contended, that the filing of the power was merely ministerial; that the defendant was not acting judicially when he refused to file it, or to allow the plaintiff to appear, and turned him out. He referred to Sections 30 and 32 of the Siam Order in Council, 1856; Sections 3 and 4 of the Orders in Council, 1886; *Davidson* v. *Ord*, 1 Kyshe, 205; 6 & 7 Vict. [1843] Section 7; 7 Jac. 1. c. 5; 21 Jac. 1. c. 12; 42 Geo. III, c. 85, Section 6; 11 & 12 Vict. c. 44, Section 18; *Mostyn* v. *Fabrigas*, [Suprà] 623, 637-8; *Calder* v. *Halket*, [Suprà]; *Houlder* v. *Smith*, 19 L. J. Q. B. 172; *Garnett* v *Farrans*, [Suprà]; *Taafe* v. *Downes*, [Suprà]; *Blarrain* v. *Scott*, 3 Camp. 388; *Watson* v. *Bodell*, 14 L. J. Ex. 281; *Clarke* v. *Bradlaugh*, 8 L. R. Q. B. Div. 63; *Porcheste* v. *Petrie*, 3, Doug. 273; *Ashby* v. *White* [suprà] *Ferguson* v. *Kinmore*, 8 Cl. & Fin. 251; *Miller* v. *Hope*, 2 Shaw's App. Ca. 125; Rules 210 and 211 of the Consular Court at Bangkok; *Bridgman* v. *Holt*, Show. P. C. 122; *Brazier* v. *McLean*, 6 L. R. P. C. 379; *Pollard's Case*, 2 L. R. P. C. 106.

Bonser, replied.

Cur. Adv. Vult.

January 21. *Ford*, C.J. This is an action by Mr. Michell an English Barrister in the employ of the King of Siam against the Vice-Consul of Siam for damages for an assault and a nonfeasance of duty under the following circumstances taken from the statement of claim. This statement must be taken as true for the purpose of this part of the case, the objection to plaintiff's claim having been taken by demurrer, upon the ground that the acts or omissions complained of were done or omitted in the defendant's judicial capacity, whether acting as Consul or otherwise. After certain allegations, [which, with the exception of a reference to certain rules referring to practice of Counsel and regulating the right of attorneys and agents to appear for suitors, do not seem to me material for the decision of the question before me] the statement of claim alleges, [read paras. 7, 8, 9, 10, 11, 12,

and 13 and prayer] these paragraphs certainly seem to me to establish an admission of the plaintiff that what acts the defendant did wrongly and omitted to do, he did or omitted as Judge, or Consul acting at least in a judicial or ministerial capacity, and not as a Justice of the Peace, as the plaintiff contended for as a reasonable inference from his statement. The question therefore becomes reduced to the points raised by the demurrer, whether or not these matters complained of were done or suffered in the defendant's judicial capacity, and whether this, if so, is in law a good defence to an action for damages. The plaintiff has indeed also raised the question whether the defence raised can be taken by demurrer, and contended that it should be specially pleaded, but although the form of a special plea has been the more usual one, I am clearly of opinion that when the facts in the statement of claim show a state of things upon which the legal questions can be at once raised, this is not only allowable but a better form of proceeding.

The two questions then before me, are as follows:—

1.—Were the acts or omissions complained of done or omitted in the defendant's judicial or ministerial capacity; if the latter purely, the demurrer would fail.

2.—If done or omitted in the defendant's judicial capacity, is he exempt from liability to an action for damages?

The 1st is a question of fact; the 2nd a question of law. I am of opinion that having reference to the terms of the rule under which the plaintiff first presented his authority for filing, the act of refusal was a judicial act. The language of the rules requires the authority to be distinct and clear so as to satisfy the Court, &c., and this at least necessitates the use by the Court of some mental process of a judicial character, and I do not know what other meaning to give to the word "Court" here, but that of its Judge for the time being. We have then, before a particular case is called on, a Judge doing, as I think, a judicial act in refusing to file that which should have entitled the plaintiff to appear in the capacity he asked. But were there any doubt about this, it is clear when the legal proceeding was called on, the subsequent act of removing the plaintiff took place during its continuance, and the act of the plaintiff in again tendering his authority after its previous refusal, was an act of interruption, and his removal from the Court, however unnecessary, insulting and ill-advised, was an act of the Judge in a judicial proceeding, a judicial, if not a judicious act.

The 2nd question is whether this having been so, its character affords a sufficient answer to the plaintiff's remedy by action. A proper summary of the law to be taken from the numerous cases cited, seems to me to be this, viz.—*That upon grounds of general public convenience a Judge is not liable in the form of an action for damages, for acts done or words spoken in his judicial capacity, unless such acts or words are done or uttered without jurisdiction and with knowledge of such want of jurisdiction.*

FORD, C.J. 1889.

MICHELL v. FRENCH.

The cases are not quite uniform on the subject but this is, I think, the fair conclusion to be drawn from the chain of authority laid before me, and the principle covers things omitted as well as acts done or words spoken. Now, I do not see in the plaintiff's statement of claim any sufficient allegation that the acts or omissions complained of were without such jurisdiction, and so to the defendant's knowledge, or any statement of facts which shews them to have been so. The nearest approach to such an allegation is in para. 13 where they are said to have been done or omitted capriciously and maliciously, and not under the powers of any Statute or Ordinance. This allegation, however, I apprehend, by no means exhausts the possible foundation of a Consul's judicial jurisdiction, and caprice and malice are compatible with jurisdiction or a *bonâ fide* belief in it. The statement of facts in the use made of the rules of the Court and particularly that part of Rule 211 to which I have alluded, is inconsistent with an absence of jurisdiction to refuse an authority to act for another, and there is nothing I think in the fact to establish that when ordering the plaintiff's removal he was doing an act outside his ordinary jurisdiction. The demurrer must therefore be allowed, but as the defendant has chosen this method of raising his defence and thereby admits a state of fact, which if true would, in my judgment shew he had committed an act unnecessarily insulting to the plaintiff and lacking prudence and discretion, it will be allowed without costs.

A secondary question arises whether this demurrer is good to that part of the plaintiff's claim which alleges that the defendant as Consul is required to perform certain ministerial acts and duties and amongst them to protect and support all British Subjects in Bangkok in the enjoyment and exercise of all rights and privileges which are in any way conferred upon them, &c., and to the breach alleged in the act or omission before complained of. I am quite unable to separate the act or omissions complained of from the judicial character in which the defendant did or omitted to do them. Demurrer will therefore be good to the whole statement of claim.

Demurrer allowed.

5th February. *Groom*, applied for leave to amend the statement of claim.

Bonser, [*Attorney-General*] opposed the application.

Ford, C.J. I do not think I ought to allow an amendment of the statement of claim in this case because the proposed amendment amounts to a different statement of facts from those in the statement of claim, and the fresh statements are made admittedly without any reference to the plaintiff since the hearing of the demurrer, and some of them, particularly those contained in Section 6 of the proposed amendment, amount to a new cause of action. This statement amounts to this, that the defendant did not in his judicial capacity do the acts complained of, but that in some other capacity and in pursuance of a previous conspiracy between himself and others he determined that the plaintiff should

not practice in his Court and therefore ejected him. It seems to me that the plaintiff will not be deprived of a remedy for his alleged wrongs by not allowing the amendment in this action, but will have a fresh right of action upon the new facts that he desires to import into this case. For these reasons I must refuse this application and with the usual result as to costs.

FORD, C. J. 1889. — MICHELL v. FRENCH.

REGINA *v.* BATTY.

PENANG. PELLERAU, J. 1889. January 15.

Misappropriation itself or mere uses of money or goods is not a crime—to be so it must be done *dishonestly*.

To decide the question whether it was dishonest or not, the Jury should take into consideration whether the accused had the *intention* of returning the money and *the power and the means* of doing so, or whether he intended making an unlawful gain of property, or had no grounds for believing that he would be able to return it when required.

The prisoner G. T. Batty, was charged before a Special Jury with criminal breach of trust as a public servant under Section 409 of the Penal Code. The evidence shewed that the prisoner while acting as Assistant Postmaster-General of Penang, being entrusted with a sum of money in his official capacity to meet the daily disbursements of the Office, appropriated $348.02 thereof to his own use. On a surprise-survey being held over his accounts by the Auditor-General the deficiency was discovered, whereupon the prisoner admitted he had used that sum in paying his pressing liabilities which he had incurred owing to his having had to work three months without salary, but that the money would be replaced. No surprise-survey on such an advance had ever been held before. The morning after the discovery the amount was paid up, but this was probably by the prisoner's sureties. There was no falsification or concealment of any kind. Sections 24, 25, 405 and 409 of the Penal Code, are as follows:—

"Dishonestly." 24. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly."

"Fraudulently." 25. A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise.

Criminal breach of trust. 405. Whoever being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

Criminal breach of trust by public servant, or by banker, merchant, or agent. 409. Whoever being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant, or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

D. *Logan*, [*Solicitor-General*] for prosecution.

PELLEREAU, J. 1899.

REGINA v. BATTY.

Adams, for defence contended, there was no evidence that the prisoner acted *dishonestly* which was the essential portion of the charge. Mayne & Serjeant on P. C.—notes to Section 405 *et seq.*, *Regina* v. *Moah*, 25 L. J. M. C. 66; *Regina* v. *Cooper*, 46 L. J. M. C. 89; *Regina* v. *Newman*, 51 L. J. M. C. 87. The prisoner merely borrowed the money and intended to repay it when matters were adjusted at the end of the month.

Pellereau, J., in summing up to the Jury said the facts of the deficiency and the amount were not denied, and the real questions for the Jury to decide were the misappropriation, and whether it was made dishonestly. [He then read Sections 24, 25 and 405 as above set out and proceeded to say] that *misappropriation* by itself was not a crime though it might lead to dismissal from the Service or a civil action. To be criminal under the Code the misappropriation must be *dishonest*. If the Jury thought from all the circumstances of the case that it was not dishonest, or if they had a doubt, a serious doubt whether it was dishonest, they should acquit; but if they were satisfied from the circumstances that it was dishonest, they should convict. To decide this question they should take into consideration whether the prisoner had the *intention* of returning the money and the *power and the means* of doing so: or whether he intended to make an unlawful gain of property, or had no grounds for believing that he would be able to return it at any time when called upon to do so,—in the former of which cases they might come to the conclusion that he was not guilty, and in the others that they would be justified in finding him guilty. Take the case of an official using Government money during the day knowing he could at once replace it by sending home for private funds and finding on doing so that thieves had abstracted the whole of those private funds and his means of replacing the money used by him. Could that official be convicted of criminal breach of trust? If that were so, then mere user of the money even for the most temporary purpose was criminal. But he understood the law to be different in such cases and it was to the prisoner's intention, power and means, that they had to look in considering their verdict.

D. *Logan*, [*Solicitor-General*] hereupon called the attention of the Court to Section 403, Explanation 1, that "a dishonest misappropriation for a time only is a misappropriation within the meaning of this section," and instancing a person finding on the road a cheque bearing a blank endorsement which he knows belonged to Z., but pledges it with a banker intending however at a future time to restore it to Z.

Pellereau, J., in reply remarked that *that* case was clearly distinguishable from the present, as there, there never was at any time rightful or legal possession on the part of the finder, and he had made use of the cheque in a manner which put it beyond his control to return it to Z., except on the banker being paid off, and there was nothing from which the Jury could gather that he believed, and had reasonable grounds for believing, that he had the means of redeeming it.

Verdict [unanimously]: *Not guilty.*

MOSES *v.* LOW KIM PONG.

SINGAPORE.

GOLDNEY, J.
1889.

February 12.

A defendant who trespasses on the land of a plaintiff, *e.g.* by building a house thereon, has no right to insist that the plaintiff be merely awarded a sum of money for the value of the land taken in lieu of a mandatory injunction on him [defendant] for removal of the trespass.

Krehl v. *Burrell*, 11 L. R. Ch. Div. 147, followed.

The facts giving rise to this case sufficiently appear in the judgment.

Drew, for plaintiff.

Donaldson, for defendant.

Cur. Adv. Vult.

February 20th. *Goldney*, J. This is an action by the plaintiff, as owner of certain lands, to restrain the defendant from erecting any building on the top of a wall, her property, and for an order commanding the defendant not to encroach upon the plaintiff's land, and to remove any building so encroaching upon the said land and premises, and damages for the wrong complained of. The defendant, who is the owner of the adjoining premises, did not at the hearing, dispute that in erecting a certain house, he had built the last wall of the house on the top of a wall, the property of the plaintiff, but contends that as the actual damage suffered by the plaintiff is so slight, she should be compensated by a pecuniary sum, and that the injunction asked for should not be granted; and further states that the plaintiff is estopped from asking for an injunction, by reason of her non-interference during the building of the wall in question, although she was aware that a trespass was being committed. The defendant also asks, by way of counterclaim, that he may be permitted to enjoy so much of the plaintiff's wall, as he has built upon, without disturbance by the plaintiff, and that the plaintiff be ordered to execute a proper conveyance thereof to him, and in the alternative, if an injunction is granted, that he, the defendant, may be granted a full compensation by the plaintiff in respect of the expense of pulling down and re-erecting the buildings erected by him on the said wall, and the structural alterations to his house rendered necessary thereby, and the loss arising to him from the delay caused thereby. Dealing first with the counterclaim. In my opinion there is no evidence of acquiescence in the trespass, or negligence in not discovering and immediately stopping the trespass, which would deprive the plaintiff of her rights to come to this Court for relief. Acquiescence or negligence such as will debar the plaintiff from recovering must be proximately connected with the result. The principles upon which Courts act in cases where the defence is that the plaintiff has by his conduct disentitled himself from insisting on his rights, is laid down in the case of the *Bank of Ireland* v. *Trustees of Evans' Charities*, 5 H.L.C. 389— In the case before me, the non-interference by the plaintiff, who was not the occupier of the premises, was not the proximate cause leading the defendant to build his house on the top of another person's wall. There was no mistake; the reason it was so built was that by utilising the plaintiff's wall and making it part of the

GOLDNEY, J. 1889.

MOSES v. LOW KIM PONG.

wall of his house a considerable expense was saved. As to the alternative counterclaim that the plaintiff should pay the expenses defendant has incurred in committing a trespass on the plaintiff's land is a proposition which has neither law nor reason to support it. The real contention between the parties is whether the defendant can insist upon the plaintiff being satisfied with a pecuniary compensation instead of the relief she asks for, viz., that the trespass which the defendant has committed, and which is a continuing trespass, shall be put an end to. It was urged by the defendant that the balance of convenience is in favour of the defendant. To pull down the wall and to build another wall would cost the defendant a considerable sum of money, while the value of the plaintiff's property has hardly been affected by the trespass. Assuming that this Court has similar powers to those which the Equity Courts in England have under what is known as Lord CAIRNS' Act [which I doubt], I cannot find that those Courts have ever exercised this power of awarding damages as a complete compensation for the injury complained of in cases of a continuing trespass such as this is. It would be to allow a servitude to be created by an act of trespass. As the *jus servitutis* necessarily diminishes the interest or estate in the servient tenement, it can be created by those only who have the power of making an alienation of the tenement which certainly a trespasser has not. This is not a case of mere inconvenience and temporary interruption of the plaintiff's right, but in creating what may be called a servitude *onus ferendi*, which would impose upon the plaintiff, the owner of the servient tenement, the obligation of keeping in repair her own wall which is used for support, and also the obligation to do nothing to diminish the use or convenience of the servitude to the defendant, the owner of the dominant tenement. I cannot distinguish this case from the case of *Krehl* v. *Burrell*, 11 L. R. Ch. 147, where, in giving judgment, L. J. JAMES, says :

> "The plaintiff has a plain legal right, and is entitled to have the order of Court which the Master of the Rolls has made to enforce his right. It was not intended, and never could have been intended by the Legislature, in giving a right to damages under Lord CAIRNS' Act, to compel a man who is wronged to sell his property to the person who has wronged him. No such right as is claimed by the appellant can exist in this country, unless specially given by Act of Parliament. If it were otherwise, the consequence would be that a person would have a right to do a wrong to his own neighbour at a price to be fixed by the Court."

I grant a mandatory injunction in accordance with the terms of the prayer, with nominal damages of $5, and, following the order made in *Smith* v. *Smith*, 20 L. R. Eq. 505, direct that it is not to operate for two months. The defendant to pay the costs of this suit.

MASIAMAH *v.* PACHAK.

SINGAPORE.

GOLDNEY, J. 1889.

April 6.

When the Court has granted letters of administration to an estate, to a person, no one has a right to detain such letters from such person.

A party entitled to land is entitled to the Title Deeds thereof; and the proper person to sue in detinue for their detention is the person entitled to the legal interest in the land.

GOLDNEY, J. 1889.

MASIAMAH v. PACHAK.

Detinue for Title Deeds. The facts sufficiently appear in the judgment.

Drew, for plaintiff.

Donaldson, for defendant.

Cur. Adv. Vult.

April 8th. *Goldney*, J. This is an action in detinue brought by the plaintiff, the administratrix of Lanasah, against the defendant for the recovery of the letters of administration granted to the plaintiff, and also the title deeds of some land which, as the plaintiff alleges, form part of the estate of Lanasah. The defendant admits he is in possession of the documents in question. As to the letters of administration, there seems to be no defence. The defendant has no right to detain the letters of administration from the person to whom the Court has granted them. As to the title deeds, the general rule of law is that the party entitled to the land is entitled to the possession of the deeds. And in an action in detinue for the title deeds of an estate, the proper party to sue is the person entitled to the legal interest in the estate. *Atkinson* v. *Baker*, 1 T. R. 229, *Plant* v. *Cotterell*, 29 L. J. Ex. 198. After considering the evidence, I have come to the conclusion that the legal interest in the land is in the plaintiff, the administratrix of Lanasah, to whom the land in question was conveyed. I think the defendant has failed to make out the plea of prescription, even if such a plea under the circumstances of this case is maintainable. *Plant* v. *Cotterell*. It may be a question whether the defendant is not entitled to some relief in Equity, so far as the possession of the land is concerned, but a defence or counterclaim of that nature has not been pleaded. I have therefore come to the conclusion, that the defendant has made out no defence to this action. Verdict must be given for the plaintiff with costs, and for a return of the letters of administration and the said title deeds within 21 days, or in default of such return, $300 damages.

ETAM *v.* BABOO.

PENANG.

WOOD, J. 1889.

April 15.

When a case is remitted to a Magistrate under Section 25 of the Appeals Ordinance 12 of 1879, it is the duty of the Magistrate to take all the evidence tendered by both sides and to return the further evidence to the Supreme Court for that Court to decide on the evidence. It is no part of the duty of the Magistrate to pronounce an opinion on such further evidence nor is he justified in refusing to take further evidence because he is satisfied.

The appellant was on the 6th December, 1888, convicted by Messrs. E. M. Merewether and J. W. Norton Kyshe, Magistrates, for that she "the said Etam on the 29th day of October, "1888, at Brick Kiln Road, in Penang, did kidnap one Mah a "minor under the age of 16 years from the lawful guardianship "of one Baboo, and thereby did commit an offence punishable "under Section 363 of the Penal Code."

The Appeal came on for argument before *Wood*, J. on the 15th April, 1889.

WOOD, J. 1889.

ETAM v. BABOO.

Adams, for Etam, the appellant contended, that there was no reasonable proof of the girl Mah being under the age of sixteen years, or of being under lawful guardianship.

Ross, [*Acting Solicitor-General*] submitted that there was *primâ facie* evidence on both points. Baboo called the girl his "adopted child" and said her age was 12, but if the Court was not satisfied he asked that the case be remitted to the Magistrates to take evidence on both points.

Wood, J. remitted the case to the Magistrates with directions that further and more satisfactory evidence be taken [1] as to the age of the girl; and [2] as to the circumstances under which she was resident with and under the guardianship of the prosecutor; regard being had to the terms of Section 361 of the Penal Code where it is enacted that the guardian should be the lawful guardian including a person lawfully entrusted with the guardianship of the minor.

The Magistrates accordingly on the 10th of May, 1889, took further evidence and stopped the appellant's Counsel producing his other witnesses as they were of opinion that Baboo had failed to prove his guardianship. This further evidence having been sent to the Supreme Court, the Appeal came on for further argument before *Wood*, J. on the 15th July, 1889.

Adams, having read the further evidence asked that the conviction might he quashed.

Ross, on behalf of the Crown offered no objection.

Wood, J. In the case heard on the 15th April, 1889, the Magistrates were ordered to take further evidence as to guardianship and age. They return the case having taken further evidence as to guardianship, having also decided in their opinion the guardianship was not proved and on that account, not taking other additional evidence offered on the part of the appellant. I think that the evidence supplied is sufficient to shew that the supposed guardian was *not* a lawful guardian, but I must observe that the Magistrates have a little exceeded their duty in coming to any conclusion upon the evidence taken before them, having regard to Section 25 of the Appeals Ordinance, 1879, which enacts that "after further evidence supplied, judgment shall be given by the Court," that is the Court of Appeal. I must also add that in strictness the Magistrates ought to have complied with the directions of the Court and taken further evidence, if tendered, as to age.

Conviction quashed.

MOOTOO *v.* MUNICIPAL COMMISSIONERS.

PENANG.

WOOD, J. 1889.

April 16.

A contract formed by the tender by a person for a lease of a Bath House or Market and its acceptance by the party calling for the tender, is a contract which confers *an interest in land*, which interest cannot be put an end to by re-entry, unless the tender so provides.

A contract for "Market Stalls" is a contract for the supplying of the *stalls* to the market and not merely of the market square, or a space in which stalls might be erected.

Where tenders were called for three distinct subjects, as a Bath, a Market and a Public Latrine—the terms of holding of which differ according to the particular subject-

matter—it is improper to include them all in one subsequent lease; and the person sending in the tender is not bound to accept such lease.

Where it appeared that the tenders provided that the person sending it would enter into a formal lease "with similar conditions to those at present in existence" and it appeared that as regarded the Bath there was a previous lease in existence, but as regarded the Market and Latrine there never had been such lease or conditions,

Held, that one lease of the three subjects containing covenants and conditions which were in existence only as to the Bath, was not a lease as regarded the Market and Latrine, which the person making the tender was bound to accept.

This was an action to recover damages for breach of contract and money had and received by the defendants to the plaintiff's use. The defendants were the owners of a certain Bath, Market and Public Latrine, in Pitt Street, in Penang. The Bath had been previously let for a year at a time to various persons, and a formal lease on each of these occasions had been made and executed. The Market and Latrine were new buildings and were first notified to let as from 1st January, 1888. With a view to obtaining lessees for that year of all the three buildings, the defendants caused to be advertised in the local papers, on 10th December, 1887, the following notice:—

"The Municipal Commissioners invite separate tenders for the renting of the following:

Pitt Street, Bath House.
———— Latrine.
———— Stalls.

Full particulars can be obtained at the Municipal Office, Town Hall. Tenders will be received by the undersigned up to 4 p.m. on Tuesday, the 20th instant. The Commissioners do not bind themselves to accept the highest or any tender.

By Order.
J. W. HALLIFAX,
Secretary to the Municipal Commissioners."

Municipal Office,
Town Hall,
Penang, 10th December, 1887.

Forms of tenders were provided by the defendants to all persons desirous of sending in tenders, and among these, was the plaintiff who was provided with three separate forms of tenders. The plaintiff accordingly sent in his three separate tenders for each of those buildings on the morning of the 20th; and on the 22nd instant his tenders were accepted by the defendants and duly notified to the plaintiff. The tenders sent in by the plaintiff for the *Stalls*, was as follows:—

"Form of tender for the leasing of the Municipal *Bazaar Stalls*, in Pitt Street, from the 1st day of January to the 31st day of December, 1888.

I hereby undertake to pay to the Municipal Commissioners of Prince of Wales' Island the monthly rent of dollars seventy-five only, [$75] subject to the following conditions—

Bazaar *Stalls*:

For the *area* allowed to be used for Bazaar *Stalls*, the renter shall not collect a toll of more than one cent. per superficial foot per diem.

No meat or fish to be sold at these *Stalls*.

The *premises* to be kept in repair by the Municipal Commissioners.

WOOD, J. 1889. — MOOTOO v. MUNICIPAL COMMISSIONERS.

In the event of my tender being accepted, I hereby undertake to pay two months' rent into the Municipal Treasury on or before the 31st day of December, 1887, and also before the last day of each subsequent month, to pay a further sum of one month's rent, the last payment being made on or before the 31st day of October, 1888.

To enter into a formal agreement under *similar conditions to that at present in force*, and to pay the amount of stamps required for the lease, and expense, if any, of drawing up the same.

In proof of my good faith, I hereby enclose Penang Bank Notes to the amount of twenty-five dollars, it being understood that in the event of my tender being accepted they form an instalment of the first payment, and in the event of my tender being refused are to be returned to me without any deduction; if from any cause I should fail to comply with the terms of this tender, they become absolutely forfeited to the Municipal Fund.

[*Signed*] MOOTOO."

The tenders for the Bath and Latrine were in the same form with the exception of a few alterations, in details, to suit the particular subject-matter of the tender. On 30th December, 1887, the plaintiff paid the defendants a sum of $310 for which the defendants gave him a receipt as "being rent of *Stalls*, Latrine and Bath, in Pitt Street, for January, 1888." They granted like receipts for February. The plaintiff was let into possession of the Bath and Market, which latter however, were provided with no *Stalls* of any kind. The Latrine was useless as it was unprovided with utensils which the defendants had agreed to supply, and which on their way out had been lost by the foundering of the s.s. *Sikh* off Ceylon. The plaintiff on several occasions after being let into possession, petitioned the defendants pointing out [inter alia] that the *Stalls* had not been provided, and the Latrine was wholly useless to him. The defendants caused a single lease to be prepared of all the three buildings which they tendered to the plaintiff for execution, but which he declined to execute as he considered he had not got what he bargained for. The lease so tendered to the plaintiff [omitting portions immaterial to this report], was as follows:—

"They the lessors [the defendants] do by these presents grant, demise, and lease unto the lessee, his executors, administrators and assigns, All that Municipal building lately erected in the centre of Pitt Street, in George Town, in front of the Pitt Street Station, comprising Bath and Latrine compartments, and *open spaces for Bazaar Stalls* together with all the appurtenances to the said building hereby demised or intended so to be ..... To Have and To Hold the premises hereinbefore expressed to be hereby demised and granted unto the lessee, his executors, administrators and assigns, for the term of twelve months from the First day of January instant, until the Thirty-first day of December next ensuing. Yielding and paying therefor unto the lessors their successor or successors in office and assigns, the sum of $930 on the execution of these presents, and thereafter during the said term, the monthly rent of $310 payable monthly in advance on the first day of each month ..... And also yielding and paying in the event of, and immediately upon, the said term being determined by *re-entry* under the proviso hereinafter contained, a proportionate part of the said rent, which may for the time being be unpaid up to the day of such re-entry ..... And the lessee doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessors, their successor or successors in office and assigns, that he the lessee, his executors, administrators or assigns ..... ***will not assign***, transfer, sublet, or set over, or otherwise part with the said premises or any

portion thereof, without the previous consent in writing, of the lessors, their successor or successors in office or assigns, but such consent shall not be withheld in favor of a respectable and responsible tenant or respectable and responsible tenants. And further, that the lessee, his executors, administrators and assigns will not levy, charge, or take any tolls, fees, or duties other than, or in excess of those contained in the schedule hereto, or permit any raw meat or fish to be sold in any part of *the open spaces reserved for Bazaar Stalls*, or use or permit other persons to use the said building for any purpose other than for bathing, latrines and bazaar stalls ..... Provided always, and these presents are upon the express condition, that whenever *any part* of the said rent in advance *hereby reserved* shall be unpaid for ten days, or if and whenever there shall be a breach of *any* of the *covenants* and agreements by the lessee, his heirs, executors, administrators or assigns to be performed as *hereinbefore contained*, the lessors, their successor or successors in office and assigns, may, at any time thereafter deliver to the lessee, his executors, administrators or assigns or leave at his place of business a notice in writing, under the hand of the Secretary for the time being of the lessors, signifying their intention to determine the said term, *and immediately upon the delivery or leaving of such notice as aforesaid, the said term shall absolutely cease and determine*, but without prejudice to any right or remedy which may previously have accrued."

The plaintiff declined to sign the lease. The defendants on 11th April sent him a notice informing him that unless the lease was signed by him within three days, he would have to quit the premises on 30th April. The plaintiff still declined and he was served on 17th April with formal notice to quit on 30th. On 30th April the defendants *ejected* the plaintiff, and *took possession* of the premises, whereupon this action was brought. The defendants in their defence submitted that all they were bound to provide in the Market was *spaces* in which stalls could be placed; as regarded the Latrine they admitted their breach, but claimed to apply the rent paid on this account towards arrears of rent they claimed for the Bath and Market. They also counterclaimed for further alleged arrears of rent in respect to the Bath and Market.

Van Someren, for the plaintiff contended, that as regards the Latrine, the defendants had wholly failed to give the plaintiff what they contracted for when they accepted his tender and received his rent, as the building was wholly useless as a Latrine by reason of the omission or inability of the defendants to provide the utensils; that as regarded the Market, they had also failed to give the plaintiff what they had agreed to give him as it was "*the Stalls*," and *not* mere *open spaces for stalls* which was the subject-matter of that tender and its acceptance. That that being so, the defendants had no right to expect the plaintiff to sign the lease nor to eject him from the premises. He further contended, the plaintiff was not bound to accept one lease for the three things; that the covenant against assignment and clause for re-entry were not provided for in the tenders, and as for the general clause in the tender for "entering into a formal agreement under *similar conditions to that at present in force*," it was clear the clause was meaningless as it had been shewn, as regarded the Latrine and Market, there never had been a previous lease and there were no conditions in force to which the new lease could be made similar. The plaintiff was justified in refusing to accept the lease tendered, and the defendants had no right to turn him

WOOD, J. 1889.

MOOTOO v. MUNICIPAL COMMISSIONERS.

out, but were themselves guilty of a breach of contract. The claim to arrears of rent made by the counterclaim depended on the stall and lease questions, and if these were decided in favour of the plaintiff, the counterclaim failed.

Ross, for defendants contended, that the *open spaces* for stalls was all that the defendants had contracted to give. The stalls themselves should be erected by the plaintiff or those selling their goods in the market. The omission to supply utensils for the Latrine was a breach of contract on the defendants' part, but the plaintiff suffered no damage thereby; the rent he had paid would be applied towards the rent of the market which the plaintiff had omitted to pay as he claimed that *stalls* should be provided. He contended further, that the former lease of the Bath had both the covenant against assigning and a proviso for re-entry, and there was no reason why in order to save expense to the plaintiff [who had to pay for the preparation of the lease] the three things should not be included in one lease and these then existing conditions inserted in it. He admitted the counterclaim depended on the decision of the previous question.

Van Someren, replied.

Wood, J. said there had clearly been a breach in respect to the Latrine and the defendants were bound to refund the plaintiff the amounts he had paid for it. He was of opinion that the defendants had also been guilty of a breach of contract in respect to the Market, as "Market *Stalls*" were the subject of the contract [constituted by the tender and its acceptance] and not merely open spaces for the erection of stalls. He considered the plaintiff was not bound to accept the lease as it included three distinct subject-matters and contained covenants not provided for by the tender. The lease being an improper one all that remained was the contract formed by the tender and its acceptance and payment of rent; that contract gave the plaintiff an *interest in land*, and under it the defendants had no power of re-entry so as to put an end to that interest. Even if it had been made out, that there was a breach of contract on the plaintiff's part, [which it had not been] the defendants' remedy was by action for damages for such breach and not to eject the plaintiff. On the whole he thought the justice of the case would be met by a verdict for the plaintiff with $500 damages and costs.

Judgment for plaintiff for $500 *damages and costs.*

TAN KIM KENG & ANOR. *v.* MUNICIPAL COMMISSIONERS.

PENANG.

WOOD, J. 1889.

May 2.

Riparian rights may be acquired on an *artificial* water-course by user, where the water-course is made or intended to be made for a *permanent* purpose.

Aliter where the purpose was only a *temporary* one.

Where a water-course was made in 1808 off a natural stream and by means of a dam in this stream, carried a large portion of its water down the course, and supplied a large reservoir which supplied a town and its shipping with water, and the plaintiff [and his predecessors] having built in 1840 a flour-mill midway between the artificial course above, and the natural stream below, and by means of a lead or aqueduct diverted

a portion of the water in the artificial course on to his mill, which after overshooting the water-wheel by which the mill was worked, passed on to the natural stream;

Held, that in the absence of evidence that the artificial water-course was originally made for a temporary object, the presumption was that it was made for a *permanent* purpose and the plaintiff and his predecessors in title *had acquired* riparian rights on the artificial course which entitled him to recover damages against the defendants who in 1878, diverted the water higher up the natural stream and thereby discontinued the water-course and prevented the mill from being worked.

Held further, the continuing of the diversion from 1878 down to this date was a *continuing* trespass and the plaintiff therefore barred by the three months' Limitation under the Conservancy Act XIV. of 1856, Section 126.

This was an action begun in 1882 to recover damages for obstructing and diverting a water-course and thereby preventing the working of the plaintiffs' mill. In 1808 the "Committee of Assessors of George Town, Penang," caused the waterfall stream to be dammed up some distance from the foot of the falls and cut an artificial water-course which joined the natural stream a little above the dam. The water-course ran along the hill side on the Northern side of the waterfall valley and emerged from the hill side at the junction of Mount Erskine and Bagan Jermal Roads, ran alongside Burmah Road, a public thoroughfare, and connected itself with a reservoir at Pulo Tikus. The reservoir was fed by this water-course with the water from the waterfall stream, and this reservoir originally by means of open channels, but subsequently by pipes supplied George Town and its shipping with water for domestic and drinking purposes. In 1840, Mr. George Scott, a former predecessor of the plaintiffs, erected a flour-mill on his land situate on the Waterfall Road, the mill standing between the artificial water-course which ran along the hill side and the natural waterfall stream which ran alongside, but below the level of the mill. A mill lead or aqueduct diverted a portion of the water from the artificial water-course above, and brought it on to an overshoot water-wheel which worked the mill, the water on overshooting the water-wheel passed back to the natural stream. This diversion by the lead or aqueduct did not affect the sufficiency of the supply of water to the town and shipping [*a*]. In 1876, the defendants—who had by virtue of the Conservancy Act XIV. of 1856, succeeded the "Committee of Assessors" and in whom were vested by the Act, all water-courses and things connected with the water-works for the supply of water to the town of George Town, Penang—dammed up the waterfall stream much higher up than the original dam and inserted iron pipes of large dimensions into this dam, which, in 1878 began carrying away the whole available water in the natural stream into town, and thereupon they abandoned the artificial water-course and reservior. The water in the artificial water-course being thus cut off there was nothing left for the plaintiffs' mill, which, in consequence had to be discontinued. The plaintiffs thereupon sued the defendants on two occasions prior to this action, but was unsuccessful both times [*b*]. In

[*a*.] The defendants attempted to prove that it did, and that every time it did so, the mill supply was cut off by the letting down of a sluice gate by their servants; but the Court held on the evidence they had failed to prove this.—J.W.N.K.

[*b*.] See *Tan Kim Keng* v. *Municipal Commissioners*, Vol. 1. of these Reports, 470, 478.

WOOD, J. 1889.

TAN KIM KENG & ANOR. v. MUNICIPAL COMMISSIONERS.

September, 1882, they began the present action to which the defendants among other things, pleaded the three months' limitation under Act XIV. of 1856, Section 126. This action—for want of skilled evidence to shew the quantity of water that was being carried away by the large iron pipes and that they were the cause of the water being cut off from the artificial course—had to stand over for many years. The necessary evidence was at last obtained and the case now came on for trial.

The case was heard on the 23rd, 24th, 25th April, 1st May, and on this day.

Ross, for the defendants contended, [1] that the plaintiffs' action was barred by Act XIV. of 1856, Section 126, and cited *Wordsworth* v. *Harley*, 1 B. & Ad. 391; [2] he contended that the artificial course was made by the defendants' predecessors, the "Committee of Assessors," for *their own use* and a *temporary* purpose. The defendants, their successors, had now no further need of it and so had discontinued it—and that no riparian rights could be acquired by user on an *artificial* course made, not for a *permanent* but a *temporary* purpose. He cited *Arkwright* v. *Gell*, 5 M. & W. 203; *Magor* v. *Chadwick*, 11 Ad. & E. 511; *Wood* v. *Waud*, 3 Ex. 748; *Greatrex* v. *Hayward*, 8 Ex. 293; *Beeston* v. *Weate*, 5 E. & Bl. 986; *Gaved* v. *Martyn*, 19 C. B. [N. S.] 732; *Sutcliffe* v. *Booth*, 32 L. J. Q. B. [N. S.] 136; *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300; *Ibimey* v. *Stocker*, 1 L. R. Ch. Ap. 396; *Nuttall* v. *Bracewell*, 2 L. R. Ex. 1; *Holker* v. *Paritt*, 8 L. R. Ex. 107, on App. 10 *ibid*, 59; *Kensit* v. *Great Eastern Railway Co.* 23 Ch. Div. L. R 566, on App. 27 *ibid.* 122; and *Chamber Colliery Co.* v. *Hopwood*, 32 Ch. Div. L. R. 540.

Van Someren, for the plaintiffs contended, [1] that as this was a diversion which began in 1878 and continued the same in 1882 and down to this date, it was a *continuing* trespass, and the plaintiffs were not barred by the three months' limitation under Section 126 of the Conservancy Act XIV. of 1856; and he relied on *Whitehouse* v. *Fellowes*, 30 L. J. C. P. 305; *Sandilands, Buttery & Co.* v. *Municipal Commissioners*, Str. L. R. 309, and *Tan Kim Keng* v. *Municipal Commissioners*, 1 Kyshe, 478; [2] he contended that while it was true the question whether the plaintiffs had acquired any riparian rights on the artificial water-course, depended on whether that course when made was intended for a permanent or a temporary purpose, yet in this case there being at this date no evidence to shew why it was made, except its position and connections, and use for so many years in supplying the town with water, which was a necessity, the presumption was it was made for a *permanent* purpose; he contended that in *Arkwright* v. *Gell*, the object was clearly *temporary*, and referred to *Beeston* v. *Weate*, suprà; *Gaved* v. *Martyn*, suprà; *Sutcliffe* v. *Booth*, suprà; *Nuttall* v. *Bracewell*, suprà; and *Holker* v. *Paritt*, suprà; and in addition he cited the cases of *Powell* v. *Butler*, 5 Ir. R. Com. Law, 309; *Blackburne* v. *Somers*, 5 L. R. [Ir.] 1; *Briscoe* v. *Drought*, 11 Ir. C. L. R. 250; *Rameshur Pershad* v. *Koonj Behari*, 4 L. R. Ap. Ca. 121; *Roberts* v. *Richards*, 50 L. J.

Ch. 297, on App. W. N. [1881] 156; *Coulson on Waters*, 102, 3, 6, 7, 22, 27, 202, 264; *Goddard on Easements*, 65, 71, 292, 3, 8; *Thompson on Limitation*, 62, 65.

Wood, J. said that on the point of the plaintiffs being barred by the three months' limitation, the case of *Whitehouse* v. *Fellowes* shewed this was a *continuing* trespass, and the plaintiffs were not barred. That as regarded the main point, the question whether the plaintiffs had acquired riparian rights on the artificial water-course, he had at first thought that this was the case merely of the dividing of a natural stream into two channels, and came within *Holker* v. *Paritt*, but on reflection perhaps that was not so. The numerous cases cited all shewed that the question of riparian rights on such a course depended on whether when the course was made it was intended for a *permanent* or a temporary nature, and on that point, which was more of fact than law, he had no hesitation in saying he was satisfied it was for a *permanent* nature and the subsequent improvements in the water-work system of Penang could not and did not alter that intention. The course was made to supply the town and shipping with water, it had been used continuously from 1808 to 1878 for that purpose; there was no evidence to shew it was made for a temporary purpose, and the fair presumption was that it was not made for such a purpose, but for a *permanent* purpose. The plaintiffs had therefore by user, by themselves and through their predecessors in title from 1840 to 1878 acquired *riparian* rights on that artificial course, one of which was, that of diverting its water for working their mill, such water being returned into the natural stream. That right had been interfered with by the defendants by the laying on of their new large iron pipes and they must compensate plaintiffs for the injury they had caused them. He therefore found a verdict for the plaintiffs for $2,500 and costs.

Judgment for plaintiffs for $2,500 and costs.

ISMAIL BIN SAVOOSAH & ORS. *v.* HAJEE ISMAIL.

The plaintiffs put up several lots of land for sale by public auction, subject to certain conditions of sale which were in English. The seventh condition was as follows: "The purchaser of each shall be satisfied with the execution of a conveyance by the vendors having the effect of conveying the fee simple in possession free from incumbrances by buying the residue of a term of years and the reversion expectant on the expiration thereof, and shall not require any title to be shewn of the term of years other than the production of such of the leases and counterparts as are in the possession of the vendors, nor make any objection with grounds of defect or want of title to the several terms of years. Intending purchasers or their Solicitors may see the deeds of the vendors' title on any day before the sale at the office of the vendors' Solicitors, and each purchaser shall be deemed to have bought with notice of the state of the title." Twelve of these lots were purchased by defendant who partly in consequence of the discovery that there were outstanding leases over the land, and partly because certain of the lots were adversely claimed by one M. refused to complete the purchase. The plaintiffs tendered the defendant a Conveyance of the twelve lots [which adjoined each other] as one whole piece, and on the defendant refusing to complete the purchase, the plaintiffs sued him for specific performance.

Held firstly, the seventh condition did not clearly shew there were outstanding leases, and was misleading; 2ndly, that it being in English only, a language the defendant did not understand, he could not be taken to have known it or be bound by it;

GOLDNEY, J. 1889. — ISMAIL BIN SAVOOSAH & ORS. v. HAJEE ISMAIL.

thirdly, that the sale though in twelve lots was really of one whole piece and that as certain of the lots were adversely claimed, and the plaintiffs at most could make title of only some of the lots, the defendant was justified in refusing to complete the purchase and this Court would not decree the same to be specifically performed.

Held on appeal [reversing the decision of the Court below] that the condition being in the English language merely, was no ground for not holding the defendant bound, as it was his duty to get it explained to him in any other language, if he so wished it; that the adverse title set up by M. which was not admitted by the plaintiffs, and had not been established at law, was also no ground for excusing the defendant; that the sale was not of one whole piece, but of twelve lots, and the inability of the plaintiffs to make a title to some lots did not excuse the defendant from accepting the others; and that a possessory title of over 12 years was a sufficiently good title and one that this Court would force on a purchaser—per *Pellereau* and *Goldney*, J.J., the seventh condition did not clearly shew there were outstanding leases and was misleading—per *Wood*, J., that it did shew some leases were outstanding and was not misleading.

The nature of this suit and the facts giving rise to it sufficiently appear in the judgment.

W. Nanson, for plaintiffs.

Napier, for defendant.

Cur. Adv. Vult.

Goldney, J. This is an action for the specific performance by the defendant of certain agreements made by him for the purchase of certain lots of land. The land in question was sold at public auction on the 7th June, 1888, under printed conditions of sale. The defendant, who became the purchaser of all the lots and paid the required deposit, refuses to complete the purchase on the ground that the plaintiffs cannot give him a good title, and further alleges that he is not precluded from objecting that the title is defective by any of the conditions of sale. When a person offers an estate for sale without qualification, he impliedly asserts that it is his to sell and that he has a good title. If, however, the vendor is aware that his title is defective, he can insert conditions of sale restricting the legal rights of the purchase. Such a condition should state clearly the nature of the defect, and provide that no objection shall be made on account of it thereafter. The question seems to be, do the seven conditions make it clear that there are outstanding leases, and that the purchaser's possession is liable to be disputed. Lord Justice FRY, in his book upon Specific Performance, Section 1154, says:—

"The Courts have held that it is incumbent on the vendor to express himself with reasonable clearness, and in the case of sales by auction, so to state his plans, particulars, and conditions of sale as to convey clear information to the class of persons who ordinarily frequent auctions. If the vendor uses terms reasonably capable of misconstruction, or ambiguous words, the purchaser is not bound to take on himself the peril of ascertaining the true meaning of the statement, but may generally construe it in the manner most advantageous to himself, and it may be gathered from the case of *Taylor* v. *Martindale*, 1 Y. & C. C. C. 658, that where a condition of sale is so obscurely worded that taken in connection with the particulars, it is likely to mislead an ordinary person as to the nature of the property, the Court will on that ground alone, and even on the argument of a summons to vary the certificate as to title, discharge a purchaser from his bargain."

See also *Jones* v. *Rimmer*, 14 L. R. Ch. Div. 592. As a matter of fact, an adverse claim had been recently made to two

of the lots by a holder of one of the leases, and it was not unreasonable to suppose that other such claims may be made by holders of leases. Of this claim, both the auctioneer and the Solicitor for the vendors had notice. At the auction sale no mention was made of this adverse claim. The auctioneer stated that the conditions of sale were read in a general sort of way, and interpreted into Malay. He did not think that they gave much attention to the 7th condition; it would be impossible to translate it into Malay. A gentleman from the vendor's Solicitor's office also made a general statement about the property, but did not make any mention of there being any adverse claim. There is no doubt to my mind that the defendant purchased the land without having the slightest idea that he was purchasing land about which there were disputed claims, or was at all aware of the existence of outstanding leases. Was the insertion of Clause 7 in the English language in the conditions of sale, sufficient to convey clear information to the defendant, who can neither read nor speak English, as to what he was actually buying? I think not. It was contended that it was the duty of the purchaser, if he did not understand the conditions of sale, to seek professional advice, or in some other way to make himself acquainted with their meaning. I do not agree with this contention. If the particulars of sale are misleading the burden is on the vendor to shew that the purchaser was not actually misled. *Farrance* v. *Bolton*, L. R. 8, Ch. App. 123; *Arnold* v. *Arnold*, 14 Ch. D. 270. I do not think that the plaintiffs have discharged themselves of this burden. In contracts for sale of real estate, an agreement to make a good title is always implied, unless the liability is expressly excluded. Sug. V. & P., 14th Ed. p. 16. But it is necessary, in order to bring a case within the exception, that there should be knowledge on the part of the purchaser that he cannot get a good title. *Ellis* v. *Rogers*, 29 Ch. D. 671; *Nottingham Patent Brick and Tile Co.* v. *Butler*, 16. Q. B. D. 789. In my judgment such knowledge on the part of the purchaser has not yet been shewn. In this case I adopt the words of Lord Justice LINDLEY in the case I have just cited: the plaintiffs ought to have used a condition pointing to the blot much more specifically than the actual conditions have done, and it would not be right to enforce specific performance of the contract without the attention of the purchaser having been much more closely drawn to the blot. Therefore the plaintiffs' claim for specific performance cannot succeed. A point was raised whether the sale should not be considered as a sale of 12 lots, so that if bad in the case of one lot, it might be held good in the case of another lot. Even if I had sufficient evidence before me, which I have not, to shew me, which, if any of the lots are not affected by outstanding leases, I think the objection of the defendant goes to the whole of the lots. The defendant undoubtedly bought the estate as a whole for grazing purposes, and the plaintiffs have so treated the sale in the conveyance prepared for the defendant's execution. To compel the defendant to take a lot here and there would, in my opinion, be inequitable, and would

WOOD, Ag. C.J. PELLEREAU & GOLDNEY. } J.J. 1889.

ISMAIL BIN SAVOOSAH & ORS. v. HAJEE ISMAIL.

be making a bargain for the contracting parties which they never would have made for themselves. I think the plaintiffs have failed to make out their right to a decree for a specific performance of the said agreements, and that the defendant is entitled to have the said agreements set aside and the deposit money returned to him. Verdict for the defendant on his defence and counterclaim with costs.

Judgment for defendant.

The plaintiffs appealed. On 5th September, the Appeal was heard before *Wood*, Acting C.J., *Pellereau* and *Goldney*, J.J.

Bonser, [*Attorney-General*] and W. *Nanson* for appellants.

Napier, for respondent.

Cur. Adv. Vult.

Pellereau, J. The first question which we are called upon to decide on this appeal is whether the respondent was misled by the wording of Section 7 of the conditions of sale. We have taken into consideration the clause itself and the explanations given according to the evidence to intending purchasers before the auction sale, and I have come to the conclusion that the nature and effect of the clause and of the explanations were misleading. The clause itself does not suggest the existence of such a large number of leases as 90, the approximate number stated on both sides of the Bar. The witness Chopard, in his explanations, stated that Syed Marican had sold some of the lots and subsequently purchased some of them. To this witness the auctioneer had referred the respondent when the latter asked for information. I think that the respondent was led by the clause and the explanations to believe in the existence of some outstanding leases, but could not anticipate therefrom that 90 of them existed. A purchaser may be willing to run the risk of a few of such leases, and may be satisfied with a possessory title which may be affected by some of them, but it is not likely that he could conceive from the facts conveyed to his mind the existence of so many, and it is probable that if the number had been stated he would have abstained from buying. I therefore consider on this ground that the respondent was in fact misled. But I think that no objection can be taken in this case on the ground that the conditions of sale were in English, and that the particulars in Malay and Tamil contained some, but not all, of the conditions of sale, especially Clause 7. The respondent does not read at all, and therefore the particulars could not have misled him; he had the explanations of Chopard, whose assertions he does not contradict on the subject, and we have already seen the effect of those explanations. Nor do I think that the conditions of sale should be printed and published in many languages; it is better that it should be so, but the omission to do so in any other than the English language would certainly not in itself be misleading as any intending purchaser can inform himself before hand. Having thus found that Clause 7 and the explanations given were misleading, and did mislead to the extent stated, I do not think

the inference should be that the respondent is entitled to have the contracts rescinded. He must have seen that a possessory title was contemplated, and where the vendors offer by their second point to give a good title, either written or possessory, I think it fair to them to allow them to do so, and if they can prove such a title they will have satisfied their contract. The respondent contended that this would be compelling him to buy a lawsuit, but the authorities quoted by the Attorney-General leave no doubt that long possession is a mode of acquiring property as good as a written title, and may be relied on and proved, although not specifically adverted to in the contract. I am of opinion that the auction sales of the various plots of land in this matter do not constitute one sale, but as many as there were auction lots knocked down for a price to the purchaser, that is, twelve. The motive which may have led the purchaser to buy cannot affect the right of the vendor, and it is far from proved that the purchaser intended to deal with the whole as one grazing piece of ground. The claim raised by Mustan was mentioned to us as giving rise to a right on the part of the respondent to repudiate the contract. But this claim has not yet been made out, it is denied by the vendor, and it would be unfair to the latter to set up against his right any pretension which may at any time be brought forward. Before the Registrar the claim of Mustan will be enquired into between the parties to this appeal, and, if substantiated, will then be shewn to be a defect in the vendors' title, but, until then, I cannot construe it into such a defect. I therefore consider that the parties should be referred to the Registrar for enquiry into the appellants' title, the decree to be in the same form as in *re Banister*. All costs reserved.

Goldney, J. I concur.

Wood, Acting C.J. In the case as argued before the Court of Appeal, several points were raised. The first and main point was whether the 7th condition of sale sufficiently disclosed to the defendant, the purchaser, the fact of there being certain outstanding leases of portion of the land sold. The condition in question is as follows:—

"The purchaser of each lot shall be satisfied with the execution of a conveyance by the vendors having the effect of conveying the fee simple in possession free from incumbrances, by paying the residue of a term of years and the reversion expectant on the expiration thereof, and shall not require any title to be shewn of the term of years other than the production of such of the leases and counterparts as are in the possession of the vendors, nor make any objection with ground of defect or want of title to the several terms of years. Intending purchasers or their Solicitors may see the deeds of the vendors' title on any day before the sale at the office of the vendors' Solicitors, and each purchaser shall be deemed to have bought with notice of the state of the title."

I am of opinion that this condition does sufficiently disclose the fact of the existence of some outstanding leases. The use of the words "*and shall not require any title to be shewn of the term of years other than the production of such of the leases and counterparts as are in the possession of the vendors,*" more particularly the last

WOOD, AG. C.J. PELLERAU & GOLDNEY. J.J. 1889.

ISMAIL BIN SAVOOSAH & ORS. v. HAJEE ISMAIL.

words, shew clearly that there are leases other than such leases which are not in their possession. I understand the condition to mean that with respect to the lots to be sold the vendors are in possession of certain leases and counterparts of portions of the entire piece of land, the subject of the auction, and as to the parties to which their leases and counterparts apply, they engage to give a documentary title. The residue of a term of years, whatever it may be, and the reversion expectant on the expiration thereof were specified, but not that the purchaser shall not require any proof of the mesne assignments by means of which the vendors became possessed of such leases and counterparts themselves, and that as to the portion of the entire piece of land to which leases and counterparts do not apply, they simply undertake by saying nothing, to give a good title possessory or otherwise. That the language of the condition is somewhat obscure can hardly be doubted, but I do not consider it ambiguous, or capable of a double meaning. It was argued that the defendant being ignorant of the English language he is to be excused on that account from the performance of his contract, but it is to my mind clear that in the common principles which govern the law of contract, the person who contracts by a written document, whether or no he understands the language in which it is written, is bound, in the absence of fraud or misrepresentation, by the terms of that contract, as to which proposition no objection was authoritatively sustained. It was further argued that the defendant having purchased the entire piece of land, consisting of as many as 88 small lots, for purposes of grazing, the loss of even one lot for want of title would excuse him from performance of the contract. But I am of opinion that the mere intention of the purchaser cannot in the absence of contract to that effect with the vendor, affect the question, and that the purchaser having contracted in a certain form, he is bound by the terms of the contract, unless, which I do not see in this case, there be fraud, mistake, or misrepresentation. This consideration governs also the point as to whether the contract is one, or whether these are in law, as there are in fact, 12 several contracts, and as to this I am clearly of opinion that the parties have contracted for the sale and purchase, not of one piece of land, but of 12 pieces of land, and that the conditions apply to each of the 12 purchasers, as they would do to other purchasers. The purchaser has preferred to enter into contracts which are in terms separate. Another point was raised with respect to a certain Mustan who had made claim to the land in respect of an outstanding lease to the knowledge of the auctioneer and of the vendors, and no mention was made at the time of the sale as to this claim. This was relied upon as concealment of what ought to have been stated, but I fail to see how in reason a vendor can be held obliged to disclose the fact that persons are simply disputing his title; he may be bound to disclose matters which he knows to affect his title, such as incumbrances and other matters, but not as I think in principle or according to the authority of any cited case, the fact of there being in existence, a person who claims to be entitled to his

estate, and against whose claim he knows or believes that he has a good title. Many authorities were cited in the course of the argument, but they do not in general affect the questions raised, so as to need special comment, but it is as well to say that I accept the reasoning of the Attorney-General on the authority of the cases of *Scott* v. *Nixon*, 3 D. & W., *Garme* v. *Barnard*, 54 L. J. Ch. Div. 517. The Court will force a possessory title if good on a purchaser, who, as long as he gets a good title to the estate which he has purchased, has obtained all he has contracted for. The decree will be in the terms of the judgment as given in the judgment of my brother judges, PELLEREAU and GOLDNEY. The question of costs reserved.

WOOD, AG. C.J.
PELLEREAU & GOLDNEY. } J.J.
1889.

ISMAIL BIN SAVOOSAH & ORS.
v.
HAJEE ISMAIL.

BROWN *v.* ATTORNEY-GENERAL.

PENANG.

WOOD, J.
1889.
May 7.

Plaintiff proceeded by Petition of Right under the Crown Suits Ordinance 15 of 1876 to recover damages for flooding his lands with sea-water, by the removal of a sluice-gate—the damages were made up of four distinct items of which the value of the sluice-gate itself or damages for its mere removal was *not* one,—

Held, the plaintiff having failed to prove that the flooding was the result of the removal of the sluice-gate, and so had failed in respect to the damages he sued for, was *not* entitled—though the removal of the sluice-gate was a trespass—even to a verdict for nominal damages for *that* trespass.

This was a Petition of Right under the Crown Suits Ordinance 15 of 1876, in which the plaintiff claimed $15,000 damages for trespass by the Public Works Department in removing a sluice-gate belonging to the plaintiff at the Sungei Menanding Bridge, and thereby causing on the 21st January, 1886, the sea, which during high-tides flowed up the Prye River, flowing into the Menanding and flooding the plaintiff's land [the Prye paddy lands] with sea-water. The damages were made up as follows:

Loss of rent and interest	$6,800
Cost of two new sluice-gates and construction of embankment	2,200
Cost of blocking up bridge at Sungei Menanding	1,000
Depreciation in property	5,000
	$15,000

The case was heard on the 7th, 8th, 9th, 10th, and 13th days of May last.

Ross, [*Acting Solicitor-General*] for the defendant argued that the Court could not on the evidence but come to the conclusion that the defendant's acts in removing the gate did not cause the flooding of the plaintiff's land. The plaintiff was guilty of contributory negligence in not looking after the sluice-gate; he also had constructive notice through Mahomedsah that the Crown intended removing the gate and he took no precautions to protect his land from the tide. The petition of right shewed what it was the plaintiff claimed; he claimed a certain amount as

Wood, J. 1889.

BROWN v. ATTORNEY-GENERAL.

damages which he made up by four distinct items, the loss of rent, the cost of two new sluice-gates and embankment, the cost of blocking up the opening at the Menanding Bridge, and depreciation in property: the value of the rotten gate and damages for the removal of it merely, he nowhere claimed. The Court could not therefore give him damages in respect of a thing he never asked for; that was not the question between the Crown and the plaintiff. The Crown never denied having removed the gate. For the simple trespass the plaintiff could bring another action if he pleased; but even if he had a verdict it could only be for nominal damages but without costs.

Van Someren, [E. W. *Presgrave* with him] for the plaintiff argued on the evidence that it was not shewn that the gate was utterly useless, the witnesses for the Crown admitted that the question of flooding was dependent entirely on the relative proportion of the size of the aperture through which the water came in and the size of the basin to be filled, the plaintiff's lands formed that basin, its size was unaltered, the size of the aperture however had been altered by the removal of the gate, for however rotten the gate was it must have acted as some kind of a preventive to the influx of the water; in other words the apertures in the rotten gate were not the size of the aperture made by the removal of the entire gate. It was nothing to the purpose to say successive high-tides would in the end through the apertures in the rotten gate have brought about the same result in course of time as the larger aperture had done in one night. In such a case the plaintiff would have had time to embank or take other precautions for keeping the high-tide;—again, there would have been an interval between each high-tide, and the little damage caused by the one would have by the return of the tide or by absorption have been removed before the next high-tide came on; but by the removal of the entire gate by the widening of the aperture the high-tide came in in a single night and flooded the whole land. They further argued that even if the plaintiff had failed to prove the special damage he alleged, he was still entitled to a verdict for nominal damages at least as the removal of his gate by the Crown was a trespass; however rotten the gate was, the Crown had no right to remove it without the plaintiff's permission. The *gist* of the action was for a *trespass*, the flooding of the land was matter of special damage consequent on that trespass, the mere failure to prove the special damage did not preclude the plaintiff having a verdict for nominal damages for the trespass itself. *Doss* v. *Doss*, 14 L. T. [N.S.] 645 [Privy Council]. Under the Crown Suits Ordinance 15 of 1876, Section 21, the Court at the trial had the same powers and adopted the same procedure in a Civil suit. Under the Civil Law Ordinance 4 of 1878, Section 1, Clauses 4, 6 and 7, the Court was required to give the plaintiff the relief which he incidentally appeared to be entitled to, and all multiplicity of suits was to be avoided. *Khoo Yah Hong* v. *Khay Thye*, 1 Kyshe, 647. The removal of the gate was admitted by the Crown at the trial; they did not do so except in an indirect way in their answer which was a piece of

special pleading, they did not however admit their act was a *trespass*; on the contrary, they seemed to *justify* by stating the removal was *necessary* in order to repair what they were pleased to call "the bridge." It was all very well to say now they always admitted they were wrong in removing the gate; if they did so think they would have paid something into Court by way of amends. The plaintiff had not been negligent; he had leased out the lands, and in the management thereof, had acted in the usual way done by all land-owners in Province Wellesley.

Cur. Adv. Vult.

June 11th. *Wood*, J. In this case in my judgment the Crown certainly committed a trespass by removing the sluice-gate which was the property of the plaintiff, and so far have committed a wrong as against him, and had this been substantially the matter complained of, the judgment would simply have been for the plaintiff with some small amount of damages and probably with costs.

This however is clearly not the case; the fact of the removal of the sluice-gate was never a matter of contention, and was admitted by the Crown in their answer of 5th April, 1886, to the plaintiff's letters of the 22nd January and 24th February of that year, and again in their answer to the petition; and the object of the suit was not to recover the damage to the gate, a matter so trifling as to be practically immaterial, but to recover damages, serious damages, which it is alleged were caused by that trespass, and as the tribunals now deal with the matter of costs in a liberal and not a technical spirit, they follow the justice of the demand or the defence as it is litigated before them. In this case I have to decide whether the damage which occurred to the plaintiff's land by the influx of sea-water was shewn to be caused by the action of the Crown. As I have already said, I think the Crown was wrong in supposing that in replying to Mahomedsah, stating that they should remove the sluice-gate in question, they gave any notice to Mr. Brown. I think they were bound when they removed so important a thing as the sluice-gate, to have inquired more into the matter and become acquainted with its uses and value and as to the persons who were interested in its maintenance, and if they relied upon notice at all to such persons, to have given such notice with all the particularity possible. This does not seem to have been done, and so I consider it fairly shewn that Mr. Brown was neither actually nor constructively aware of the destruction of the sluice-gate.

Upon the question as to whether the damage from the influx of sea-water was due to the action of the Crown in destroying the sluice-gate, I think that it may fairly be considered that it was not so. The fact which I consider clear beyond all question, that the water at high-tides was on the same level on both sides of the sluice-gate as early as May, 1885, satisfactorily shews that the pressure of water on the catch-water-gate at high-water was the same as if no sluice-gate had existed, and that it may reasonably

WOOD, J. 1889. BROWN v. ATTORNEY-GENERAL.

be inferred that the influx of sea-water which was caused by the giving way of the catch-water-gate, would have happened in the same way whether or no the sluice-gate had been allowed to remain, and I conceive that the catch-water-gate having given way, the salt-water from the river would in a few successive tides have effectually destroyed the crops as it in fact did by the tide of a single night. I take it for granted that there would have been more obstruction to the influx of the tide had the old sluice-gate remained, but still that the tide would have penetrated through the dilapidated sluice-gate—a sluice-gate of the effectiveness of which may be assumed to have diminished up to the time of the disaster—as effectually as it did when it was entirely removed though possibly not so rapidly.

I entertain however a strong view that the disaster of the flood was to a great extent due to the want of reasonable precaution on the part of those interested in the up-keep of the sluice-gate.

As I stated in the course of argument a sluice-gate of this kind in which so many persons are interested should have been guarded with care. It seems to me to be a strong proof of neglect that from August to January no one in the direct interest of the plaintiff seems to have visited the place; and that from October 11th to January 20th, a period of over three months, it had escaped the knowledge of the plaintiff's agents that the sluice-gate had ever been removed. It seems to me that no careful proprietor of a sluice-gate, which protected from inundation from salt-water, not only his own lands, but those of others, should fail to take precautions for its effective up-keep; should fail to know that it kept out water so ineffectually that the levels of the water on each side of the gate were the same,—or to appreciate the risk which would be run where the levels were, as Mr. E. Brown admits they were, about equal on both sides—or be ignorant of its removal for several months. Had the plaintiff by his agent known as I cannot but think he should have known, of its dangerous state up to October 11th when it was removed, or its actual removal, no doubt he would have taken effective steps to have re-built it; and I hold that such a failure in reasonable care is an important factor in the disaster which followed.

The exact application however of this principle which is embodied in the known legal maxim *vigilantibus non dormientibus jura subveniunt*, I cannot find to have been held to prevail in a case quite like the present, and I found my judgment as matter of fact on the finding that the destruction of the sluice-gate in question did not cause the influx of sea-water on to the plaintiff's land. As this was in effect the contention in the case, in which the Crown in my opinion have succeeded, I am constrained to give judgment for the Crown with costs.

Judgment for defendant with costs.

MAHOMED SALLEH & ANOR. *v.* NACODAH MERICAN.

PENANG.

WOOD, J
1889.

June 11.

The defendant, on the marriage of his daughter to the plaintiff promised in writing, *inter alia* to "build and give" to the plaintiff "a suitable house." He afterwards built a house and the Court was satisfied on the evidence he did it for the plaintiff and had let plaintiff into possession of it in pursuance of the promise. After residing there some years, the plaintiff fell out with the defendant and quitted the house, and some time after brought a suit for specific performance by the defendant of his promise by "building and giving" him "a suitable house."

Held, though the promise was void under the Statute of Frauds for uncertainty as to the house intended, and the Court could not say what was "a suitable house," yet the parties had by their acts pointed out the house intended and the letting plaintiff into possession thereof, was a part performance which took the case out of the Statute.

Held also, the house being ascertained, the promise to build and give a "house," necessarily implied the gift of the *land* on which it was to be built, with such curtilage as was proper for the due enjoyment of the house.

Suit for specific performance. The plaintiff Mahomed Salleh on 16th July, 1874, married the defendant's daughter, the plaintiff Syed Nachiar. At the time of the marriage the Kali or priest made an entry thereof in his Register. The defendant in consideration of the marriage promised the plaintiff certain things which were duly entered in the Kali's Register and signed by plaintiff and defendant. The entry so far as is important to this report, was as follows:—

"The *Kykuli*, that is to say the father-in-law's gift unto his son-in-law, one hundred and one pagodas [gold coin of Southern India] equal to two hundred and eighty-three rupees, and also the gift of the father unto this daughter of his, is two hundred and one pagodas of jewelry, *and he shall also build and give a house which must be a suitable building.*"

The marriage was duly solemnized, and within a year after the defendant built a house on his own property in Love Lane, and on completion let the plaintiff and his wife into possession of the house telling the plaintiff [as the Court on the evidence held] that it was the house he had agreed on his marriage to build for him. The plaintiff and his wife as well as the defendant and other members of the family lived in the house and continued doing so for some years. Eventually, the plaintiff and defendant fell out and the plaintiff and his wife quitted the house. Some time after the plaintiff and his wife brought this suit against the defendant praying that the defendant might be ordered specifically to perform his promise "by building and giving to the plaintiffs a suitable house." The evidence of the possession and the reason for letting the plaintiff reside in the house in question was very conflicting, and the trial occupied the 11th, 12th, 13th and 14th days of June, 1889.

Van Someren, [*Adams* with him] for the plaintiffs contended, that the promise was not void for uncertainty; the parties were before the Court, they could be examined and the Court could from their condition in life, decide what would be "a suitable house" for them. *Id certum est, quod certum reddi potest.* At all events even if void the plaintiff must still succeed as the parties had by their acts and words pointed out the house intended and which they considered was "suitable." Letting

WOOD, J. 1889.

MAHOMED SALLEH & ANOR. v. NACODAH MERICAN.

the plaintiff into possession was a part performance which took the case out of the Statute of Frauds—29 Car. II. c. 3, Section 4. *Ungley* v. *Ungley*, 4 L. R. Ch. Div. 73, on App. 5 L. R. Ch. Div. 887.

Ross, [*Clutton* with him] for the defendant contended, that a promise of "a suitable house" was too vague for the Court to enforce. The Court could not say what was or was not "suitable." *Brace* v. *Wehnert*, 25 Beav. 348. A contract "to build a house" was also not an enforceable one. FRY on Specific Performance [2nd Ed.] §§. 76, 78, 9; *Errington* v. *Aynesley*, 2 Bro. C. C. 343; *Lucas* v. *Commaford*, 3 Ibid. 166; *Cooper* v. *Hood*, 28 L. J. [N.S.] Ch. 212. The promise being vague there was no contract in writing to satisfy the Statute of Frauds—*Franks* v. *Martin*, 1 Eden, 309—Marriage was not part performance—*Caton* v. *Caton*, 1 L. R. Ch. Ap. 137, Affd. 2 L. R. Eng. & Ir. Ap. 127. Possession was never given to the plaintiff; he lived in the house along with the defendant and as one of the family. In that respect this case was distinguishable from *Ungley* v. *Ungley*. The plaintiff's remedy, if any, was for damages.

Van Someren, in reply contended, the cases cited as to the Court not enforcing a building contract were all cases between lessor and lessee or land-holder and a house-builder. In those cases, damages could always be recovered and was an adequate remedy. They had no bearing on the present case. If the Court was against granting specific performance the plaintiff was willing to waive the claim and accept damages instead, which could be done in such a case as this—*Mayor and Corporation of London* v. *Southgate*, 38 L. J. Ch. [N.S.] 141—whether at law or equity the vagueness [if any] of the contract was rendered certain by the acts of the parties. [He was then stopped by the Court.]

Wood, J., intimated that he had made up his mind on the evidence that the defendant had put the plaintiff in possession of the house in Love Lane, as the house he had agreed to build for him. The uncertainty in the contract was rendered certain by this act which was also a part performance, which took the case out of the Statute of Frauds, even if there was no writing. Judgment would therefore be for the plaintiff for specific performance with costs—but as the plaintiff was willing to accept damages instead, the Court would, if the parties wished it, ascertain the value of the house and land and award damages instead.

Ross, then submitted the "house" did not include the land on which it was built, or if it did, then it meant no more than the actual site.

Van Someren, contrà.

Wood, J., considered the promise "to build and give a *house*" implied the gift of the land as well on which it was built, and such curtilage as was proper for the due enjoyment of the house. [*a*.]

[*a*.] The parties hereupon subsequently came to a settlement, and the decree was not carried into effect.

HEIM *v.* LIM TIANG HEE.

SINGAPORE.

GOLDNEY, J.
1889.

June 17.

Where there is a breach of contract for the purchase of shares, but the vendor is able to go into the market and sell the shares at once, his duty is to do so and sue the vendee at law for the difference in price as damages for the breach, but where there is no market for the share, he is entitled to sue the vendee in equity for specific performance of the contract.

The defendant agreed to purchase from the plaintiff certain shares in a Tin Mining Company registered in London, the bought-note was as follows: "Bought from Jos. Heim, Esq., three hundred Bentong Straits Tin Company's Shares £1 paid up at $23½, delivery in about one month on arrival of scrips from London." At the end of the month the plaintiff was unable to deliver the "scrips," but tendered the defendant certain documents in reference to the shares known as "certified transfers" which would have enabled the defendant to have got himself registered in London as the owner of the said shares.

Held, that the "certified transfers" enabling registration in London, were not equivalent to delivery of the "scrips" at Singapore, and the Court would not force the same on the purchaser.

Hunt v. *Gunn*, 13 C. B. [N.S.] 226, distinguished.

The "certified transfers" were prepared and signed by the Secretary to the Company in London—the name of the transferee was left blank and was subsequently filled in by the plaintiff [the vendor] at Singapore.

Held, the transfers were void, and the transferee, the defendant, could not be compelled to take them.

Hibblewhite v. *McMorine*, 6 M. & W. 200; and *Société Générale de Paris* v. *Walker*, 11 L. R. Ap. Cas. 20, followed.

The nature and facts of this case sufficiently appear in the judgment.

The case was heard on the 11th, 12th, 13th June, and on this day.

W. *Nanson*, for plaintiff, cited *Goodwin* v. *Roberts*, 1 L. R. App. Ca. 476; *Hunt* v. *Gunn*, 13 C. B. [N.S.] 226; FRY on Spec. Per. §26; *Bowes* v. *Shand*, 2 L. R. Ap. Cas. 455-488; *Field* v. *Laline*, 30 L. J. Ex. [N.S.] 168; *Shaw* v. *Port Phillip Mining Co.* 13 Q. B. D. 103; *Colonial Bank* v. *Winney*, 30 L R. Ch. Div. 261; *Gunn* v. *Bolckow*, 491; *Hare* v. *Waring*, 3 M. & W. 362; *Rumbold* v. *Metropolitan Bank*, 2 Q. B. 194; *Shaw* v. *Fisher*, 2 De G. & S. 11; *Kurling* v. *Flight*, 2 Phil. 116.

Bonser, [*Attorney-General*] and *Drew* for defendant cited FRY on Spec. Per. §20; *Hunt* v. *Gunn*, Suprà; Steven's Dig. of Evid. 90; *Lewis* v. *Marshall*, 7 Man. & Gr. 729, 744; *Moore* v. *Campbell*, 11 Exch. s.c. 23 L. J. Ex. [N.S.] 310; *Kirchner* v. *Venus*, 12 Moo. P. C. 399; *Bowes* v. *Shand*, Suprà; Companies Act 1862, Section 3; *Re* Bahia & San Francisco Ry. Co., 3 L. R. Q. B. 594; *Buckinshaw* v. *Nicholl*, 3 App. Ca. L. R. 1004; *Hibblewhite* v. *McMorine*, 6 M. & W. 200; *Société Générale de Paris* v *Walker*, 11 Ap. Cas. L. R. 20; *Colonial Bank* v. *Winney*, Suprà; *Gibbons* v. *McMullen*, L. R. P. C. 217; *Barnett* v. *South-London Tramway Co.*, 18 Q. B. Div. L. R. 815; *Barnett* v. *Smith*, 10 Ch. Div. L. R. 491; *Larios* v. *Gubrity*, 5 L. R. P. C. 346; Dart on V. & P. [4th Ed.] 902; *Mendies* v. *Gurdellas*, 2 J. & H. 263; *Hare* v. *Waring*, Suprà; 1 Taylor on Evid. 61; *Bradford Banking Co.* v. *Briggs*, 12 Ap. Cas. L. R. 39.

Nanson, replied.

Cur. Adv. Vult.

GOLDNEY, J. 1889. — HEIM v. LIM TIANG HEE.

21st June. *Goldney*, J. This is an action for the specific performance of a contract for the sale of certain shares in the Bentong Straits Tin Co. An objection was taken by the Attorney-General on behalf of the defendant that an action for specific performance would not lie, as the plaintiff's remedy, if any, was by an action for damages. Where the contract is in its nature such that a breach of it can be satisfied by damages, the Court will not exercise its jurisdiction in specific performance, yet if from some particular circumstance this remedy is not open to the aggrieved party, the Court will exercise this jurisdiction. In places where a market exists, it is the duty of the person who is aggrieved by an alleged breach of contract to go into the market and buy or sell, as the case may be, against the person whom he alleges has broken the contract, and then to bring an action against such person for the loss, if any, that he has sustained; this loss is the difference between the contract price and the price he bought or sold at in the market. If, however, there is no market, in the sense that the aggrieved person cannot, as a matter of course, within a reasonable time find a buyer or a seller of the subject-matter of the contract, an action for damages would not or might not be an adequate remedy. In such a case the Court will interfere in specific performance. The subject-matter of the contract is shares in a Mining Company registered in London. There is no Stock Exchange in Singapore, and from what I gathered from the evidence, nothing at all resembling a Stock Exchange. Brokers were called both on the part of the plaintiff and the defendant. None of these brokers were asked whether, after the defendant had refused to accept what the plaintiff offered in fulfilment of the contract, the plaintiff could have gone into the market and sold against the defendant. This contract was a contract made between the parties themselves without the intervention of any broker, and in the absence of any evidence to the effect that the plaintiff could had he tried, at once, have sold out against the defendant, I think I am justified in saying that particular circumstances existed in this case which entitle the plaintiff to bring his action in this form. Before going into the merits of the case, there is one other point I should mention. That is this. A Court of Law, in coming to a decision upon a question of contract, does not regard the motives of the parties to the contract. It is as immaterial to the decision of the question before the Court for the plaintiff to say that the defendant repudiates the contract because the price of the shares had fallen, as it would be for the defendant to say that he should be relieved from the contract, because the plaintiff sold him these shares at too high a price. When a contract is alleged to have been broken the rights of the parties to it must be settled not by their motives but by the terms of the contract. The contract in this case was as follows. "*Bought from Jos. Heim, Esq., three hundred Bentong Straits Tin Company's Shares* £1 *paid up at* $23\frac{1}{4}$, *delivery in about one month on arrival of scrips from London.*" There is a difficulty in construing this contract. It is a contract for the sale by the plaintiff to the defendant of 300 shares in the company named,

at the price named, to be delivered in Singapore with a suspensive condition, or condition precedent that the plaintiff should not be bound to make delivery until about one month from the date of the contract or the arrival in Singapore of the scrip from London. Shares in a company are not in themselves capable of delivery in the same way as a debenture or mortgage on a company's property is. A share is the definite portion of the capital of the company to which the owner of such share is entitled. A contract such as this, without any special conditions except the one I have referred to, and not made between brokers or bound by any rule or custom of a Stock Exchange, is a contract by the vendor to transfer to the vendee his dominium in the shares, and by the vendee on such transfer to pay to the vendor the agreed price. The contract is performed by the vendor delivering to the vendee, in exchange for the price, a transfer and the certificate of the shares which he holds in the company and has contracted to sell and transfer to the defendant. As far as I can see, there is nothing in this contract to take it out of the general rule. The only exception being that the vendee could not demand the performance by the vendor of his part of the contract until the stipulated time for delivery had elapsed. When the time arrived for delivery under the contract, the plaintiff tendered to the defendant six transfers of 50 shares each, but did not tender the share certificates, respectively representing the shares named in such transfers. The plaintiff did not do so because—1st, he had not got the share certificates to deliver; and 2ndly, because these transfers were alleged to be not ordinary transfer which would require the share certificates to be attached, but special transfers, called certified transfers—so called because in the margin of the transfers there is an undated memorandum as follows:—"*Certificate at Company's Office, J. Fitzpatrick, Secretary.*" The transfers are ordinary printed stock transfer forms not specially printed for this company. What I suppose is intended to be conveyed by the memo., although it does not say so, is stated on another certified transfer of shares in another company which was put in as evidence by the plaintiff. The memorandum on this transfer is as follows:—"*Certificate to meet this transfer lodged at the Office of this Company, London, 29th March, 1889, C. H. Wetherley, Secretary.*" The defendant refused to accept the delivery of these certified transfers as a performance by the plaintiff of his part of the contract, hence this action. I am not aware that there is any law or custom which compels a man to accept that for which he did not bargain. I have no hesitation in finding that at the time that the bargain or contract was made, it was not in the contemplation of either party to the contract that certified transfers as they are called should in fulfilment of the contract be delivered by the plaintiff to the defendant, instead of an ordinary transfer with the share certificate attached. The contract itself, on the face of it, shows what it was the parties at the time, had in their minds. The use of the word *scrip* shews that they were contemplating a delivery of scrip on share certificates. The word *scrip* in Singapore is not confined to the scrip issued

GOLDNEY, J. 1889. — HEIM v. LIM TIANG HEE.

before the allotment of shares, but is used as it is commonly used in the Law Courts to signify *share certificates*. In this case the contract being for shares with £1 paid, the word scrip obviously refers to share certificates. On the part of the plaintiff it was contended that the tender by the plaintiff of that which would obtain for the defendant the right of having his name registered as a shareholder in the company's books, was a good satisfaction of the contract. Evidence was called to shew that in Singapore, at the banks, a marked or certified transfer would be considered equivalent to an ordinary transfer with the share certificate attached, and several brokers were called to prove that they were in the habit of accepting, as delivery, transfers on which there was a memo. by an officer of the company to the effect that share certificates to meet the transfers were deposited with the company. The instances given were of transactions between brokers. In a place like Singapore such a practice no doubt is a great convenience to the selling broker, and should cause no inconvenience to the buying broker. It amounts to this. The selling broker, when he transfers shares, has to deliver in Singapore share certificates to fulfil the contract; unless he does so, the company will not act on the transfer and register the name of the transferee as a shareholder. The selling broker says to the buying broker: I will deliver the necessary share certificate to you or your vendee at the company's office in Singapore, instead of at your or my office. The contract, the subject-matter of this action, was to deliver in Singapore, and cannot in my opinion be performed by the vendor offering to make delivery in London. Some witnesses were also called who gave evidence that the certified transfers were used in the Stock Exchanges in London and Glasgow. There was no evidence that a purchaser can be compelled either in London, Glasgow, or Singapore to accept a certified transfer instead of a transfer with a share certificate attached. The evidence really amounted to this: that brokers in Singapore were in the habit of using certified or marked transfers as if they were transfers with the share certificate attached. But no custom or practice of brokery as between themselves can in any way affect a purchaser, unless it can be shewn that he has in some way authorised such custom or practice. There is no such evidence in this case. The purchaser's rights are to be found in his contract, and the only question is what are his legal rights under his contract. I have come to a conclusion upon the evidence that an ordinary purchaser in Singapore, a certified transfer of shares in a company whose office is in London, tendered to such purchaser in Singapore, is not an equivalent for an ordinary transfer with the share certificate attached. The purchaser, if he wrote to re-sell such transfers, cannot, especially among the natives, sell it as readily as he could an ordinary transfer with a certificate attached, and further, on the authority of the case to which I shall presently refer, by reason of the execution in blank of the transfers, the plaintiff had not acquired and could not transfer to the defendant any legal right to be registered. Mr. Nanson, on the authority of *Hunt* v. *Gunn*, 13 C. B. [N. S.] 226, contended that the defendant was

bound to accept a certified transfer on the ground that for the purpose of transferring shares from one person to another it was equivalent to a transfer with a share certificate attached, and that the plaintiff had sufficiently performed his engagement by placing the defendant in the position of becoming the legal owner of the shares sold. I do not think that the case of *Hunt* v. *Gunn* is an authority for Mr. Nanson's proposition. I have referred to the report of this case at *Nisi Prius, see Foster's & Finlayson's Reports, Vol. 3, p. 233,* where the special plea upon which the defendant obtained the verdict is set out. It was as follows:—

"That after the making of the agreement and before breach the defendant was entitled to 100 shares in the company with £10 paid on each share, and was entitled to execute the deed of settlement of the company. And that it was then mutually agreed by and between the plaintiff and defendant that the defendant should transfer to the plaintiff his interest in 60 of the said shares, and should empower the plaintiff to execute the deed in respect of the same, and that the plaintiff should accept such transfer in satisfaction and discharge. Averment: that the defendant in pursuance of the said agreement transferred to the plaintiff his interest in the said 60 shares and empowered him to execute the deed; and that the plaintiff accepted such transfer and executed such deed upon the terms aforesaid, and in such satisfaction as aforesaid. As pleaded, the plaintiff, in pursuance of the agreement between him and the defendant, did execute the deed and became the owner of the shares, which it will be seen, if the declaration is referred to, he agreed to accept in the first place satisfaction of a debt of £250 due to him from the defendant."

Erle, C.J., before whom the case was tried, held, that the contract was in substance carried out when the plaintiff became the owner of the shares on appeal.

Williams, J., in his judgment, says:

"Here the intent of the parties was, that the defendant should give the plaintiff the means of becoming a shareholder in the company. The result of the transaction is, that the plaintiff contracted to become and did become a shareholder in the company. I think there was a complete performance of the contract in the defendant's part. It would be a reproach to the law if it was otherwise."

In the contract before the Court, the contract was for the delivery in Singapore of share certificates, one indicia of the property in the shares, within one month from the date of the contract. Such a contract, in my opinion, cannot be performed by a tender of a document which will ensure the delivery of the indicia of property to the defendant not in Singapore, but in London. In *Hunt* v. *Gunn,* the plaintiff had obtained what he had agreed to accept as a discharge of the debt due to him from the defendant, and then because the mode of his obtaining this was not exactly the same as originally proposed, he endeavoured to make the defendant pay the same debt again, in cash. As the Judges said, if this could be allowed it would be a reproach to the law. The case of *In re Arnold,* L. R. 14 C. D. p. 270 seems to me, although it arose upon a contract for the sale of land, to be much in point. There a mistake had been made in the particulars of

GOLDNEY, J. 1889.

HEIM v. LIM TIANG HEE.

sale as to the title of the vendors to one of the lots put up for sale. Instead of being owners, the vendors were only part-owners. An agreement was made by the vendors, subsequent to the sale with the other part-owners of the lot in question, by which arrangement the vendors were enabled to give the purchaser possession of the whole lot. JESSEL, M.R. held that the purchaser having by this subsequent arrangement obtained everything or an equivalent to everything he bought, was bound to complete the purchase.

On appeal, L. J. *James*, over-ruling the Master of the Rolls, said:

"It appears to me that the purchaser is well-warranted in asking to be relieved from the necessity of performing not the contract into which he had entered, but another contract which the Court has made for him by giving what is called compensation."

Lord ELDON in *Knatchbull* v. *Gueber*, 3 Mer. 146, expressed his opinion that the Court was becoming more and more in the habit of holding people to the contracts they had made, and not holding them to contracts they had not made, and I hope that the Court will continue in that course. There is no doubt that if a man purchases a property and what I may call an infinitesimal portion cannot be given to him, then he may be obliged to complete with compensation in such a case. But it has never been held that a man is obliged to take a thing with compensation when the thing is substantially and materially different from that which he was induced by the representations made to him to believe that he bought. A further question was raised by the Attorney-General on the transfer itself. The transfers in question are by deed. They have been executed by the proprietor of such shares with the names of the purchaser in blank, and handed over by him to the plaintiff for the purpose of inserting the names of the persons to whom he has sold such shares. In support of this contention, the Attorney-General cited *Hibblewhite* v. *McMorine*, 6 M. & W., 200, and *Société Générale de Paris* v. *Walker*, L. R. 11 Ap. C. 20. It is admitted that the transfers tendered by the plaintiff to the defendant were executed in this manner. I am unable to distinguish the facts in this case from the facts in the cases I have referred to. These cases therefore appear to be exactly in point, and I feel obliged to hold that the transfers tendered by the plaintiff to the defendant are void. The difficulty, no doubt, could be got over by a re-delivery, but it seems to me that until the defect is remedied, the plaintiff cannot ask the Court to order the defendant specifically to perform a contract which would compel him to accept a void deed. There was also a Stamp objection which I do not think under the circumstances it is necessary to discuss. In conclusion, I think that the plaintiff has not made out a case for a decree for the specific performance of the contract of the 11th March, 1889. In my opinion the plaintiff has never been in a position to give the defendant the thing he bought. This action must be dismissed with costs.

JAMALSAH *v.* VERSHAT.

In re RAMAN CHETTY.

PENANG.

WOOD, J.
1889.

July 10.

A Bill of Sale which provides that "in case of default of payment of any one instalment [secured thereby] the whole amount remaining unpaid should become immediately due and payable" is void under Section 8 of the Bills of Sale Ordinance 12 of 1886 as not being in the form set forth in the Schedule to the Ordinance.

A Bill of Sale is also void as not being in accordance with such form if it omit to shew the rate at which interest is to be charged.

This was an Interpleader Summons. The plaintiff Jamalsah, having recovered a judgment in this Court against the defendant Vershat, caused certain goods in the latter's shops at Nibong Tebal, Province Wellesley, to be seized on 26th June, 1889, on a *fi. fa.* The goods were claimed by the claimant Raman Chetty under a Bill of Sale by way of mortgage of personal property, dated 4th June, 1889, made in his favour by the defendant Vershat, to secure the sum of $765. One Nina Mahomed Rowten was surety therein for the said Vershat. The defendant and his surety by the Bill of Sale agreed that they would "duly pay to the said Raman Chetty the principal sum aforesaid together with *the sum of $85 being the interest thereon*, both amounting to $850 by instalments as follows, by ten monthly instalments of $85 per month, payable monthly on the 4th of every month during the period of ten months from the date hereof, *and in case of default in payment of any of the aforesaid instalments, the whole amount then remaining unpaid, shall become immediately due and payable; and interest to be computed at the rate of 24 per centum per annum after maturity.*" The Bill of Sale also provided, that the goods should not be liable to seizure by the claimant for any cause other than those specified in Section 10 of the Bills of Sale Ordinance. The plaintiff, the Execution-creditor, having refused to release the property, the present Interpleader Summons was taken out and now came on for hearing.

Adams, for the claimant placed the claimant in the witness-box and gave formal evidence of the execution of the Bill of Sale, and the amount secured by it being still due.

Van Someren, for the Execution-creditor contended, that the Bill of Sale was void under Section 8 of the Bills of Sale Ordinance 12 of 1886, as not being in accordance with the form set forth in the Schedule to the Ordinance; firstly, as the whole amount remaining unpaid was to become immediately due and payable, which would give the Bill of Sale holder a right of seizure under Section 10, Sub-section 1, Clause 1, the very first time there was a default; and secondly, because the rate at which interest had been calculated did not appear on the face of the Bill of Sale. On the first point he referred to Section 8 and Clause 1 thereof, and Section 10, Sub-section 1, Clause 1 of the Ordinance 12 of 1886, and the corresponding Section 7, Clause 1 and Section 9 of the English Bills of Sale Act 1882 [45 & 46 Vic. c. 43] and the cases of *Davis* v. *Burton*, *Blaiberg*, claimant, 11 L. R. Q. B. Div. 537; *Simpson* v. *Charing Cross Bank*, 34 W. R. 568; and *Myers* v.

WOOD, J. 1889.

JAMALSAH v. VERSHAT. *In re* RAMAN CHETTY.

Elliott, 16 L. R. Q. B. Div. 526. On the second point he referred to *Myers* v. *Elliott* [suprà] where the Court of Appeal dissented from *Thorpe* v. *Cregeen*, 55 L. J. Q. B. 80.

Adams, suggested that all that the Bill of Sale stated was, that the whole amount remaining unpaid should become immediately due and payable, not that the goods could be then seized, which could only be done in cases falling within Section 10. He admitted however, he could not get over the cases which had been cited.

Wood, J. I quite agree that the cases cited are very strong, and cannot be distinguished from the present. I must hold the Bill of Sale is void as not being in accordance with the form set forth in the Schedule to the Ordinance, and give judgment for the Execution-creditor with costs.

Judgment for Execution-Creditor with costs.

REGINA *v.* MAH AH CHOON.

PENANG.

PELLEREAU, J. 1889.

July 15.

The power to direct an accused person to be tried again on a proper charge when the Court is of opinion that he has been convicted on a wrong charge [Clause II. Section 34 of Ordinance 12 of 1879] is discretionary and will not be exercised in all cases.

The Court refused to exercise such power when the charge had been hanging over the appellant for over two and a-half years, and there was a probability that it would be difficult to get the witnesses for the prosecution as well as the defence.

The appellant could not plead *autrefois acquit* to such new charge should it be hereafter preferred.

A Magistrate has no power under Section 71 of Ordinance 6 of 1873 to interrogate a prisoner. That power is conferred on the Supreme Court only.

The appellant had been convicted by A. W. O'Sullivan, Esquire, Magistrate, Balik Pulau. The charge in the case was as follows: "That the said Mah Ah Choon on the 7th November, 1886, at Sungei Pinang, in Penang, being the owner of a Common Gaming House, and that he has thereby committed an offence punishable under Clause 1, Section 3, Ordinance 13 of 1879."

The evidence for the prosecution was to the effect that European Sergeant Morton with a Lance Corporal and three Constables on 7th November, 1886, at 2 p.m., went to execute a gambling warrant against House No. 888, Sungei Pinang, Balik Pulau. On entering the house they found some 12 or 15 people, who immediately ran away in various directions. There was a platform about 2 feet in height across the house. The appellant was on the platform throwing off some cards and money which were on it—he was arrested by the Police. On the platform were a tobacco box, a cigar-holder, some Chinese cards, a mat and fifty-five and a-half cents in copper and a basket—some other cards were scattered about the house. There was *no* evidence on the part of the prosecution to shew who was the owner or occupier of the house. The appellant on being called for his defence stated that that afternoon he was *in his shop*; a man named Draman brought some Chinese cards and some 4 or 5 Malays, and asked his permission to play; he objected, but Draman insisted and thereupon

spread the mat on the platform and began playing—some Chinese subsequently joined them—appellant shortly after went in and drove them away, and was in the act of throwing the cards and money off the platform when the Police entered and arrested him. The three last sentences of the appellant's statement in defence, as sent up by the Magistrate, was as follows: "I am not the Manager of the Sungei Pinang Opium and Spirit Farm. *I am the owner of the house in which the arrest took place.* The platform in my house is for eating on." In his defence the appellant called two witnesses, the first of whom stated he went *to the shop of appellant* to get some pisangs. While there Draman came in and spoke to appellant asking him to play. Appellant replied he had no time, whereupon Draman said, "let me go and play a little." It was then coming on to rain and the witness left the shop. The second witness stated on 7th instant about noon he went to *appellant's shop* to load chaff. Shortly after the Police entered and a number of people ran away in various directions. This closed his defence. After this the Magistrate re-called [or allowed the prosecution to do so] the Lance Corporal who had given evidence for the prosecution, who, on being re-called, stated he recollected a warrant having issued for the arrest of appellant about the year 1882—at that time he [witness] was a Constable in Sungei Pinang. The Magistrate convicted the appellant on the above charge and sentenced him to a fine of $200, and in default of payment to 4 months' rigorous imprisonment. There were two other prisoners also convicted of gambling at the same time, and fined $10 each who did not appeal. The appellant gave the Magistrate notice of appeal on 16th November, 1886, but he never stated the case till 18th June, 1889. The appellant was on bail. In stating and delivering to the appellant the appeal case, the Magistrate omitted to deliver a formal record of conviction. The appellant filed an affidavit stating that the last three sentences aforesaid, which on the stated case appeared as part of his statement in his defence before the Magistrate, were replies by him to questions put to him by the Magistrate on conclusion of his statement. This affidavit was not contradicted nor explained.

Van Someren, for the appellant, after reading the stated case and the affidavit, explained how the delay in bringing forward the appeal had occurred. He then contended, 1.—that the charge disclosed no offence; it should, after stating that the appellant was owner of the house, have alleged that he "kept or used the same for the purpose of carrying on the business of a Common Gaming House;" he further pointed out Section 3 did not bear on the charge, and had no Clause 1.

Ross [*Acting Solicitor-General*] for the Crown, here stated that that was a clerical error for Section 2—whereupon

[*Pellereau*, J. requested Counsel for appellant to argue the matter as if the words omitted had been inserted and the number of the section corrected.]

2.—There was no evidence on the part of the prosecution that the appellant was the owner or occupier of the house, or that

PELLEREAU, J. 1889. —— REGINA v. MAH AH CHOON.

he kept or used it as a Common Gaming House; his answers to the Magistrate's question [among others] that he was the owner of the house in which the arrest took place was inadmissible as the Magistrate had no right to interrogate a prisoner. Ordinance 6 of 1873, Sections 71—74 which allowed a prisoner to be interrogated applied only to the Supreme Court. The sections themselves as well as Section 94, clearly shewed this.

3.—The appellant's own statement and the whole evidence shewed, if anything, that he being the occupier of the house permitted others to use it for the time as a gaming house; but if so, he was guilty under Section 2, *Clause 2*, and not Clause 1 which applied to the owner or occupier himself keeping and using the place as a Common Gaming House. The presumption under Section 11 to be drawn from the presence of the cards, &c., was only that the place was kept or used by the *occupier*; that meant by him *personally*. The evidence disproved that presumption.

4.—The Magistrate had no right to receive evidence that a warrant had been issued for the arrest of No. 1 about the year 1882, or any other time. It did not appear also what the warrant was issued for.

Ross, [*Acting Solicitor-General*] for the Crown admitted, that the objections 2 and 4 were good, and that the evidence referred to in No. 4 was admissible, but he submitted that that in itself was not sufficient to quash the conviction. He further submitted that the want of proof by the prosecution that appellant was the owner of the house was supplied by the first portion of the appellant's statement, and by the two witnesses called for him who spoke of the house as *his shop*—that shewed that he at least was the *occupier* of it. It was quite clear on the whole case that being such occupier he had permitted gambling on his premises, he was therefore guilty under Section 2, Clause 2, and he [Mr. Ross] asked the Court to send the case back to the Magistrate under Section 34, Clause 6 of the Appeals Ordinance 12 of 1879, with directions to enter up sentence for the offence of which the appellant ought to have been convicted, or to annul the proceedings under Section 34, Clause 2 of the same Ordinance, and direct the appellant to be tried again on a proper charge.

Van Someren, in reply submitted, that the power of the Court under Clauses 2 and 6 of Section 34 was discretionary, and would not be exercised in a case like the present where the matter had hung over the appellant for over two and a-half years. He was informed also the chief witness for the prosecution Sergeant Morton, had left the Police Force; and besides it would be difficult for the appellant to get his witnesses.

Pellereau, J. It has been admitted on both sides that there is no evidence on the charge as laid, but it is clear that the appellant permitted gambling to take place in his premises. It is my duty now either to annul the conviction on the charge as laid, and direct the appellant to be tried again on a proper charge or to quash the conviction simply. If I do the latter, I do not prevent the Crown from proceeding against the appellant on the

proper charge, if sufficient evidence can be procured. He could not plead *autrefois acquit* to that charge never having been tried on it. Under all the circumstances of the case, considering how long ago the offence was committed, the probability of the Crown not being able now to prove their case, the difficulty of the appellant to procure his witnesses, I consider it best simply to quash the conviction.

I may add, I am clearly of opinion, that the Magistrate has no right to interrogate a prisoner. That is a power conferred by Ordinance 6 of 1873 on the Supreme Court alone.

Conviction quashed.

OOI KOEY CHUAN *v.* LOW CHIN.

Although a Bill of Sale of personal property may be void *quâ* mortgage under Section 8 as not being in accordance with the form prescribed by the Bills of Sale Ordinance 12 of 1886, yet the convenant to pay the amount thereon may be a good note or memorandum to satisfy the fourth section of the Statute of Frauds.

Where a document is stamped *quâ* mortgage and is void as such, there is nothing in Section 11 of the Stamp Ordinance, 1881, to prevent the stamp being used as on a document of some other nature if the document is capable of being so construed.

A creditor who takes a void Bill of Sale of goods as security for his debt, discharges a surety who, under the belief of such security being valid, becomes surety.

This was an action [a small cause] to recover $107.33, principal and interest on the defendant's convenant in a Bill of Sale of personal property by way of mortgage, dated 14th day of September, 1888. The property mortgaged consisted of a certain number of pigs and household property belonging to one Tan Saw, who was a party to the Bill of Sale, but who, having fraudulently disposed of the mortgaged property without paying off the mortgage, absconded. The defendant in his defence alleged that he was merely a surety for the said Tan Saw, and that the plaintiff had taken possession of the property mortgaged and sold it, but had not accounted for the proceeds. He also alleged that the full sum of $100 [mentioned as the principal amount in the Bill of Sale] was not advanced on it, and that it was therefore void as not stating the true consideration for the making of it. The plaintiff denied all these allegations, but at the trial on giving his evidence he admitted the defendant was only a surety for the said Tan Saw. The Bill of Sale by way of mortgage provided that the $100 and interest should be paid within twelve months with interest monthly, in the meantime, and that "in case of default of payment by any one instalment or the interest thereof, the whole amount remaining unpaid should become immediately due and payable." It also contained a covenant by the defendant to pay the said sum of $100 with interest at twelve per cent. per annum monthly, and was in other respects according to the form prescribed by the Bills of Sale Ordinance 12 of 1886. On the case being called on for hearing,

Hogan, for the plaintiff admitted, that as the Bill of Sale provided for immediate payment on default of payment of any one instalment or interest it was void as not being in accordance

PELLEREAU, J. 1889.

OOI KOEY CHUAN v. LOW CHIN.

with the form prescribed by the Bills of Sale Ordinance above mentioned [*a.*]; but applied for leave to amend his claim by turning in into an action for money lent.

[*Pellereau*, J. allowed the amendment to be made, which having been formally done,]

Gawthorne, for the defendant put in an amended defence reiterating that the money was lent to the said Tan Saw and that he [the defendant] was surety,—alleging that there was no note or memorandum to satisfy the fourth section of the Statute of Frauds [29 Car. II cap. 3]; and that as surety he had been "discharged by subsequent acts of the plaintiff."

Hogan, for the plaintiff contended, that on the true construction of Section 8 of the Bills of Sale Ordinance, the Bill of Sale was void only *quâ* Bill of Sale—that is as a mortgage of the property,—but that the covenant to pay was not void and was a sufficient note or memorandum to satisfy the Statute of Frauds.

Gawthorne, contended that the Bill of Sale was void and the covenant went with it, and could not be relied on as a note or memorandum; that there was a difference where the Bill of Sale was void under Section 6 where the Bill of Sale was "void so far as regards the property .....comprised in such Bill of Sale," and Section 8, where "every Bill of Sale..... ..shall be void" if not made in the form prescribed by the Ordinance; that the covenant was never intended as a note or memorandum and could not be relied on as such, as it was not stamped as such—having been stamped for one purpose, namely a Bill of Sale,—it could not be relied on as being of a different nature and he cited the Stamp Ordinance 2 of 1881, Section 11. He further contended, that the defendant was discharged as surety as the plaintiff had omitted to take a proper Bill of Sale, and the security of the goods was lost to the defendant.

Hogan. contended that the section of the Stamp Ordinance had no application; and that the plaintiff had been guilty of no laches, nor done anything to the prejudice of the defendant without his knowledge and assent. The plaintiff took an invalid Bill of Sale, but that was the very Bill of Sale the defendant intended he should take and which he as surety signed.

Pellereau, J. delivered judgement on the first two points, but reserved judgment on the third.

Cur. Adv. Vult.

25th July. *Pellereau*, J. It is admitted on behalf of the plaintiff that the mortgage originally sued on is void as not being made in the form required by the Bill of Sale Ordinance 12 of 1886, and *quâ* mortgage, the plaintiff is not in a position to sue on it. The plaintiff therefore has amended his claim by suing for money lent to which the defendant by way of amended defence replied that the loan was made to the man Tan Saw who had since absconded, and that the defendant was only surety for him. This the plaintiff admitted in his evidence.

[*a.*] See *Jamalsah* v. *Vershat—In re* Raman Chetty, antè p. 471.

Three points were submitted for the defendant. 1st, that there was no note or memorandum in writing signed by this defendant sufficient to satisfy the Statute of Frauds; 2, that if the mortgage signed by this defendant could be regarded as a note or memorandum within the meaning of the Statute, yet it was inadmissible by reason of want of stamp—the original stamp on it being affixed to it *quâ* mortgage and not as a "memorandum or note in writing"; 3, that this defendant being surety only, the plaintiff has been guilty of laches in taking an improper security over the goods and thereby he was discharged from his suretyship.

Upon the first point, as already expressed, I am of opinion that although the mortgage is bad and void as not being made in the statutory form, yet as it is a writing signed by the defendant setting out the amount of money lent by the plaintiff to him and the since absconding debtor together with the terms for its re-payment, I hold that it is a sufficient memorandum or note to satisfy the requirements of the Statute of Frauds. [*a*.]

As to the second point, as already expressed, I am of opinion that this memorandum or note in writing is sufficiently stamped. It is true it was stamped *quâ* mortgage and as such mortgage it is void; but it does not follow that the stamp so affixed is also a nullity. Section 11 of the Stamp Ordinance [2 of 1881] says, that only one instrument shall be on the same stamp, but no second instrument has been written upon the stamp now in question, which, instead of serving its purpose as on a mortgage, may be regarded as serving the purpose of an agreement. There is nothing in the Ordinance to prevent this.

As to the third point on which I took time to consider, I am of opinion the defendant must succeed. The plaintiff lent the money now sued for, to another person since absconded, and for whom the defendant was surety only, and for which the plaintiff took the mortgage in question which comprised the property of the absconding party. By this it was understood that in default of payment the plaintiff would be at liberty to sell that property and so recover his money. It might be that such sale would be sufficient to cover the whole of the plaintiff's claim, in which case the defendant would have nothing to pay. At all events the plaintiff could only claim from the defendant as such surety, such balance as might be found due to him after such sale [*b*].

Both Law and Equity require that the condition of a person should not be made worse than that originally contracted by him. Here it is admitted that the defendant was surety only and as such, it is possible that he will not be called upon to pay for any sum whatsoever,—this of course depends on what proceeds may

[*a*.] The attention of the Court was not called to the case of *Davies* v. *Rees*, 17 L. R. Q. B. Div. 408. Also see *Re* O'Dwyer, 19 L. R. [Ir.] 19; *Re* Burdett, 20 L. R. Q. B. Div. 310, and *Monetary Advance Co.* v. *Cater*, Ibid. 785.

[*b*.] The attention of the Court was also not drawn to the law as laid down in *Fisher on Mortgages*, Vol. 1, pp. 349, 350; and *D'Collyar on Guarantees*, pp. 169,170; as to the surety being liable to be sued without any previous sale of the goods given as security.—J.W.N.K.

PELLEREAU, J. 1889.

OOI KOEY CHUAN v. LOW CHIN.

be realised from the sale of the principal's property. To render the defendant liable in this case, the Court would be obliged to alter his position entirely, and that for the worse; namely, to deprive him of the benefits which accrue to him as surety and then to saddle him with the liabilities of a principal. The plaintiff has brought about the loss of the security by taking an improper and void Bill of Sale by way of mortgage over the goods, and he has thereby discharged the defendant [*a*].

As both reason and equity forbid such a course, I must hold the defendant not liable for the money lent.

Judgment for defendant with costs.

PAYNA EMAMSAH *v.* THE GLENFALLOCH.

SINGAPORE.

GOLDNEY, J. 1889.

August 5.

When a vessel runs foul of a stationary object, the presumption is that she is in fault, and the burden is cast on her to repel the presumption.

There is no rule or regulation in force in this Colony rendering it obligatory on tongkangs lying alongside vessels for purpose of discharging or relieving cargo to carry lights.

The plaintiff was the registered owner of the tongkang, but at the time of action brought had ceased to be the true owner he having sold the tongkang to one M. who brought the action in the plaintiff's name and at the trial personated the plaintiff and gave evidence under that name. On enquiry into the damages before the Registrar these facts came to light, whereupon the defendant moved to stay all further proceedings in the action and costs to be paid by M.—M. moved that all proceedings might be amended by the substitution of his name for the plaintiff.

Held, however wrongly M. had acted, yet as to the merits of the case it was absolutely of no consequence who was the real plaintiff, or by what name he called himself, and no possible injury or inconvenience could be caused to the defendant by allowing the amendment—the proceedings therefore should not be stayed, but leave given to amend by substituting the name of M. for the plaintiff, on M. paying the defendant the costs of his application.

This was an Admiralty suit. The facts sufficiently appear in the judgment.

Khory, for plaintiff.

Donaldson, for defendant.

Cur. Adv. Vult.

August 7th. *Goldney*, J. The collision, which was the subject of enquiry in this case, occurred in the New Harbour, Singapore, on the evening of the 15th May, 1889, at about 7 to 7.30 p.m., between the s.s. *Glenfalloch* and a tongkang or lighter which was lying alongside the s.s. *Niobe* moored at the Tanjong Pagar Wharf. The force of the collision damaged the plaintiff's tongkang, which was inside the tongkang which came in contact with the s.s. *Glenfal'och*. The s.s. *Niobe* was lying alongside the Tanjong Pagar Wharf taking in cargo at three hatches from the tongkangs. The *Niobe* was working with electric lights over the

[*a*.] Nor was the attention of the Court drawn to the cases of *Hardwick* v. *Wright*, 35 Beav. 133; *Re* Barber & Co., 9 L. R. Eq. 725, 731 *et seq.*, and *D'Collyar on Guarantees*, pp. 325-6; 340, 342, 343-4, as to there being no discharge of a surety simply because the security was worthless from the outset, or because so subsequently without any actual act or omission on the part of the creditor beyond his taking such invalid security—J.W.N.K.

hatchways. The plaintiff's tongkang was in the third or fourth tier from the *Niobe*. The *Glenfalloch* was coming in from sea from the Westward through the New Harbour by the North Channel, intending to go alongside the Tanjong Pagar Wharf. The berth to which she was proceeding was immediately astern of the *Niobe*. The night was dark, but clear, the wind, if any, blowing from the South towards the land, which would be on the starboard quarter of the *Glenfalloch*. The evidence about the tide was conflicting, the plaintiff stating that it was running to the Eastward, that would be ebb-tide, the defendant that it was about 2/3 flood. In my opinion, at the time of the collision, it was about slack-water. The North Channel at this part is narrow and the berth assigned to the *Glenfalloch*, being on a curve, is difficult to approach. The *Glenfalloch* proceeded up the Northern Channel, those on board her, when at a considerable distance off, observed that the *Niobe* was taking in cargo from tongkangs alongside her. Although they could not at the distance see how many lighters were alongside her, yet they could see and did see that the tongkangs were not carrying lights. At the time those on board the *Glenfalloch* observed that the *Niobe* was taking in cargo from tongkangs, she could without danger to herself or others have stopped and anchored, or proceeded into the Bay. If she had adopted either of these measures she would not have been able to have gone alongside the wharf at that tide. The *Glenfalloch* proceeded to her berth, passing clear of the *Niobe* and the tongkangs alongside of her. She was going dead slow with hardly any way on her, heading almost at right angles to the wharf, intending to lie with her stern to the stern of the *Niobe*. At this time her head was about 12 ft. from the wharf and her stern was being gradually sagged into the wharf either by the little tide that was running, or by the wind which [if any] would be on her starboard quarter. In drifting towards the wharf the stern of the *Glenfalloch* just failed to clear the tongkangs alongside the *Niobe*, and in consequence the plaintiff's tongkang got crushed. At the time there were no ropes out from the *Glenfalloch*; she had practically no headway on her. To let go her anchor would have been of no use: she could not move her engines either ahead or astern without in the one case running into the wharf, and in the other running down the tongkangs. She had placed herself in a position where, if the slightest accident arose to interrupt or embarrass the manoeuvre which she was engaged in, it was all but impossible to avoid a collision either with the *Niobe* or the tongkangs, or with the wharf. The law which applies to this state of facts is quite settled. When a vessel runs foul of a stationary object, the presumption is that she is in fault, and the burden is cast on her to repel this presumption. The tongkang was stationary, the *Glenfalloch* was allowed to get into the position I have described, although at the time she proceeded up the North Channel those on board of her knew that the *Niobe* was taking in cargo from tongkangs alongside of her, but did not know how many tongkangs there were or their exact positions. In my opinion, if those in charge of a steamer, under these

GOLDNEY, J. 1889.

PAYNA EMAMSAH v. THE GLENFALLOCH.

circumstances, on a dark night, in a narrow channel, chose to proceed alongside a wharf at all times difficult of access, they do so at their own risk, and must bear the consequences of a contingency to which they have exposed themselves, and must be responsible for the damage they may cause. *The Hope*, 2 W. Rob. 8; *The Lids K. Jalf*, Swab. 118; *The Batavier*, 2 W. Rob. 407; *The Annot Lyle*, 11 Prob. D, 114; *The Egyptian*, 1 Moo. P. C. C. 373.

It was alleged on the part of the *Glenfalloch* that the tongkangs should have had lights up, and should have slipped their ropes when the *Glenfalloch* approached. No rule or regulation was produced which makes either of these things obligatory upon tongkangs lying alongside vessels for the purpose of having their cargo discharged into the larger vessel, nor does in my opinion the principle laid down in *The Saxonia*, Lush. 410, and cited in *The Industrie*, 3 L. R. Ad. & Ecc. Ca. apply to the circumstances of this case. The absence of lights on the plaintiff's tongkang or on the tongkangs immediately outside of him in my judgment did not and could not have contributed to this collision. If the outside tongkangs had had lights, as it was suggested they ought to have had, those on board the *Glenfalloch* would have had no more information than the electric lights on board the *Niobe* already gave them, viz., that the *Niobe* had tongkangs alongside her and that she was taking in cargo from them at three hatchways. Nor do I consider that because the *Glenfalloch* was proceeding to a berth which, considering the place, time, and tide, was difficult to approach without causing damage to others, she had any right to demand that the *Niobe* or the tongkangs should take extraordinary precautions to avoid a collision. *The Vivid*, *1 Asp. N. S. 601.* In my opinion the defendants have failed to show that there was sufficient justification for their intentionally placing their vessel in a position where, as the facts have proved, on the slightest miscalculation of distance a collision with the *Niobe* or the tongkangs alongside of her became inevitable. The presumption arising from their running foul of a stationary object has not been repelled by the defendants. I must therefore pronounce the *Glenfalloch* alone to blame. The question of damage to be referred to the Registrar.

On the enquiry being held before the Registrar it appeared from the cross-examination of one Madarsah [who had at the trial said he was the plaintiff, and who at the enquiry also so represented himself], that he was not the plaintiff at all, but that his name was Madarsah and that he was the purchaser of the tongkang in question from Emamsah, but the transfer had not been registered. The Registrar reported to the Court accordingly.

On November 11th, before *Goldney* J,

Donaldson, for the defendant applied that all proceedings might be stayed and that Madarsah might be ordered to pay the costs of the action, submitting that it was a gross case of personation.

Khory, for Madarsah submitted, that his conduct though reprehensible was due to ignorance and not from any intention to defraud. He in fact was the owner of the tongkang though his name was not in the register.

Cur. Adv. Vult.

November 25. *Goldney*, J. The damages in this action were referred to the Registrar. When before the Registrar, the plaintiff in his examination as to the amount of damage sustained by the *Manikapore*, admitted that he had brought the action in the name of the then registered owner, and not in his own name. At the time of the collision, he was the true owner, though not the registered owner. He also admitted that he gave his evidence in the name of the registered owner, and not in his own name. The defendants, on this admission, have applied to the Court for a stay of proceedings, and the plaintiff has also applied to the Court to amend the proceedings by substituting his name for the name of Payna Emamsah, the registered owner at the time of the collision, and in whose name the writ was issued. At the time of the collision, the plaintiff was the real owner, and had a bill of sale from Emamsah, registered owner. The B/S had not been registered, so that the owner on the register still was Emamsah. The plaintiff appears to have thought, that under these circumstances, he was bound to bring this action in Emamsah's name, and also to say he was Emamsah. This no doubt was very wrong, and by so doing the plaintiff may have brought himself, within the range of the criminal law; but as to the merits of the case, it was absolutely of no consequence who was the real plaintiff, or by what name the plaintiff called himself. An amendment substituting the name of the true owner of the boat for that of the then registered owner cannot, in any possible way that I can conceive, injure or inconvenience the defendants. I therefore accede to the application of the plaintiff, Madarsah, to substitute his name for that of Emamsah in all the proceedings in this case. It would be wrong that the defendants should have to pay the costs of this application, which has been occasioned by the plaintiff's fault. I therefore refuse to stay the proceedings, and order the name of the plaintiff to be substituted for the name in which the action has been brought, subject to his paying the defendants' costs of this application.

BRANDT & Co. *v.* GOH GUAN LU.

A person who agrees to sell to another a certain quantity of goods which he has to procure from abroad, is not at the time he tenders the other goods, bound to inform that other that he has imported more of the like goods and placed them in the market, and he commits no fraud in withholding such information.

Where a contract stated that it was for "25,000/30,000 cases Kerosine oil," and it being shewn by evidence that the expression meant from 25,000 to 30,000 cases,

Held, the fact that *the defendant* made the *proposal* to purchase that quantity was material, and his proposal having been accepted, he was bound to accept *the full* 30,000 cases if the vendor tendered him that quantity.

In such a contract the option is with the *vendor* as to whether he would only delver the 25,000 cases or the larger number of 30,000.

WOOD, AG. C. J. 1889.

BRANDT & Co. v. GOH GUAN LU.

The nature of this case and the pleadings therein and facts giving rise to it, are fully set out in the judgment.

Drew, for plaintiffs.

Donaldson, for defendant.

Cur. Adv. Vult.

August 20. *Wood*, Acting C.J. This was an action brought by the plaintiffs against the defendant for the refusal by the defendant to receive 5,000 cases of Kerosine oil.

The statement of claim alleges—

1. The defendant on the 13th February, 1889, made an offer in writing, duly signed, to the plaintiffs, through Mr. J. Lyall their broker, in the following terms:—

Singapore, 13th February, 1889.

J. LYALL, ESQ.,

SIR,

We make you the following firm offer, subject to reply on the 18th instant, viz., to buy from you 25,000/30,000 cases Kerosine oil, Devoe's High Screw, per steamer from New York *viâ* Canal, March/April sailing, to discharge at Singapore, at a price of $2.25 [Two Dollars and Twenty-five cents] per case, payment to be made in Promissory-notes, half at 3 months', and half at 6 months' date.

Delivery of the oil to be made on the usual Singapore conditions.

Your obedient Servant,

GOH GUAN LU.

Notice to be given to Goh Guan Lu immediately the shipment is arranged.

2. On the 18th, the plaintiffs by their agent, Mr. Lyall, duly accepted the offer of the defendant.

3. In pursuance of the said contract, the plaintiffs shipped on board the s.s. *Nubia* then lying at the harbour of New York, 33,000 cases Kerosine oil, Devoe's High Screw, and the said steamship sailed from New York on 3rd April, 1889, and proceeding *viâ* Suez Canal arrived at Singapore, on the 28th May, 1889, and the cases of oil were discharged in due course at Singapore.

4. The plaintiffs gave notice through Mr. Lyall to the defendant of the said shipment on or about the 6th April, 1889.

5. The plaintiffs called upon the defendant to accept delivery of 30,000 of the said cases, *but the defendant accepted delivery of 25,000 of such cases only*, and refused *to accept delivery of the remaining 5,000 cases.*

6. The plaintiffs thereupon claimed damages for such non-acceptance.

The defendant in his statement of defence, said as follows:—

1. That as to the 4th paragraph [alleging notice] that the plaintiffs did not give notice to the defendant immediately the shipment was arranged.

2. That on arrival of the s.s. *Nubia*, the plaintiffs informed him that the oil had arrived, *but did not inform him*, as the fact was, *that such oil was part only of a much larger shipment*, and the plaintiffs by *such concealment fraudulently induced the defendant to take delivery of the said oil.* The defendant afterwards discovered that the oil offered him was part only of a larger shipment, and thereupon refused to accept more than the minimum quantity mentioned in his said offer.

3. That by the *true construction of the contract he was not bound to receive more than 25,000 cases.*

On these allegations issue was joined.

Dealing with these defences in the order in which they appear in the statement of defence, I.—I find as matter of fact that the plaintiffs did give notice to the defendant immediately the shipment was arranged. II.—As matter of law that the plaintiffs were not guilty of fraud in law, in not informing the defendant of the fact that the oil was part only of a much larger consignment, viz., of 33,000 cases.

As to this second point no very strenuous contention was raised, and looking at the facts as disclosed in the statement of claim and defence, I can see no reason why the plaintiffs should have made any such disclosure. This is not the case of the purchase of an entire cargo, nor is anything shewn in the contract between the parties, arising as it did, which raises any duty in the plaintiffs to do more than tender to the defendant the number of cases which he had contracted to purchase. The rights and liabilities of the parties arose as they are stated in the particulars of claim and no circumstances were discovered in the case to limit the right of the plaintiffs to import a greater number of cases than 30,000. Possibly had it been shewn as a fact that the 3,000 cases imported in addition to the 30,000 had a material effect on the oil market of Singapore, or that oil in such quantities as to glut or materially affect the market had been imported by the plaintiffs, or that concomitant circumstances existed which bound the plaintiffs to import 30,000 cases and no more, the contention might have been founded, but the facts of the case are only the facts as stated in the particulars of demand, and I fail to see any reason for imputing fraud in law to the plaintiffs in importing the extra 30,000 cases. The main contention however arose on the question whether the defendant *on the true construction of his contract was bound to receive more than 25,000 cases.* The contract being to deliver 25,000/30,000 cases, I took evidence to explain the meaning of this mode of expression, and I find as a fact, that this is equivalent to the expression from 25,000 to 30,000 cases, a meaning which may easily be inferred and was admitted by both parties to the suit to be correct. In the course of the arguments, I was under some doubt whether the option did not lie with either party, inasmuch as the offer and the acceptance constituting a contract, it might be urged that its effect was that the plaintiffs were to deliver from 25,000 to 30,000 cases of oil, and the defendant was to accept from 25,000 to 30,000 cases, and thus there existed in the contract, an uncertainty as to the subject-matter beyond the 25,000, and thus the fact of the contract consisting of an offer on the one side, and an acceptance on the other, was immaterial, but upon consideration of the cases referred to in argument, especially *Cross* v. *Eglin*, 2 B & Ad. 106, *Cockerell* v. *Aucompte*, 2 C.B. [N.S.] 440, and *Bourne* v. *Seymour*, 16 C.B. 337, as well as upon consideration of the general law as affecting contracts, I am satisfied that the fact of the defendant making the offer or

WOOD, AG. C. J. 1889.

BRANDT & Co. v. GOH GUAN LU.

proposal is material, and that when a proposal is made by one party and duly accepted by the other, the party proposing is bound by the terms of the proposal.

I see no difference in principle between the cases which involve the words "about" or "more or less" or "say about" and the present case. Here the defendant limits his liability as to the number of cases he will take in analogous if not in similar terms to those of certain reported cases, instead of using vague terms such as "say 25,000 cases" or "25,000 cases more or less" upon which a question might, and as in the case of *Cross* v. *Eglin* above cited did arise, he uses words equivalent to 25,000 cases *or more* not exceeding 30,000, and given the meaning of the expression 25,000/30,000, the Court can construe the contract so as to infer the intention of the parties to it. This intention I hold to be that the plaintiffs may at their option tender any amount of cases from 25,000 to 30,000. This construction of the contract I consider to be clear on the principles established by reported cases; and that, without the help of any evidence of the custom of the trade, evidence concerning the admissibility of which some doubts may not unreasonably exist. In the case before us the plaintiffs tendered 29,652 cases of which the defendant accepted only 25,000 cases leaving 4,652 on their hands. These I find were sold by auction and resulted in a loss to the plaintiffs by the refusal of the defendant to accept these 4,652 cases, of $1,580.16 which, as matter of fact, I find to be reasonable, and I accordingly give judgment for the plaintiffs for $1,580.16, with costs.

ATTORNEY-GENERAL *v.* MUNICIPAL COMMISSIONERS.

SINGAPORE.

WOOD, AG. C. J. 1889.

August 26.

The defendants were a Corporation constituted under Ordinance 9 of 1887, and were in possession [how it did not clearly appear] of a Town Hall the lower portion of which for many years had been fitted up as a Theatre It was considered advisable to replace the old scenery with new ones, and with that view the defendants through their Secretary wrote a letter to a gentleman in England ordering such new scenery. To meet the cost of such scenery they had passed a vote of $1,000 from the Municipal Funds on their Budget for the present year which had been duly sanctioned by the Governor in Council in accordance with the Ordinance- by a subsequent vote they proposed to apply a further $260 of such funds towards such cost,—this $260 being transferred from another vote for a different matter which had also been sanctioned. The defendants were about paying this $1,260 to meet the said cost when this suit was begun at the relation of a rate-payer seeking to restraint the defendants from applying the said funds towards paying for the cost of such new scenery.

Held by the Court of Appeal [reversing the judgment of the Court below] following *Flower* v. *Local Board of Low Leyton*, 5 L. R. Ch. Div. 347, that Section 259 of the aforesaid Ordinance incorporating therein Section 44 of the Police Ordinance 1 of 1872, did not apply to such a suit [*a.*], and it was not necessary for the plaintiff to allege or prove "malice and want of reasonable and probable cause" on the part of the defendants in passing such votes and proceeding to make such payment.

Held further by the Court of Appeal [*Pellereau & Goldney*, J.J., *Wood*, Acting C.J. dissenting]—reversing the judgment of the Court below that the purchase of such scenery for the Hall, for the Theatre, for the benefit of the public was not a providing for the "convenience" of the public within Section 56 of the said Ordinance and that an injunction should be granted restraining the defendants from so applying the aforesaid funds towards the purchase of such new scenery.

[*a.*] See also *Phelps* v. *Hadham District Board*, 1 C. & E. 67.

Held further [by *Goldney*, J.] that the contract for the purchase being over $200 in value, but not being under the seal of the defendant-Corporation, was not a contract of the Corporation, and on that ground alone an injunction should have been granted.

Semble [*per Pellereau & Goldney*, J.J.—*Wood*, Acting C.J. dissenting] that the defendant-Corporation could not undertake to have a theatre [as a condition to their holding possession of the Town Hall] unless such an undertaking was within their powers under the Ordinance which it was *not*.

This was a suit praying for an injunction restraining the defendants from expending a sum of $1,260 or any other sum from the Municipal fund in the purchase of scenery for a theatrical stage in the Town Hall. It was instituted by the Attorney-General by the relation of James Guthrie Davidson, an owner of property and a rate-payer in the town of Singapore. A vote of $1,000 had been passed by the defendants in November, 1888, and had been placed on the Budget for 1889, which had been sanctioned by the Governor in Council in December, 1888. A Supplemental vote of $260 was subsequently passed by the defendants, and on 15th March, 1889, the Secretary to the defendants wrote to a Mr. Buckley in England authorising him to purchase the necessary scenery, who had completed the contract and was about to draw on the defendants for the price. The following are the sections of the Ordinance 9 of 1887, and 1 of 1872, bearing on the case.

"56. [Ordinance 9 of 1887]. The purposes for which the Commissioners are authorised to expend the Municipal Fund are the following, viz.:—

[*a.*] Lighting public streets places and buildings; extinguishing and preventing fires; control supervision and removal of dangerous places buildings trades and practices; regulation of traffic; and prevention and removal of obstructions in public streets or places.

[*b.*] Construction maintenance supervision and control of public markets and slaughter houses latrines privies urinals drains sewers drainage works and other works for the removal and disposal of sewage night soil and town refuse tramways water-works public baths bathing-places wash-houses and washing-places drinking fountains tanks and wells parks and gardens; reclamation of unhealthy localities; and other sanitary measures of a like nature.

[*c.*] Cleansing and watering of streets and sewers; scavenging; removal of excessive or obnoxious vegetation; and generally the abatement of all nuisances.

[*d.*] Construction maintenance and alterations of streets bridges causeways culverts and the like; regulation of buildings; removal of undue projections naming streets and numbering houses; and planting trees in public streets and places.

[*e.*] Construction purchase and maintenance of all buildings required in order to give effect to the purposes of this Ordinance.

[*f.*] All matters necessary for or conducive to the public safety health or *convenience*.

[*g.*] Acquisition of land necessary for any of the above purposes.

[*h.*] The exercise of all powers and the performance of all duties which under or by virtue of this Ordinance or any other enactment are or may be or become vested in or delegated to the Commissioners.

259. All actions and other proceedings which may be lawfully instituted against the Commissioners or the President or any Commissioner or any of the officers of the Commissioners or any person acting under their or his direction for anything done omitted or intended to be done under the provisions of this Ordinance or of any rules or by-laws made thereunder shall be

WOOD, AG. C.J. 1889.

ATTORNEY-GENERAL v. MUNICIPAL COMMISSIONERS.

commenced within three months after the accrual of the cause of action and not otherwise, and the provisions of Sections forty-three to forty-nine both numbers inclusive of "The Police Force Ordinance, 1872" shall apply to such actions and proceedings.

44. [Ordinance 1 of 1872.] In every action so brought it shall be expressly alleged that the defendant acted maliciously and without reasonable or probable cause, and if at the trial the plaintiff shall fail to prove such allegation, judgment shall be given for the defendant."

The case was heard on the 22nd and 23rd August, and on this day.

W. *Nanson*, for the plaintiff now moved for an interlocutory injunction—he contended that the expenditure was illegal and the resolution and vote were *ultrâ vires*—the question being one of principle. The expenditure was purely for the purposes of amusement and recreation of the public; it was not one of the duties thrown on the defendants by the Ordinance. They were attempting to apply the funds towards matters beyond their Ordinance and they thereby brought themselves under the jurisdiction of the Court, and the Court would restrain them. The defendants were not bound by the simple correspondence from their Secretary to the gentleman in England. Section 56 of their Ordinance defined the purposes for which they might expend Municipal funds—"public safety"—"health"—"streets"—"buildings"—"purposes of maintaining buildings required in order to give effect to the purposes of the Ordinance"—and "all matters conducive to the public safety, health, or *convenience*." It was only under the latter word such an expenditure could be based—but that word did not take in this case. The funds were "trust funds"—*Attorney-General* v. *Aspinall*, 2 M. & C. 613—the wrongful expenditure of it would be restrained by the Court—*Attorney-General* v. *Compton*, 1 Y. & C. 417; *Attorney-General* v. *Norwich*, 16 Sim. 245; *Freuwin* v. *Lewis*, 4 M. & G. 249; *Attorney-General* v. *West Hartlepool Improvement Commissioners*, 10 L R. Eq. 152; *Dance* v. *Goldingham*, 8 L. R. Ch. Ap. 902; Lewin on Trusts, 697; Brice on *Ultrâ Vires*, 862-75; *Munt* v. *Shrewsbury Railway Co.*, 13 Beav. 1, and *McGregor* v. *Deal and Dover Ry. Co.*, 22 L. J. Q. B. 69.

Drew, for the defendants contended, that the expenditure was for the "*convenience*" of the public, that word being a very wide one. Webster gave the meaning of the word as "for the promotion of ease, comfort, enjoyment and accommodation." The defendants had a discretion as to what was, or was not, convenient, and the Court would be very slow to interfere with that discretion. The case was the same as that of the Committee of Clubs. Joyce on Injunctions, p. 730; *Hopkinson* v. *Marquis of Exeter*, 5 L. R. Eq. 63; *Dawkins* v. *Antrobus*, 17 L. R. Ch. Div. 615. It was for the plaintiff to satisfy the Court that it was unreasonable, that it was unlawful. The case of *Attorney-General* v. *West Hartlepool* was not applicable—see *Attorney-General* v. *West Hartlepool Improvement Commissioners*, 10 Eq. L. R. 152, and *Attorney-General* v. *Eastlake*, 11 Hare 205, 223; the defendants also could not be sued as more than three months had elapsed from the time the vote was passed, and there was no proof or

allegation of the defendants acting maliciously and without reasonable and probable cause. Section 259 [suprà] and Section 44 [suprà]—*Selmes* v. *Judge*, 6 L. R. Q. B. 724, and *Midland Ry. Co.* v. *Local Board of Wittington*, 11 L. R. Q. B. 788.

Nanson, in reply contended, Sections 259 and 44 had no application to such a case as this. *Flower* v. *Local Board of Low Leyton*, 21 Q. B. Div. 160; he was entitled to have his injunction in order to have matters kept *in statu quo*, 2 Daniel Ch. Prac. 1501.

Wood, J. This was a motion for an injunction to restrain the defendants from expending the sum of $1,260 out of the Municipal fund for the purchase of scenery for a theatre until the trial of the action. The relator is a rate-payer, and the affidavits shew that the defendants purposed to pay out of the Municipal fund this sum of $1,260 for the purchase of scenery for a theatre now existing at the lower hall of the Town Hall, for which provision had been made in the Budget, and a Supplementary vote approved of by the Governor in Council. That the defendants, as Municipal Commissioners, held themselves bound as trustees for the public to maintain the lower hall as a theatre, and that the purchase of scenery was in fact beneficial to the maintenance of the theatre and a source of income to the rate-payers. Under these circumstances, which are stated in full in the affidavits, I am of opinion that the defendants are justified in expending the sum of $1,260 in the purchase of such scenery, and that for the following reasons:—

1.—By Section 56 of the Municipal Ordinance 9 of 1887, Subsection F., it was declared that one of the purposes for which the Commissioners are authorised to expend the Municipal fund is a matter "conducive to the public convenience." The "public" I take to mean "the public" in its ordinary sense, and not to mean the "rate-paying public," and "convenience to the public" I also take to mean the reasonable wants, requirements, or enjoyments of the public, of which the opportunity of witnessing theatrical performances in a locality where it is admitted the public have no other suitable place for the accommodation of companies of actors, professional or otherwise, may fairly be considered to be one. If the case of *Attorney-General* v. *West Hartlepool*, 10 L. R. Eq. 152, seems to be in any way a case in favor of the plaintiff, I desire only to say that while not taking upon myself to disapprove of the decision of W. M. JAMES, V. C., in that case, yet, reading the judgment, it is not too much to say that it refers to a special application of Municipal funds, that it discloses no tangible *ratio decidendi* applicable to this case, and should not be extended beyond the exact point there decided.

2.—I am however further of opinion that the spirit of the Ordinance is evidently to give to the Commissioners a discretion which, bridled as it would appear to be to some extent by the approval of the Governor in Council, they may exercise honestly, and which can only be successfully assailed by the imputation and proof of *malice or want of reasonable or probable cause*. This I take to be established by the incorporation by Section 259 of the Municipal Ordinance of the provisions of that Ordinance with

WOOD, AG. C.J. PELLEREAU & GOLDNEY. J.J. 1889.

ATTORNEY-GENERAL v. MUNICIPAL COMMISSIONERS.

Section 44 of the Police Force Ordinance of 1872 by the combined effect of which it is provided that in actions brought against the Municipal Commissioners for matters done or intended to be done under the provisions of the Municipal Ordinance, it shall be expressly alleged that the defendants acted maliciously and without reasonable and probable cause. That the defendants have acted otherwise than in good faith is not alleged, and as a consequence the action of the Commissioners cannot on this present application be impeached. I inclined at first to what may be called the common sense view of the case, that inasmuch as the defendants were in possession of a public room which might on occasions be let for purposes of public entertainment, such public room, if unprovided with scenery, could not be conveniently let for theatrical entertainments, and therefore that the expenditure by the Commissioners of so comparatively small a sum as $1,260, with the reasonable expectation of its being an ultimate benefit to the rate-payers, was a breach of trust so trifling [if breach it were] that an objection on that score would be looked upon as captious and nominal rather than real, and that for that reason the Supreme Court would not entertain a suit to set right so insignificant a matter, but it is due to Mr. Nanson's argument to say that he has shewn much to convince me that it is in the power of a rate-payer to object to even a trivial breach of trust, and that as matter of principle the Court would enforce the exact performance of their duty on the part of the Commissioners where the trust is clearly defined.

I should add that in the hearing of this matter a determination of the exact position of the Commissioners with respect to their performance of any trust towards the public with respect to the hall has not been arrived at, but the decision is based upon the supposition urged by Mr. Nanson that the public halls are the property of the Commissioners, a question which may rest until the action is ripe for trial if the plaintiff desires to proceed further in it, the present decision being that the motion for the interlocutory injunction is dismissed without, however, any order as to costs.

The plaintiff appealed.

September 7th. The Appeal now came on for hearing before the Court of Appeal, consisting of *Wood*, Acting C.J., *Pellereau* and *Goldney*, J.J.

Nanson, for plaintiff.

Drew, for defendant.

Goldney, J. said, that he would, upon such an important matter, like to put his judgment in writing, but he thought that the application for an interim injunction should be granted. The first point was that Mr. Presgrave, the Secretary to the defendants had admitted and stated that a contract had been made on behalf of the Corporation, which was not under the seal of the Corporation. Mr. Nanson said that the rate-payers' money could not be spent under this contract. According to the law, the Corporation, as Commissioners, are formed into a body

corporate, and as a body Corporate, they can only contract under the common seal, except in cases where for convenience, the Legislature had provided that the President may contract up to $200. A contract therefore not under seal for over $200 was not the contract of the Corporation, but of the individual Commissioners, and no money of the rate-payers could be applied to such a contract. On that point alone an injunction should be granted. Mr. Drew argued that the word "convenience" *Sub-section f, Section 56*, would enable the Commissioners to carry on a theatre. His Lordship's opinion was that it referred to those acts the Corporation might do under their Ordinance, and referred to *Pickering* v. *Stephenson*. [*a*]. He did not intend to decide whether or not the Corporation had any power to have a theatre, because those facts were not before them, but the facts were sufficiently before them, to say "you shall not spend this money until we know you have a right to carry on a theatre on part of your property." Until Mr. Drew could shew that they had such power an injunction should be granted until the trial of the action.

Pellereau, J. said, the last point raised by the Municipality touching the good faith of the Municipal Office, was not insisted on and was indeed untenable. The other point was concerning the transfer of the Town Hall to the Municipality, and it was argued by Mr. Drew that they took the place upon certain conditions, one of which was that the Municipality should keep certain scenery for the benefit of the public. He thought the Municipality could not undertake certain conditions, unless these were within the limits of its power, and this was really the same as the first point; it was necessary, in order to decide such a question, to refer back to the law of the Municipality's constitution. On the point itself his Lordship had the greatest doubt. The first four clauses of Section 56 referred to various matters which might be included under the head of safety, health, and convenience. The four last clauses of the same section applied to several things, referred back to the first four, also paragraphs G. and H. referred back to the clause, and he therefore thought that paragraph F. which reads "those matters which are necessary and conducive to public health, safety, or convenience," might be one of those general phrases at the end to make the matter more clear and general, but what was the necessity of repeating them under Section F.? Was it not more plain and logical that the wording of Section F. was meant to give something which was additional? The meaning was an important one, because it may have great weight with the Municipality in future in regard to its power. No doubt the word "convenience" might be construed as Mr. Drew meant it, but upon the interlocutory application, his Lordship did not intend a decided opinion on that point. But even assuming that the phrase bore the broad construction upon the word as put upon it by Mr. Drew—there arose the question whether buying scenery was a matter of public convenience,—his Lordship thought not. He abstained from deciding the legal point; it was not necessary that it should be decided, but

[*a*.] 14 L. R. Eq. 322.

WOOD, AG. C.J. PELLEREAU & GOLDNEY. J.J. 1889.

ATTORNEY-GENERAL v. MUNICIPAL COMMISSIONERS.

certainly buying scenery for such purposes for theatrical performers, was in common parlance, a matter of common recreation or enjoyment. No doubt convenience included enjoyment. A certain amount of enjoyment and pleasure was included in "convenience;" it was less than convenience, and it required something more in order that enjoyment might amount to convenience, and he could not think that the buying of scenery was for the public convenience. On this point he thought the Municipality were *primâ facie* in the wrong and that an interim injunction should be issued.

Wood, J. said, with regard to the second point, the question of no proof of malice he, since giving judgment in the Court below, had considered whether it was sound, and he was afraid he was bound to pay due consideration to the authority [*a.*] he had studied during the day and he had foregone that conclusion. With reference to the question of trustees of the Town Hall, this matter was not before them, and they could not at all decide that question. His Lordship assumed that this would be gone into, and they would then have to settle whether or not there could exist on the part of the trustees a condition to keep up their hall on the terms they agreed to do so. If the Municipality was not bound to perform the agreement, they must *give up so far*. The Court did not know whether the Commissioners were out and out owners, or whether they were persons merely there to perform an agreement, and whether it was a disastrous state of things, injurious to the Commissioners and injurious to the rate-payers. Then followed the vocation of words in Section 56 and it seemed to him those words must be read according to their meanings and sense, for a sentence was meant to be read in the way that an ordinary person would read it—*Max. on Statutes*. It was reasonable to suppose, in the construction of the Statute, that after generally dealing with the purposes for which the Act was passed, the general principle died away—the Act should be put in force for all purposes conducive to the public safety, health, or convenience; dismembered as it was from other sentences, it was a reasonable supposition that some division of the sentence was to be read as possessing power. They could only arrive at the meaning of the English language in part, but they had a right to refer to books, and his Lordship understood the meaning of the word "convenience," the ordinary meaning of the word, that which is conducive to public convenience, or rather convenience to the public—"the reasonable wants, requirements, or enjoyment of the public." Everything of this kind must be construed according to its surroundings. In this town there was no place where the public could enjoy a theatrical performance as in the Town Hall, and where they were in a place where theatrical exhibitions were restricted to one place,—they were entitled to look at the meaning of the word "convenience," in the locality where it was in order to find out what it was.

Judgment reversed with costs.

[*a.*] *Flower* v. *Local Board of Low Leyton*, supra.

SHAIK PAREETHO *v.* EBRAMSAH.

SINGAPORE.

WOOD, AG. C.J. PELLEREAU & GOLDNEY. } J.J.

1889.

August 29.

The defendant and his deceased partner prior to the death of the latter stated an account between them shewing $1,200 odd were in the firm belonging to the deceased partner. After the death of the deceased partner, the defendant, who was his Executor, made use of the money in the business of the firm and continued doing so for several years. The plaintiff, a next-of-kin of the deceased, sued the defendant for accounts and claimed that the deceased's estate was entitled to share in the profits of the business, to date of action.

Held, he was entitled to have the accounts of the business taken and a proportion of the profits credited to the deceased's estate and not merely to interest on the $1,200 as for money lent.

Held further that both profits and interest could not be charged on the amount of capital, nor interest on the profits.

Suit for partnership accounts. One Mahomed Pitchay and the defendant carried on business in partnership as Cutlery shopkeepers. In May, 1875, an account was stated between them shewing that Mahomed Pitchay's share in the assets of the firm amounted to $1,200 odd. Mahomed Pitchay died in June, 1875, appointing his partner the defendant, as his Executor. The plaintiffs in the case were the next-of-kin of the deceased, and claimed against the defendant that he had been using this $1,200 odd in his business up to date, and that therefore, they were entitled to a share in the profits of the business up to date. The defendant contended, that he had not used the money in the business, and that if anything could be claimed from him beyond the amount of the capital, it would only be the interest thereon, and not a share in the profits. In the Court below, *Goldney*, J. found as a fact that the defendant had used the money in the business, and did not believe the defendant's story that he had put money away in a small tin box. He decreed that the plaintiffs were entitled to have the accounts of the business taken, and that a proportion of the profits of the business up to date be paid to them. Against this judgment defendant appealed.

W. *Nanson*, for appellant.

Drew, for respondent.

Pellereau, J. said, the substantial question in the case was whether certain money had been used in the business or not. There was no direct evidence to shew that Mr. Nanson's client had put the money into his box, but there was evidence with which the Court could be guided. Mr. Nanson said there was evidence that the defendant put the money into the box and that there was no evidence to contradict that, but did that evidence bear upon it the stamp of truth? His Lordship thought not. It was a large sum of money for a man in that class of life, and he thought the story was incredible. His decided conviction was that the story was not true. If that was the case, then why did the defendant bring witnesses to swear to the truth of it. He thought it was because the defendant had been gaining profits from the use of this money, and when the action was threatened he made up this story to meet it. If the books were to be considered confirmatory evidence, there was no entry in the business book shewing that this money was put aside and that the business was carried on as before. There was no proof that there had been

WOOD, Ag. C.J. PELLEREAU & GOLDNEY. J.J. 1889.

SHAIK PAREETHO v. EBRAMSAH.

anything put into the box. His Lordship had therefore come to the conclusion, that the Executor had been using the money of the deceased in the business. With respect to the second part he held that the deceased's share remained mixed up in the business, and that the story setting it aside was not true, and the plaintiff was entitled to have an account of the business and a share of the profits. Mr. Nanson wished to have the judgment amended. What were the special circumstances referred to by Mr. Nanson? His Lordship could not see any. A claim made by the manager for his services was only a claim against the whole partnership, and the profits could only be arrived at after the deduction of such claim. If the decree as it stood was not broad enough to cover the claims made by the manager for remuneration for his management, power was given by the terms of the decree to apply: no Judge would refuse to make an order if necessary. The appeal should be dismissed with costs.

Wood & Goldney, J.J. concurred.

Appeal dismissed.

O'MALLEY, C.J. PELLEREAU & GOLDNEY. J.J. 1890.

The accounts having been taken before the Registrar on the footing of the above judgment, he made his report thereon by which he found sums due by the defendant. The defendant excepted to this Report and the exceptions were argued before *Goldney*, J., who on 9th December, 1889, confirmed the Registrar's report with a variation, allowing $1,103.31 for capital, $1,106.81 for profit, and $2,069.61 for interest on each of the previous sums. The defendant appealed against this judgment. The Appeal was heard on 25th and 26th March, 1890, before *O'Malley*, C.J., *Pellereau* and *Goldney*, J.J.

Bonser, [*Attorney-General*] and *Nanson* for appellant.

Napier, for respondent.

The Court of Appeal declined to reduce either amounts allowed for capital or profits, but reversed the judgment of the Court below in part, by holding that both profits and interest could not be charged on the capital, nor interest on the profits, and ordered the item of $2,069.61 to be struck out. They gave the appellant his costs of the appeal, and certified for two Counsel.

Judgment varied and affirmed.

CHIH LIM NEO *v.* SIT HOON NEOH.

SINGAPORE.

Although appeals in matters of detail, as accounts, should not be encouraged, yet where the evidence preponderates in favour of the appellant, this Court will act on such evidence and even reverse the judgment of the Court below, or the Registrar's certificate, on a point of fact.

WOOD, Ag. C.J. PELLEREAU & GOLDNEY. J.J. 1889.

Sept. 5.

This action which was brought against the defendant as Administrator of one Lee Tek Joo deceased, claiming the balance of an account, was originally brought at Malacca, but as it involved some complicated matters of account it was referred to the Acting Registrar, Mr. C. Logan, "to examine the accounts, with power to order the production of documents, &c." An application

was made to *Goldney*, J. to vary the report contained in the Registrar's certificate in August last. The learned Judge confirmed the report. The defendant now appealed.

R. W. *Braddell*, [*Shearwood* with him] for the appellant contended, that the terms of the order of reference were generally to inquire into the accounts, whereas the Registrar appeared to have misconceived this, as in his certificate he stated that it was ordered that he should inquire whether a certain item of $1,500 was paid or not, and he found that it was, basing his decision upon there being a certain formal receipt in a purchase deed of some shares. He further contended that the report, as confirmed, was against the weight of evidence. The transactions dated from 1879, the plaintiff being the widow and administratrix of one Lee Tek Hong, who died in that year, and the defendant her brother-in-law, who became her attorney and managed her affairs. Lee Tek Hong was possessed of 10 shares in a certain Tapioca plantation, on which $6,000 capital remained unpaid, and a call was made shortly after his death. Five of these shares passed to the father of Lee Tek Hong under the Statute of Distributions, whose executor and residuary legatee the defendant subsequently became. Two more of these shares the plaintiff sold to the defendant for $1,500, which the plaintiff alleged had never been paid for, and which she claimed together with $1,530 for interest. There were many other transactions between them, but it was this item which was the chief point of contention, and according to the view of the Acting Registrar of Malacca, as expressed by his certificate, the only point at issue. He then proceeded to shew that the balance of account, alleged in his statement of claim to be due, would still be due, whether the offending item was considered satisfied or not.

Everard, for the respondent.

The Court [*Wood*, Acting C.J. and *Pellereau*, J.– *Goldney*, J. dissenting] considered that appeals on matters of detail, as accounts, should not be encouraged, but held that the preponderating nature of the evidence was such that the Registrar's certificate could not be supported—they therefore reversed the decision of the Court below and set aside the said certificate.

REGINA *v.* KOK SAH LAI.

A conviction of offences in the *alternative* is bad, but may be amended by the Court of Appeal.

A person who is shewn to have committed an offence as a principal cannot be convicted as an accessory.

So, where a prisoner was shewn to have *purchased* a girl for the purpose of prostitution and kept her in her brothel, but the age of the girl not having been shewn to satisfy the section [Clause 1, Sub-section 1 of Section 4 of Ordinance 14 of 1888] creating the offence of purchasing, the Magistrate convicted the prisoner of *receiving* [Clause 3] the girl for purpose of prostitution knowing she had been purchased,

Held, the conviction could not stand.

The purchase and receipt of the girl having taken place *prior* to that Ordinance although the girl still remained with the prisoner while the Ordinance was in force,

Held, the "*receiving*" was an act completed prior to the Ordinance and could not be punishable thereunder.

GOLDNEY, J. 1889. — REGINA v. KOK SAH LAI.

Held however, the keeping of the girl was a distinct act from the purchase or receiving—it was a continuous act from day to day, and having continued while the Ordinance was in force, was a "*harbouring*" of the girl and was punishable under Clause 3 aforesaid.

This was an appeal from a conviction by Messrs. R. N. Bland and E. L. Brockman, sitting as a Court of two Magistrates, in Penang. The appellant Kok Sah Lai was the keeper of a brothel, in Campbell Street, and it was shewn by evidence that she had in May, 1887, in Penang, purchased a girl named Tsan Wan Chun of a woman named Tang Wi Sung for the purpose of prostitution; that from that time the girl remained with her, and in February, 1889, was registered as a prostitute and an inmate of her brothel. The age of the girl was not satisfactorily proved, but judging from appearance it was possible she was above sixteen years. In July, 1889, the mother of the girl arrived in Penang, and finding her in the brothel, complained to the respondent, the Registering Officer and Protector of Chinese, and thereupon got the girl removed from the brothel and restored to her. The appellant was thereafter prosecuted for buying the girl for the purpose of prostitution under Clause 1, Sub-section 1 of Section 4 of the Women's Protection Ordinance 14 of 1888, and with receiving and harbouring the girl under Clause 3 of the same sub-section. The girl in her evidence stated she did not wish to be a prostitute. The Magistrates dismissed the charge under Clause 1 as there was no evidence the girl was under 16 years of age, but convicted the appellant under Clause 3 of "receiving *or* harbouring." She appealed. Section 4, Clauses 1 and 3 aforesaid, is as follows:—

4. [1] Any person who:—

[i.] Sells, lets to hire, or otherwise disposes of, or buys, hires, or otherwise obtains possession of any girl *under the age of sixteen* years with intent that such girl shall be employed or used for the purpose of prostitution *either within or without the Colony* or knowing it to be likely that such girl will be so employed or used;

[ii.] .....

[iii.] Knowing or having reason to believe that any woman or girl ..... has been sold or purchased [whether such sale or purchase be made *within or without* the Colony] *receives or harbours* such woman or girl with intent that such woman or girl shall be employed, or used for the purpose of prostitution either within or without the Colony;

[iv.] Detains any woman or girl in a brothel against her will;

[v.] .....

[vi.] .....

shall on conviction before the Supreme Court or a Court of two Magistrates be liable to imprisonment of either description for a term not exceeding one year or to a fine not exceeding five hundred dollars or to both.

Van Someren, [*Anthony with him*] for the appellant.

Ross, [*Acting Solicitor-General*] for the respondent.

Cur. Adv. Vult.

26th September. *Goldney*, J. This is an appeal from the decision of the Magistrates convicting the appellant of an offence under Section 4 of Ordinance 14 of 1888, Sub-section 1, Clause 3.

The grounds of appeal upon which the Counsel for the appellant relied, were the third and fourth, viz:—that the evidence did not bring the case within Section 4, Sub-section 1, Clause 3, as it shews the defendant was actually the buyer or purchaser of the girl, and not merely a receiver or harbourer as the section contemplates; also, that the case does not come within Clause 3 as the sale and purchase took place before the Ordinance 14 of 1888 was passed.

As to this last ground of appeal, the appellant knew that the girl had been sold and purchased for the purpose of prostitution within the Colony, she herself having been the purchaser, and she does not deny that after purchasing the girl she has kept her in her brothel with the intent that she should be employed for the purpose of prostitution. These facts would bring the appellant within Clause 3; the purchase of the girl being previous to the Ordinance coming into force is not material.

The date of the purchase seems not to be material—the offence is harbouring a girl for the purpose of prostitution, who has been sold for that purpose. I do not think that the principle laid down in *Regina* v. *Debruiel*, 11 Cox. C. C. 208, applies, viz., that a prisoner could not be convicted of "receiving in England goods stolen in another country, because that crime consisted in the guilty receipt of stolen goods, that is to say, goods stolen according to the law of England, and that the law does not recognise a stealing in a foreign country as a crime which it will punish." This Ordinance expressly enacts that the "locus" of the sale whether it be within or without the Colony is "immaterial;" in other words makes an act committed in another country which may not be an offence in that country, an offence in this Colony. I think therefore, that if it is immaterial for the purposes of this Ordinance, that the sale was, at the time it was made, no offence by reason of its not having been contrary to the law of the place where it was made, it is also for the purposes of this Ordinance immaterial that the sale when made was no offence because the Ordinance making such a sale in this Colony an offence, had not come into operation. Having come to this conclusion, it is not necessary for me to decide the first ground of appeal raised by Mr. Van Someren. I think the conviction was right. As to reducing the sentence no facts which were not before the Court below have been brought before me. I cannot say that the Court below on the facts before them have exercised an unwise discretion in the sentence they passed upon the appellant. As this is the first time this section has been before the Court, having expressed my opinion, I reserve the question for the consideration of the Full Court.

18th October, 1889. The case now came on before the Court of Appeal, consisting of *Wood*, Acting C.J., *Pellereau* and *Goldney*, J.J.

Van Someren, for appellant argued [1] that the evidence shewed that the prisoner was actually the purchaser of the girl and so was a principal under Clause 1, but was not punishable thereunder only because the age of the girl could not be proved,

WOOD, AG. C.J. PELLERAU & GOLDNEY. J.J. 1889.

REGINA v. KOK SAH LAI.

but she could not on the evidence be convicted as a receiver or harbourer under Clause 3 as an accessory after the fact—as she would be called in English Law—*Regina* v. *Jordan*, 1 Leach C. C. 515; *Rex* v. *Owen*, 1 Mood. C. C. 96, and *Regina* v. *Parkinson*, 2 Den. C. C. 461; [2] that the sale of the girl took place prior to Ordinance 14 of 1888 being passed, and the case did not therefore, fall within Clause 3; to hold so would be to give the clause a retrospective effect—the Court below was wrong in supposing the act of purchasing was not then punishable; it was punishable under Section 373A. of the Penal Code; the Magistrates had not found definitely whether they convicted the prisoner of "receiving" or of "harbouring." If of "receiving" the act was complete prior to Ordinance 14 of 1888 being passed, and it could not be punished; if of "harbouring" the evidence did not shew the girl acquiesced in it, but it was rather to be inferred she was kept in the brothel against her will, the prisoner was therefore "detaining" her [Clause 4] and not "harbouring" her. There could be no harbouring unless there was *assistance* in some form given *personally* to the person harboured—*Regina* v. *Chapple*, 9 C. & P. 355, and there could be no assistance in this sense unless the person assisted concurred in it.

Ross, [*Acting Solicitor-General*] for respondent contended, that the act of harbouring was a continuous act and went on *de die in diem*—this state of things continued while the Ordinance was in force and was an offence under Clause 3. It was a distinct act from the purchase, and there could be no good reason for saying as regarded *that* offence it was a conviction of an accessory on evidence shewing the prisoner to be a principal. What the prisoner had done as a *purchaser* was done and completed before the Act; what she did in the way of *harbouring* was subsequent thereto, and during the time the Ordinance was law. [He was then stopped by the Court.]

Van Someren, in reply contended, the evidence did not disclose a case of "*harbouring*," the girl was in the brothel just as any of the other inmates were, and was a free agent in choosing that mode of life and that place of living.

Wood, Acting C.J. I am of opinion that the conviction for "receiving" is bad, but for "harbouring" is good, and that there was evidence to support that charge. The words "receiving or" will be struck out and the conviction as amended will stand.

Pellereau, J. The conviction is clearly wrong because it is in the alternative—but I agree that the words "receiving or" may be struck out. There was sufficient evidence of "harbouring" and *that* should be the offence of which the prisoner is convicted. With regard to the first point taken by Mr. Van Someren, I agree that the prisoner could not on this evidence be convicted of "receiving" on the authority of the cases he has quoted, but I do not think those cases apply to a case of harbouring. They apply to the charge of "receiving" as that act was complete in itself and took place at the same time as or immediately after the purchase—but "harbouring" goes on from day to day,—it was a distinct and separate offence which occurred even during the

Ordinance 14 of 1888, and is punishable thereunder. I have no hesitation in holding the "harbouring" is punishable although the selling could not have been under the Ordinance. As to the second point it is a fact that the sale and purchase took place before the Ordinance was passed; but that act of purchase was punishable under the Penal Code as the sale took place in Penang. This Ordinance punishes the harbourer—so that the effect of our decision is not to punish the harbourer for harbouring a person for doing an act which was not punishable, but for doing an act which was punishable at the time it was committed, under the old law—and the prisoner must be taken to have known this. I do not think it is necessary that the punishment to be awarded for that offence must be punishable under the same Ordinance as punishes the harbouring. The second point argued therefore fails, but if there is anything in it then I agree with the reasons given by my brother GOLDNEY. The restriction as to place of commission of the act being removed under Clause 3, why should not the time of its commission be equally immaterial? In giving that construction we do not make the clause retrospective—the offence we punish thereunder is not the sale or purchase, but the "harbouring" with the knowledge of such previous sale or purchase,—a harbouring which took place while the Ordinance was in force. The conviction as amended must be affirmed.

WOOD, Ag. C.J. PEL-LEBEAU & GOLD-NEY. } J.J. 1889.

REGINA v. KOK SAH LAI.

Goldney, J. I agree with the judgment of the Court.

Conviction amended and affirmed.

ATTORNEY-GENERAL *v.* HAJI ABDUL RAHMAN.

PENANG.

GOLDNEY, J 1889.

October 3.

On the death of a sole trustee, the trust estate devolves on his legal personal representative as trustee *to carry on the trust* by virtue of Section 33 of the Conveyancing and Law of Property Ordinance 6 of 1886, and *not* merely for the *limited purpose* of his *appointing* a new Trustee.

Section 34 of the Ordinance in no way controls Section 33.

This was a suit to have it declared that the defendant was not a trustee of the Acheen Street Mosque, in Penang, founded by one Tunku Syed Hussein Idid, deceased, or if the defendant were such trustee, then to have him removed; for the appointment of new trustees and general administration of the charity. The following were the facts giving rise to the suit. The said Tunku Syed Hussein Idid, deceased, died in 1823, having previously thereto founded a Mosque in Acheen Street, Penang. He left a Will by which he appointed four persons of whom Syed Abdul Rahman bin Mahomed Bilfahir was the survivor, his Executors, and thereby bequeathed the said Mosque and the lands thereof to them in trust for the said Mosque. The said Executors proved the said Will and obtained probate thereof. In 1849, the said Syed Abdul Rahman bin Mahomed Bilfahir executed a Malay document purporting, among other things, to enable the persons named therein to act after his death in the care and management of the said Mosque. One Haji Abdul Gunny was the survivor of

GOLDNEY, J. 1889.

ATTORNEY-GENERAL. v. HAJI ABDUL RAHMAN.

the persons so named therein. In 1867, the said Haji Abdul Gunny propounded the said document as a Will, and probate was granted thereto by this Honorable Court. From that time until 1874, various attempts were made by members of the family of the said Tunku Syed Hussein Idid to obtain the revocation of the said probate, but were unsuccessful at each attempt. In 1874, on the last of such attempts, this Honorable Court decided the said Haji Abdul Gunny represented the said trust and was the trustee of the said Mosque. The said Haji Abdul Gunny from that time till his death about 1883, acted as such trustee. The said Haji Abdul Gunny left a Will by which he appointed three Executors of whom the defendant Haji Abdul Rahman was the survivor. Probate was granted to the said Will of the said Haji Abdul Gunny by this Honorable Court dated 1883, and from that time the defendant had acted, and up to the time of the trial, still was acting as the trustee of the said Mosque and trust.

The case was heard on the 3rd and 4th October, 1889, before *Goldney*, J.

E. W. *Presgrave*, for plaintiff.

Van Someren, for the defendant contended, the defendant was the trustee of the charity being the legal personal representative of the deceased trustee, Haji Abdul Gunny, under the Conveyancing Ordinance 6 of 1886, Section 33. If he were removed still *he* had the power of appointment under Section 34. *Cecil* v. *Langdon*, 28 L. R. Ch. Div. 1; re *Walker & Hughes' Contract*, 24 L. R. Ch. Div. 698. Section 34 was taken from 44 & 45 Vict. c. 41, sec. 31, and was applicable even to the case of a sole trustee. Re *Shaflo's Trust*, 29 L. R. Ch. Div. 247.

Presgrave, replied.

Cur. Adv. Vult.

7th October. *Goldney*, J. This is a petition presented on behalf of some of the lineal descendants of Tunku Syed Hussein who founded a Mosque, in Penang. The object of the petition is the removal of the defendant Haji Abdul Rahman from the trusteeship of the Mosque, and for an account of the moneys he has received from Mosque lands. The defendant claims to be trustee of the Mosque as the surviving Executor of Haji Abdul Gunny.

The affairs of this Mosque have been many times before the Court. The most important occasion so far as the present petition is concerned was in 1874, when Haji Abdul Gunny claiming as the Executor of Syed Abdul Rahman bin Mahomed Bilfahir was declared by this Court to be entitled to act as the trustee of the Mosque.

What materials were before the Court at the time this order was made is not very clear. At that time the same facts and arguments however, which have been brought forward by the present informers could have been brought forward then, and I cannot assume that they were not before the Court. The result of this decision was that Haji Abdul Gunny was declared trustee of the Mosque to the exclusion of all others. I do not feel justified in going behind this decision.

WOOD, Ag. C.J.
PELLERAU & GOLDNEY. } J.J.
1889.

ATTORNEY-GENERAL.
v.
HAJI ABDUL RAHMAN.

The only question that remains is, whether the defendant as the Executor of Haji Abdul Gunny is entitled to the position of trustee. In my opinion he is not, except for the limited purpose of keeping the trust alive. As the personal representative of the deceased trustee under Section 33 of the Conveyancing and Law of Property Ordinance, 1886, the trust property vested in him; but not so as to create him trustee, but so as to enable him to deal with the trust property as the deceased trustee's representative, and to keep the trust alive by appointing another person to be trustee in the place of the trustee dead.

The defendant offers through his Counsel to render an account of what he has received from the Mosque property, so it will not at present be necessary for me to order this to be done. I think however, that the defendant should render this account and exercise the power conferred upon him by the 34th Section of Ordinance 6 of 1886 within a fixed time, say one month. When the accounts are rendered to the Informers this petition should come up for further consideration. The other questions raised by the petition can then be dealt with. It will be for the new trustee to consider what course he will take to protect the Mosque property and to receive such of it [if any] which has been alienated.

Reserve costs till further course.

The defendant appealed. The Appeal was heard on the 18th and 19th days of October, before the Court of Appeal, consisting of *Wood*, Acting C.J., *Pellereau* and *Goldney*, J.J.

Van Someren, for appellant contended, that the Court below was wrong in thinking Sections 33 and 34 hung together and were to be so construed. Section 33 was directory, Section 34 permissive. Prior to any enactment on the subject the fee simple estate of a beneficial owner as well as the legal estate of a trustee who died intestate devolved on his heir, unless the trust was a *discretionary* trust, *personal* to the trustee. *Hill on Trustees*, 293. As regarded this Colony, the estate of the *beneficial* owner devolved on the *legal personal representative* under Act 20 of 1837—the legal personal representative taking the place of the heir. The estate of the *trustee* still devolved on the *heir—Goods of* Cauder Mohuddeen, *deceased*, Str. L. R. 281, 2. Where there was a trust for *sale*, whether on the death of the trustee, the heir or a devisee could exercise the power was left somewhat doubtful on the authorities—*Cooke* v. *Crawford*, 13 Sim. 91; *Osborne* v. *Rowlett*, 13 L. R. Ch. Div. 774; *re Morton & Hallett*, 15 L. R. Ch. Div. 143. The English Statute 44 & 45 Vict. c. 45, sec. 30, was passed to set the point at rest, and gave the right to the legal personal representative of the trustee. When there was no legal personal representative, the trust estate was in the heir, but the moment there was a legal personal representative, *he* under the section, put aside the heir—*Re* Pillings' Trusts, 26 L. R. Ch. 432; *Wolstenholme & Turner on the Conveyancing Acts*, 82, 3. The case of *Re* Ingleby & Boak, and *The Norwich Union Company*, 13 L. R. [Ir.] 326, which was decided

WOOD, AG. C.J. PELLEREAU & GOLDNEY. J.J. 1889.

ATTORNEY-GENERAL. v. HAJI ABDUL RAHMAN.

on the Statute and which will be relied on by the other side turned on the special wording of the Settlement; it was also the case of a *trust for sale* which is a *discretionary* trust. Section 33 of our Ordinance had done for the legal personal representative of a deceased *trustee* exactly what Act XX. of 1837 had done for such representative of a *beneficial* owner. The section too, had a retrospective operation under Clause 3 thereof, and so governed this case. Section 34 did not affect Section 33 and had no bearing on the question whether the defendant as the legal personal representative of the deceased trustee was, or was not, a trustee.

Presgrave, for respondent contended, a trust estate did not pass to the heir on the death of a trustee unless the heir was named in the Settlement or Will. *Re* Ingleby & Boak, &c., *suprà*. The trust to manage a Mosque like the one in this case was clearly a *discretionary* trust and so did not pass to the heir. The case *In the goods* of Cauder Mohuddeen, *deceased*, was merely an *obiter dictum*.

Wood, Acting C.J. I am of opinion that the defendant as the Executor of Haji Abdul Gunny is entitled to the position of trustee not for the limited purpose of keeping the trust alive, and this by virtue of the words of Section 33 of the Conveyancing and Law of Property Ordinance, 1886. There is nothing to over-rule the direct language of the section. The appeal must be allowed with costs.

Pellereau, J. I trust the trusteeship has descended from Haji Abdul Gunny to his Executor and this by virtue of the operation of Section 33 of the Conveyancing and Law of Property Ordinance, 1886. I agree therefore, with the learned Chief Justice's decision, and I think that the case should be remitted back to the Judge who heard it.

Goldney, J. I do not wish to express any opinion contrary to that already expressed by the majority of the Court.

Appeal allowed with costs.

YEOH HIM & ORS. *v.* YEOH CHENG KANG & ORS.

PENANG.

GOLDNEY, J. 1889.

October 7.

The "Seh" or tribal Kongsis in these Settlements are *public charities* and the Attorney-General is the only person who can sue in any suit relating to them.

The objection that the Attorney-General ought to be such a party is fatal, although the suit may have proceeded through various stages and even to final judgment and appeal. Such an objection cannot be waived by the parties to the suit.

Query. If a Judge after reserving judgment in a civil suit, reads papers touching on the matters in question in the suit, which are found among the cause papers, but were *not* put in evidence at the trial, what would be the effect of such an act on the verdict? Would it make any difference if there is sufficient evidence to support the verdict, independently of the matters mentioned in such papers?

The Court of Appeal however refused to draw the inference that a Judge had so read such papers, merely because certain dates and one or two immaterial expressions were found in his judgment, which dates and matters to which such expressions referred, could not be found in the evidence laid before him at the trial.

The Registers kept by the Protector of Chinese as Registering Officer under the late Dangerous Societies Ordinance 19 of 1869 are not admissible in evidence on their mere production by that Officer when he is unable to speak to the matters contained in them.

The plaintiffs, five in number, in this suit, sued "for themselves and other numerous parties having the same interest" in

the Society or Kongsi hereinafter mentioned. The defendants, five in number, were sued by name "and other numerous parties having the same interest" in the same Society or Kongsi. The material paragraphs of the statement of claim, were as follows:—

1. The plaintiffs by Edward Faithful Thomas, their attorney, say that in or about the year, 1815, the members of the Seh *Yeoh* then residing in Penang established the Yeoh Kay Sye Tow Kong Kongsi for the general assistance and benefit of the tribe, or Seh *Yeoh* in this Settlement, and at that time the image of Sye Tow Kong was brought from China by Yeoh Boon Hien of Cheow Yeoh Seah, one of the founders.

2. That at or about that time, headmen of the Kongsi were elected by the members resident here of the Seh *Yeoh* generally, and Yeoh Boon Hien, Yeoh Boon Cheng of Cheow Yeoh Seah, and Yeoh Twah Teah of Teh Tean Seah were the elected headmen and were also the founders of the Society. That these were at first the only officers of the Society, but as land and property was afterwards acquired, additional trustees were appointed, namely Yeoh Chiam of the Eh Yeoh Seah, Yeoh Pin of Poo Lam Kay Seah, Yeoh Eang of Eh Yeoh Seah, Yeoh Teet of Ah Wee Seah, and Yeoh Poon of Ow Kay Seah, and subsequently others were also appointed.

3. .....

4. .....

5. That from the time of the foundation of the Society, subscriptions were raised among the members and with them lands and premises purchased at different times for the use of the Society and which were placed in the names of trustees for the benefit of the Society.

6. .....

7. .....

8. That the original and present constitution of the Society was and is as follows:—All the officers were and are to be appointed by election, such officers being a President and Committee, consisting of the trustees who are also Treasurers, a Secretary, and two members from each village in China of the Seh *Yeoh* resident here.

9. That the villages belonging to the Seh *Yeoh* in China, of which there are residents here are ten in number, and the number of the Seh *Yeoh* at present in Penang and Province Wellesley number nearly 800.

10. That the defendants are not with the exception of Yeoh Cheng Kang, sons of any of the deceased trustees.

11. That the plaintiffs say that the defendants have wrongfully assumed the position and powers of trustees of, and the direction and control of the business of, the said Society, and have not been elected according to the rules and constitution of the Society to the offices they hold; in fact, have not been elected at all. That they have further misappropriated a great part of the funds and income of the Society for the sole and exclusive benefit of one village only, out of the ten different villages entitled thereto; and that without the knowledge or consent of the surviving members of the committee, or the rest of the members of the said Society.

12. .....

13. That the plaintiffs were not aware until the death of the original President, Yeoh Yoo Boo, who for some time previous took no personal and active concern in the business of the Society, and whose death took place about 9th January last year, that the funds of the Society had been misapplied to the extent they are now informed they have been; but upon the brother of the late President, Yeoh Cheng Kang, wrongfully assuming the office in April this year, enquiry was excited and investigations were made, and it was found that the matters alleged in this statement of claim had taken place and an account was demanded from the defendants and a requisition made that they should call a general meeting of the Seh to consider these and other matters both of which they absolutely refused.

14. That the plaintiffs allege that for many years back—but from what precise period they cannot say, as no account has been rendered by the defendants of the moneys received—considerable sums have been wrongfully devoted to remittances to Eh Yeoh Seah and for the exclusive benefit of the

GOLDNEY, J. 1889.

YEOH HIM & ORS. v. YEOH CHENG KANG & ORS.

inhabitants of that village resident here, and they say, while admitting that the defendants have not applied moneys for their own personal benefit, that such an appropriation of the funds of the Society was contrary to the object thereof and wrongful, and they ask for an account of the moneys of the Society come to the hands of the defendants, or those acting with them, or on their behalf, shewing the expenditure incurred by them and the use that has been made of the funds.

15. .....

16. That the plaintiffs further say, that one of the objects of the Society is the due maintenance of a Kongsi house as a refuge for the needy and unemployed members of the Seh, and as a hospital. That more or less about 48 years ago such a house was established and was used as a Kongsi house until about 9 years ago, when the defendants or some of them wrongfully abolished the said Kongsi house and let the same as a private shop, and since then the receipts from the said shop have been devoted by them for the sole benefit of the inhabitants of their village Eh Yeoh Seah.

17. That the plaintiffs further say, that another of the principal objects of the Kongsi in common with many others, is the decent interment of the poorer members of the Seh. and a sum of $10 was formerly in accordance with the objects of the Society, supplied from the funds thereof for the interment of necessitous members. That the observance about 7 years ago was abolished by the defendants and they have since that time declined to provide funds for this purpose, alleging that there were none which could be so applied.

18. That the plaintiffs further say, that religious observances and the worship of the idol Sye Tow Kong on the 18th day of the 6th Moon in every year was one of the original objects of the establishment of this Kongsi, and the plaintiffs charge that the defendants have since neglected to send circulars for the due and regular attendance of the members upon the worship of the idol, and that the worship of the same idol has in consequence been neglected, and the defendants have for some time past and contrary to the due observance of the objects of the Society, added the worship of the idol of the "Goh Clan" named "Poh Seng Tye Tai" which besides entailing great further expense to the funds of the Society was contrary to the objects and intention of the founders thereof, which was that the idol of the Seh Yeoh should be duly attended to on the date abovementioned, and that idol only should be worshipped.

19. ....

I.—The plaintiffs pray that the defendants may be directed to account and that such accounts may be taken in the Registry of this Honorable Court in the usual way.

II.—And for an order declaring that the defendants have not been duly elected and appointed trustees of the said Society and directing that President, Trustees and Treasurers and Committee should be duly appointed under the direction of this Honorable Court by election of all the members of the Seh Yeoh, and for an order directing the defendants to pay over to such trustees and committee when appointed such moneys as may be found due upon the taking of the accounts aforesaid.

III.—And for an order directing all the property of the Society to be duly transferred and vested in the officers to be appointed as aforesaid under the direction of this Court, and that the deeds and muniments of title thereof, and the keys, books of account, and other property of the said Society be handed over to them.

IV.—And that the costs of this suit may be paid to the plaintiffs by the defendants.

V.—And for such further or other relief as to this Court may seem meet as the nature of the case may require.

The material paragraphs of the statement of defence were as follows:—

I. The defendants deny the statements contained in the first paragraph of the statement of claim and on the contrary say, that the Yeoh Kay Sye Tow Kong is not a Kongsi or Society, but an institution or association

established for the general assistance and benefit of persons of the Yeoh Seh, or tribe belonging to the Eh Yeoh Seah or village only, and is not and was not intended for other members of the Seh Yeoh. The plaintiffs are not members of the Eh Yeoh Seah or village nor of the said Yeoh Kay Sye Tow Kong Institution. The Sye Tow Kong is an idol belonging solely to the inhabitants of the Eh Yeoh Seah or village, and was brought to Penang about 1836 by the late Yeoh Chooee who was an inhabitant of that Seah.

2. The defendants deny the statements contained in the 2nd paragraph of the statement of claim except as hereinafter admitted, and on the contrary say, that the said association was established, by one Yeoh It Cheam, an inhabitant of the said Eh Yeoh Seah in or about the said year 1836, who collected subscriptions from members of the Seh *Yeoh* belonging to the said Eh Yeoh Seah; with the same and moneys borrowed, he purchased lands for the institution. At a meeting of the subscribers then held in his shop, Yeoh Hean, Yeoh Pin [not the plaintiff of that name] Yeoh Eng, Yeoh Tean, Yeoh Tit, and the said Yeoh It Cheam were appointed trustees.

3.....

4.....

5.....

6.....

7. The defendants deny the statements contained in the eighth paragraph of the statement of claim and on the contrary say, the management of the said institution has always been conducted by a committee of managers consisting of 20 or more persons all of the Eh Yeoh Seah or village who have had the right to appoint and have appointed Treasurers and Collectors of rent also of the same village. The plaintiffs are neither members of the Committee of management, Trustees, Treasurers nor Collectors.

8.....

9. The defendants admit that with the exception of the defendant Yeoh Cheng Kang none of them are sons of deceased trustees, but they say that they have been properly elected trustees and members of the committee of management among numerous others as mentioned in paragraph 3 hereof in accordance with the rules and regulations of the Sye Tow Kong and have held the keys of the institution ever since. The defendants say that none of the plaintiffs are sons of deceased trustees. The defendants deny that they have ever misappropriated any part of the funds of the institution and on the contrary they say, that they have spent the money subject to the control and approval of the committee of management and in strict conformity with the rules and regulations of the institution.

10.....

11. The defendants deny the statements contained in the 13th paragraph of the statement of claim, except that they admit that the defendant Yeoh Cheng Kang became President of the said institution. The defendants further say, that shortly after the death of the said Yeoh Yew Boo the plaintiff Yeoh Him had an interview with Yeoh Oon Leang, one of the members of committee, and asked him for a loan of $2,000 from the funds of the institution for the members of the Seh Yeoh belonging to Eh Yeoh Seah or village upon the security of land in China. Yeoh Oon Leang referred this proposal to the committee of management who agreed to consider the same if lands in this Settlement were offered as security. This decision was communicated to Yeoh Him at a meeting held in the institution of members of the Hong Long Tong institution called there to hear the determination of the members of committee.

12. The defendants deny the statements contained in the 14th paragraph of the statement of claim and on the contrary say, that accounts are annually rendered by the committee of management to the members of the institution and that all expenditure, remittances, subscriptions to charity, repairs and other outgoings are subject to the control and approval of the members of the committee of management and are in strict conformity with the rules and regulations of the institution.

13.....

14. The defendants admit that a house was opened for the accommodation of poor members of the Seh Yeoh generally who on their arrival in

GOLDNEY, J. 1889.

YEOH HIM & ORS. v. YEOH CHENG KANG & ORS.

Penang should find themselves homeless and friendless. This house was not however opened till 1846 under certain new and additional rules then passed. At the time of the establishment of such house, only a few members of the Seh Yeoh arrived here, but their numbers having increased, the committee of management for the time being discovered about 6 years ago that the privilege intended to be conferred was abused by the admission of strangers not members of the Seh Yeoh, and whether such strangers were admitted or not, that disturbances frequently took place in the said poor house. The said committee of management thereupon abolished the poor house as they had power to do under the said rules and regulations. This step was subsequently approved of by the general body of members of the association, and except in the present suit has never been questioned by any one but has been acquiesced in generally. The defendants admit that the premises formerly used as a poor house have since been let as a shop, but the rent obtained for the same is placed with the other rents collected on behalf of the institution to the credit thereof.

15. The defendants admit that owing to the detection by the committee of management of several instances of fraud they were compelled to stop contributing indiscriminately towards the funeral expenses of members of the Seh Yeoh, but in order to help persons who were really in want, a rule or regulation was passed in 1867, that any member of the Seh Yeoh who contributed a sum of $2.12½ was entitled on his death to a sum of $10 on presentation to the committee of management of a ticket shewing such subscription had been paid. Forty-five poor members of Seh Yeoh have availed themselves of this privilege, and in 27 of these cases a sum of $10 each has been paid to the friends of such contributors.

16. The defendants deny the statements contained in the 18th paragraph of the statement of claim and on the contrary they say, that the birthday of the said idol Sye Tow Kong has always been observed. They have invited members of the Seh Yeoh who do not belong to the Eh Yeoh Seah as they have invited other guests. The defendants deny that they have added the worship of the idol "Poh Seng Tye Tai," but say that such worship was observed under the original rules and regulations of 1836.

17. .....

18. The defendants submit that the plaintiffs are not entitled to the relief prayed for, and claim to be hence dismissed with their costs in this behalf most wrongfully sustained.

The reply was a mere joinder in issue. The case had been pending for several years and in various forms came up before the Court [see *antè* p. 204] as referred to in the judgment of *Goldney*, J. The final trial [*de novo*] came on before *Goldney*, J. on the 7th, 8th, 9th and 10th days of October, 1889.

Thomas, [*Presgrave* and *Wreford* with him] for plaintiffs.

Ross, [*Van Someren* with him] for defendants.

Cur. Adv. Vult.

October 14th. *Goldney*, J. This is an action brought by the plaintiffs who claim to be members of the Yeoh Kay Sye Tow Kong Kongsi, against the defendants who are also members of the same Society, for an account; also for a declaration that such of the defendants who now are acting as trustees and officers of the Society are not duly elected; for the election of new trustees, and that the property of the Society be vested in such trustees. The defendants do not appear to have taken any objection to the plaintiffs' right to bring this action on the ground that even if they substantiate their claim to be members of the Society, that the Society being a charitable one, they cannot without a "fiat"

of the Attorney-General, represent the Society for the purpose of this action. *Strickland* v. *Weldon*, 28 L. R. Ch. Div. 429. As the action was commenced on the 14th September, 1885, and has been several times before the Court, I must assume that this objection if a good one, has been waived. This action came on for hearing before Mr. Justice SHERIFF, in October, 1886, and was under Sections 440 and 442 of the Civil Procedure Ordinance, 1878, referred to the arbitration of certain Chinese gentlemen. The arbitrators made their award on the 22nd November, 1886. The award was taken up by the defendants and filed on the 1st of December, 1886. On the 11th January, 1887, this award was on the application of the plaintiffs set aside. The defendants appealed from this order. The Court of Appeal found that the arbitrators had misconducted themselves within the meaning of Section 454 of the Civil Procedure Ordinance, 1878, and affirmed the order made by the Court below. The award was not sent back to the same arbitrators, but the Cause was set down again for trial on the 1st July, 1889, and has been tried before me. I regret very much that the arbitration failed, as I feel that a case of this sort can be much better settled by the arbitration of persons who are personally acquainted with the workings of these charitable Societies than by an ordinary tribunal.

The dispute between the parties to this action, shortly is this: are the benefits of the Society limited to Eh Yeoh Seah [village] or open to the whole of the Seh *Yeoh*? To decide this, it is necessary to ascertain who were the "founders" of this Society—for the foundation of a Society of this sort and its regulations must be made by the founder or by his authority. The original "founders" must be taken to be those persons who first subscribed to, and collected subscriptions for the Society; and that having once started with a foundation though by small beginnings [see *In re St. Leonard's Parochial Schools*, 10 L. R. App. Ca. 308], yet that everything afterwards added, every accretion to the original subscriptions [which was not an endowment for any new and special purpose] must be taken to be upon the footing of the original foundation; not a new foundation, but something contributed for the purpose of the original foundation. It is admitted by the defendants that in 1867, the privileges of the Society were to a large extent open to any member of the Seh Yeoh, and that the important office of Low Chew was frequently filled by persons who were not belonging to the Eh Yeoh village. If as the defendants contend this was a new privilege, and not by right of the "original foundation," what right had the management of the Society to make rules impressing a new character upon the original foundation? There is no evidence before me that in inviting all the Seh Yeoh to their feasts and in electing a Low Chew and other officers from men not of the Eh Yeoh village, the trustees or managers did this in pursuance of what in law is commonly known as the *Cy-près* doctrine—that is, because they found from lapse of time and change of circumstances it was no longer possible beneficially to carry on the Society in the exact way in which the founder had directed, and that it could only be

GOLDNEY, J. 1889.

YEOH HIM & ORS. v. YEOH CHENG KANG & ORS.

carried on beneficially to similar purposes by different means. On the contrary, the people of the Eh Yeoh village seem by no means exhausted, and as far as I can see, there was no necessity if the defendants' contention is right, for the trustees or managers to have gone outside the people of the one village. Much stress was laid by the defendants upon the book of rules of the Society which was produced. This book contained rules alleged to have been made in 1836, 1846, 1867, and in 1881. If these rules are accepted as they stand, they no doubt are much in favour of the defendants' contention that the original foundation was confined to the one Yeoh village, Eh Yeoh Seah. The plaintiffs however dispute the genuineness of these rules. I have examined them with great care, and the conclusion that I have come to is that they are not the original rules [if any rules ever were drawn up and written at the time the Society was founded—which I very much doubt]. I think the rules before the Court are of a very much later compilation, and while containing no doubt most of the rules of the Society, they also in my opinion embody as rules what in fact formed no part of the regulations of the original foundation, but are only the desire and wish of a certain portion of the Society. I do not think it necessary to go through the evidence in detail as with the exception of the identification of certain names in the various grants, there is hardly any dispute as to the main facts brought forward by the plaintiffs, viz., that the name of the Society includes the whole of the Seh Yeoh; that for many years some of the most important offices in the Society have been held by men not of the village of Eh Yeoh; that the whole of the Seh Yeoh are summoned to the feasts and subscribe to them; that the burial privileges and the right to have ancestral tablets in the Kongsi house is not confined to the people of the Eh Yeoh village; that the people of the Eh Yeoh village contribute no more to the Kongsi or in other manner than the people of the other Yeoh villages,—the only subscription that is paid being the money collected for the feasts. In addition to these points raised by the plaintiffs, a fact came out in the course of the trial which I think has considerable bearing upon this case. There is established in Penang, a Hokien Kongsi which is composed of the five principal Sehs in the province of Hokien. Each Seh is represented in the Hokien Kongsi by its own "Seh" Kongsi—the Seh Yeoh is represented in the Hokien Kongsi by the Kongsi, the subject-matter of this action. Taking the whole facts into consideration I have come to the conclusion that "the founders" were not exclusively men of the Eh Yeoh village, and that the original founders did not intend to limit the Society simply to the people of the Eh Yeoh village. That from the time of the foundation of the Society, the people of the Eh Yeoh village have in every way taken the leading part, is also clear. But the mere fact that the management of the Society has been principally carried on and is carried on by people of a certain village, is not enough to lead to an inference of law, that by the original foundation the benefits of the Society are confined to this village to the exclusion of all other villages of the Seh Yeoh. It is admitted that the plaintiffs and those whom they

represent have subscribed and do subscribe to this Society. I think on this ground alone, apart from any other question, that the plaintiffs, if they are entitled to sue in their own names, are entitled to receive from the defendants an account of their dealings with these funds. For the reasons I have given, I think the plaintiffs are entitled to succeed in this action. Verdict must be for the plaintiffs in the terms of their prayer. Under the circumstances, I think the costs of both parties should be paid out of the estate of the Society.

O'MALLEY, C. J. WOOD & PEL-LEREAU. } J.J. 1890.

YEOH HIM & ORS. v. YEOH CHENG KANG & ORS.

From this judgment the defendants appealed both on law and facts by leave of the Court. The grounds of Appeal, were:

1.—That this suit ought to have been dismissed as it was only maintainable by the Attorney-General.

2.—That such a defect in the suit could not be waived.

3.—That there was no evidence to support the plaintiffs' case.

4.—That the judgment was against the weight of evidence.

5.—Wrongful admission of the Registers produced by Mr. Wray.

6.—The learned Judge, as appears from his judgment, after he had reserved judgment, read the arbitrators' award and proceedings thereon in the Court below and on appeal [which had *not* been put in evidence before him] and so had his mind charged with facts he should not have known and which operated prejudicially to the defendants.

The Appeal was heard by the Court of Appeal, consisting of *O'Malley*, C.J., *Wood* and *Pellereau*, J.J., on the 10th and 11th days of July, 1890. Points 1, 2, 5 and 6 were alone argued, it being unnecessary to go into the question of fact.

Ross, [*Van Someren* with him] for the appellants contended first, as to the 6th point, that there had been a mistrial and the verdict ought to be set aside and a new trial had as the learned Judge had, after reserving judgment, read the aforesaid award which formed part of the papers in the case in connection with former proceedings thereon, but had not been put in evidence at the trial, and such award was calculated to influence his judgment. They relied on the matters mentioned by the learned Judge in the judgment as to the various stages the case had gone through, the successive dates and results, and the expression that the Chinese arbitrators were better judges in this kind of a case than the ordinary tribunals. The Judge here was Judge and Jury and the result of his having so done vitiated the verdict. They referred to *Regina* v. *Fowler*, 4 B. & Ald. 273; *Regina* v. *Murphy*, 2 L. R. P. C. 535, 552; *Harpurshad* v. *Sheoh Dyal*, 3 L. R. Ind. App. 259, 285-6; *Chatterton* v. *Cave*, 3 L. R. App. Ca. 483; *Merican and Ors.* v. *Mahomed*, 3 Kyshe, 138; *Re Dillett*, 12 L. R. Ap. Ca. 459; that Section 5 of the Appeals Ordinance 12 of 1879, and Section 57 of the Indian Act 2 of 1855, did not apply as they only referred to admission and rejection of evidence *at the trial* so that the old law applied, and it was immaterial whether there was sufficient evidence to support the judgment or not. *Bailey* v. *Haines*, 19 L. J. Q. B. [N.S.] 73; *Queen* v. *Gibson*, 18 L. J. Q. B. Div. 537. Then as to the 5th point—the Register No. 1 was a copy of No. 2 and was clearly inadmissible—but No. 2 was also inadmissible. It was a

O'MALLEY, C. J. WOOD & PELLERAU. } J.J. 1890.

YEOH HIM & ORS. v. YEOH CHENG KANG & ORS.

Register begun in January, 1870, and subsequently under the Dangerous Societies Ordinance 19 of 1869; as this Society though not a dangerous Society, consisted of five or more members it was registered under Section 1. The Register under that Ordinance should have been kept by the Superintendent of Police—by an amendment Act, the Governor was to name the registering officer —by an Order in Council the Protector of Chinese was named such officer. He produced these books as from his custody; he says he did not make entries himself—and as to No. 2, the original book, he says he does not know when the entries therein were made and he had no personal knowledge of these matters. These books could only have been corroborative evidence under the Evidence Act 2 of 1855, Section 43, but that section did not apply to this case as there was nothing to shew that No. 2 ever was in the office of the Superintendent of Police, or that its entries were made in the regular course of duty, nor were they brought in as corroborative evidence, but as independent proof, and there was no other evidence throughout the case touching them. They should not therefore have been admitted, and the learned Judge was wrong in over-ruling the objection taken at the trial to their admissibility—of course Section 5 of the Appeals Ordinance as well as Section 57 of the Evidence Act would render this wrongful admission harmless, if there was other evidence to support the verdict. But if we succeed in shewing the Registers should not be looked at when arguing as to the question of fact before this Court, this Court will not look at them—and this was the object sought, by this objection being now raised. Then, as to the 1st and 2nd points. This was a charitable Society as appeared from the foregoing paragraphs of the statement of claim—it was, according to the plaintiffs, a charitable Society, without proper trustees to represent it. The Attorney-General, under those circumstances, ought to sue. *Boyle on Charities*, p. 12—13; and he *alone* could do so. *Mitcheson on Charities*, p. 3 § 3; *Story on Eq.* § 222; *Strickland* v. *Weldon*, 28 L. R. Ch. Div. 426. As he *alone* could do it, the plaintiffs had *no right* whatever to do it, and the suit was hopelessly bad and the whole proceeding a nullity. The objection to it could not be waived. The Attorney-General would *not* be a *formal* party here—and where he ought to sue, but some one else does so, the defendant, in putting in a defence, and allowing some months to elapse, does not prevent him afterwards raising the objection. *Attorney-General of Lancaster* v. *Duke of Devonshire*, 14 L. R. Q. B. Div. 195. If it was a mere irregularity, the taking of a fresh step would waive the objection—and if the taking of one fresh step did not, no more would any number of them. This judgment could not bind the Attorney-General if he afterwards chose to sue, as he is no party here—the judgment might be put aside by him as really not affecting the property of the charity. It was an empty and useless decree which could not be enforced if he stepped forward. Section 4 of the Appeals Ordinance did not apply—it only referred to some "defect of form or otherwise" where the party suing *had a right* to sue. Section 123 of the Civil Procedure Ordinance did not apply as it did not

refer to a case in which the plaintiff suing has *no* right to sue and is desirous *therefore* to substitute another. *Walcott* v. *Lyons*, 29 L. R. Ch. Div. 584; *Showell* v. *Winkup*, 60 L. T. [N.S.] 391. No party also will be added *after final* decree—*Attorney-General* v. *Corporation of Birmingham*, 15 L. R. Ch. Div. 423. The objection, though technical, was fatal even now, and the suit should be dismissed.

E. W. *Presgrave*, [*Wreford* with him] for respondents contended, as to the sixth point, that the inference the Court was asked to draw that the Judge below had read the award was unwarrantable—and this Court would be going out of its way, on these materials, to find he had done so. An act such as this must be clearly stated and proved, there must be traversable facts, and it was not sufficient merely to allege it on these mere dates. *Regina* v. *Murphy*, [suprà] p. 549-50, *per* ERLE, C.J. As to the fifth point, they admitted they could not now contend the Registers were properly admitted, but there was evidence *aliunde* to support the verdict. As to the 1st and 2nd points, the Attorney-General was not required to be a party, as this was not a *public* charity. It was a private one at most. The paragraphs in the statement of claim relied on, are denied or qualified by certain paragraphs of the defence. This was not a permanent institution, there was nothing to oblige these persons or any one else to carry it on. *Lewin on Trusts*, p. 20 § 5; *Re Clarke's Trusts*, 1 L. R. Ch. Div. 497; *Stuart* v. *Greene*, 5 Ir. R. Eq. 470; *Tyssen on Charities*, p. 523; *Prestney* v. *Mayor of Colchester*, 21 L. R. Ch. Div. 111; *Brown* v. *Dale*, 9 L. R. Ch. Div. 75. As to the waiver, *Attorney-General* v. *Sidney Sussex College*, 15 W. R. 162—but if necessary the Attorney-General could be made a party. *Kader Mydin & ors.* v. *Hadjee Abdul Kader*, 1 Kyshe, 489.

Ross, replied. Kader Mydin *v.* Hadjee Abdul Kader, was an amendment *before* final decree—the objection was taken at the hearing, the case adjourned, and amendment allowed. The *final* decree in the case was made when the Attorney-General *was* a party. This was clearly a public charity, the persons intended to be benefitted were a fluctuating body. *Lewin on Trusts*, p. 20 § 5.

Cur. Adv. Vult.

O'Malley, C.J. The first ground of appeal in this case is, that it can only be maintained by the Attorney-General, and the question raised by this objection is, whether this Society was a public charity. I am of opinion that it is, and I come to that conclusion from the matters stated in the pleadings and the passage in Lewin which was relied on by Mr. Ross. Then the second point is that this objection could not be waived. If the Society is a public charity, the Attorney-General alone could sue. He has not done so, and I think the objection is fatal. I do not see how it can be waived. The whole of the proceedings, I think, must be set aside. The third and fourth grounds of appeal were not gone into. As to the fifth, the Registers were clearly not admissible, but it is not necessary to go into the question

O'MALLEY, C. J. WOOD & PELLEREAU. } J.J. 1890.

YEOH HIM & ORS. v. YEOH CHENG KANG & ORS.

whether there is sufficient evidence without them. As to the last objection, I think that the conclusion that the appellants ask us to draw that the learned Judge in the Court below after he reserved judgment read the arbitrators' award, is unwarranted and unsupported by anything in his judgment or in any part of the case. The order I think we should make is, not that the suit be dismissed, but that the whole of the proceedings in the case be set aside.

Wood, J. I am of the same opinion, except that I think the suit ought to be dismissed now. I hold this was a public charity, and the objection that the Attorney-General alone could sue, is fatal and cannot be waived. The parties to a suit cannot, by agreement between them, or their conduct, deprive the Crown of its right, and that right is represented by the Attorney-General. I also hold that the Registers were not admissible. As to the sixth ground of appeal I do not think that it has been made out. The gravamen of the objection is, that the learned Judge read the award, and was influenced by it. I do not think the mere matter of dates given in his judgment warrant us in so inferring, nor the expression of regret at the failure of the arbitration. There is nothing to shew those dates and facts were not referred to or mentioned in the opening or arguments at the trial; nor that the award assisted him in coming to a finding in the case. I do not think it is by any means clear that he read the award. This objection therefore fails.

Pellereau, J. I hold that there is no evidence that *Goldney*, J. read the award, and as to his expression of regret I can well understand them as I share it myself—and I very well remember the late Chief Justice FORD expressing such a regret in this very case as he thought the habits and customs of these people were best known by them and the arbitrators would decide according to their ideas and knowledge. There is however nothing to shew that the learned Judge in the Court below read the award. As to the dates, it might have been got from the other papers in the cause and not from the award—but even if from the award that does not shew he read the award—*Omnia presumuntur rite esse acta*. The difficulty of proof is no substitute for the proof itself, and I find nothing is shewn that he read the award. On the legal point connected with this objection as to what the consequence would have been had we found the award had been read I say nothing—nor what would be the effect, if there was sufficient evidence *aliunde*. I agree that the Registers should not have been admitted. As to the last points argued—the first two in the memorandum of appeal—I also agree that the absence of the Attorney-General is fatal and it cannot be waived. I think, with the learned Chief Justice, that the order we should now make is, not that the suit be dismissed, which may hereafter raise a question of *res judicata*, but that all proceedings in it be set aside.

Order accordingly. Costs of both sides out of the estate.

MANA NONDU & Co. *v.* POONASAMY NAIKU & Co.

SINGAPORE.

WOOD, AG. C.J.

1889.

October 7.

The defendant, a resident of Bangkok, made a contract in Singapore with plaintiff, a resident of Singapore, for the supply *at Bangkok* of certain number of cattle and that payment should be made *there*. The plaintiff began an action on the contract in Singapore, and on an affidavit that the contract was made in Singapore obtained an order under Section 66 of the Civil Procedure Ordinance, 1878, to serve the writ of summons at Bangkok. Service was thereupon effected at Bangkok, whereupon the defendant moved to set aside the order.

Held, the contract was one to be performed in Bangkok, and as the witnesses would necessarily be there, leave to serve the writ of summons should not have been granted and the order was accordingly discharged.

W. *Nanson*, had on 6th August last, obtained from *Wood*, Acting C.J., an order giving plaintiffs leave to serve the writ of summons herein upon the defendants at Bangkok, in Siam, on an affidavit which alleged the following facts; 1, that the plaintiffs carried on business in Singapore; 2, that the defendants carried on business in Bangkok; 3, that on the 16th January, 1889, the defendants entered into a written contract with the plaintiffs in Singapore to ship bullocks from Bangkok to Singapore; 4, that the defendants failed to supply bullocks and that the plaintiffs had thereby suffered loss amounting to $891.10, and that the defendants also owed the plaintiffs $131 for money paid in Singapore for the defendants' use and $500 $\frac{34}{100}$ for money remitted to Bangkok.

Drew, for the defendants now moved that all proceedings in the action be transferred to the Consular Court, in Bangkok, or the order of 6th August discharged. The contract for the alleged breach of which the action was brought, provided that certain bullocks contracted by defendants to be delivered to the plaintiffs, *were to be delivered in Bangkok*. He also produced an affidavit in which the defendants stated that they would not be able to procure the attendance of witnesses in Singapore. Although the Court had jurisdiction to make the order of August 6th, yet the making of such an order was matter of discretion to be exercised by the Court in each particular case—*Davis* v. *Park*, 8 L. R. Ch. Ap. 862 [note]; *Société Générale de Paris* v. *Dreyfus*, 37 L. R. Ch. Div. 215, 223-6, *per* LINDLEY, J. The contract was one to be performed at Bangkok—a fact not mentioned to the Court before—that fact was a material fact and having been suppressed the order should be discharged. *Republic of Peru* v. *Dreyfus*, 38 L. R. Ch. Div. 348.

Nanson, for plaintiffs contended, the order was rightly obtained and could not now be set aside—*Fowler* v. *Barstow*, 20 L. R. Ch. Div. 241; that the contract was to be performed in Singapore. *Morton* v. *Tibbett*, 19 L. J. Q. B. 382.

Wood, Acting C.J. The contract is clearly to be performed in Bangkok, and had the facts which are now before me been brought to my knowledge, I should never have made the order giving leave to serve the summons out of the jurisdiction. Such an order would inflict great hardship upon the defendants in a case of this sort when the witnesses must necessarily be in Bangkok. The order of the 6th August must be discharged, and the costs of the defendants be paid by the plaintiffs.

Order discharged with costs.

FRASER *v.* EVERETT.

SINGAPORE.

WOOD, AG. C.J.

1889.

October 9.

A person who contracts for the purchase of "transfer and scrip," cannot be compelled to take a "bearer-warrant."

There is no rule of law like the saying "Silence gives consent" applicable to mercantile contracts; and an omission to reply [in connection with such a contract] does not constitute a waiver.

Under a contract for scrips for Mining shares "expected to be mailed about the end of March," and which if mailed would have arrived on 23rd April, it is not a delivery within a reasonable time, to have the scrips mailed early in April, and to offer them on 15th May.

This was an action to recover $600 damages for breach of contract in refusing to accept certain shares in the Bentong Tin Mining Company, Limited. The defendant, through a broker, requested plaintiff's firm to telegraph to London for 100 shares in the above Company which had its Registered Office in London. The contract was as follows:—

MESSRS. FRASER & Co.

Dear Sirs,

I have this day sold to E. E. Everett, Esq., on account of your principal in London, 100 Bentong Shares at $13 = $12½ net to F. & Co., Terms.—Cash on delivery of transfers and scrip expected to be mailed about end of March.

Yours faithfully,

R. DUNMAN, *Broker.*

Confirmed,

E. E. Everett, *Buyer.*

The "principal in London" referred to in this contract, was John Fraser, the plaintiff in this action.

In pursuance of this contract, Messrs. Fraser & Co., on the 2nd March telegraphed to the plaintiff, in London, to purchase the said shares. By the Article of Association of the Bentong S. T. M. Co., Ltd., the Company might issue share-warrants to bearer, and at the date of the contract it was known in London and to the plaintiff that shares for which such warrants had been issued were more readily saleable, and commanded a better price in Singapore, than registered shares; accordingly, the plaintiff applied to the Company to issue share-warrants for the 100 shares so purchased by him for the defendant. On the 29th March, the plaintiff advised the said firm that the said shares were being so exchanged to "Bearer" scrip, and that they were not ready to send by that mail. Fraser & Co., on receipt of this advice on the 25th April, 1889, gave notice to the defendant that the shares were being so exchanged, and were not ready to be sent by the mail which had that day arrived. The said share-warrants arrived by M. M. mail steamer *Melbourne* on the 15th May, 1889, the mails carried by which steamer had left London on the 19th April, 1889, and on the same day, the plaintiff through Messrs. Fraser & Co. tendered the same to the defendant, but the defendant refused to complete his purchase and to pay the contract price for the shares, whereupon this action was brought.

Donaldson, for plaintiff contended, there was nothing fixed as to time; it was not one of the essentials of the contract. The shares were "expected" to be mailed about end of March. Defendant was informed by letter of 25th April, that warrants were being obtained and he did not reply that he did not want them, or else he might have got scrips. He never told the plaintiff of the mistake, but allowed him to pay money out of his pocket. The former were more valuable and saleable in Singapore.

Napier, for defendant contended, that the contract was for scrip, and the defendant was not bound to take what he did not want. Warrants were less safe because when lost there was no remedy; whereas in case of scrip, further transfers could be stopped. As to time, the contract fixed a time—a month was lost by the plaintiff trying to get something for defendant which he did not want, and his market had in meantime fallen. The value of these shares was fluctuating. Singapore was a small market, and the decisions of the Courts were strong in favour of time being essential. He referred to *Dolaret* v. *Rothschild*, 1 S. & S. 590, 598.

Donaldson, replied.

Wood, Acting C.J. As the defendant in this case has contracted for transfer and scrip, he was entitled to what he had bargained for, and cannot be compelled to take a bearer-warrant. Mr. Donaldson argued that by not replying to Messrs. Fraser & Co.'s letter of the 25th April, informing him that the certificates were being exchanged for bearer-warrants, the defendant must be taken to have waived this objection. But there is no rule of law like the saying "Silence gives consent" applicable to mercantile contracts, and the omission to reply does not constitute a waiver. With regard to the question of time, I hold as a fact that the shares in question, were mining shares of a very fluctuating character, and that a delivery of the documents of title to the shares, on the 15th of May, when, if they had been mailed on the 29th March, they would have arrived on the 23rd April, is not a delivery within a reasonable time under the terms of the contract, "expected to be mailed about the end of March." In the result, judgment must be given for the defendant with costs.

REGINA *v.* RABIA.

A Mahomedan married woman is *not* exempt from prosecution on a charge of bigamy under Section 494 of the Penal Code.

Case stated by *Pellereau*, J. for the consideration of the Court of Appeal, as follows:—

"At the May Assizes 1889, Rabia, a Mahomedan married woman was put on her trial for committing an offence against Section 494 of the Penal Code. She pleaded not guilty, but was found guilty by a majority of five to two of the jury with which majority I agreed. The jury recommended her to mercy on the ground of the possible ignorance under which she might have been of

WOOD, Ag. C.J. PELLEREAU & GOLDNEY. J.J. 1889.

REGINA v. RABIA.

this law which seemed never to have been enforced before. Her Counsel *Adams*, raised at the trial the point that the Court had no jurisdiction in the matter, as Rabia, her first husband, and the second husband were all Mahomedans. I reserved the point for the consideration of the Court of Appeal and released Rabia on bail."

The following is the 494th section of the Penal Code:

"494. Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

Exception:—This section does not extend to any person whose marriage with such husband or wife has been declared void by Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife if such husband or wife at the time of the subsequent marriage shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge."

The case now came on for hearing before the Court of Appeal, consisting of *Wood*, Acting C.J., *Pellereau* and *Goldney*, J.J.

Prisoner, in person.

Ross, [*Acting Solicitor-General*] contended, that the conviction was good and the Court had jurisdiction in the case; that the Mahomedan law did not allow polyandry, and there was no ground for supposing the conviction was in any way contrary to Mahomedan religion, usage, or custom. The second marriage of the prisoner was void under Mahomedan law and Section 494 applied to her. It was different in the case of the Mahomedan husband as his second marriage would not be void. As the Mahomedan law allowed him four wives, he would only come within Section 494 if he married a fifth during the lifetime of the first four. He referred to *Mayne on the P. C.* 400, notes to Section 494, and *Queen* v. *Nuddy Moosalamee*, 6 Suth. W. R. Cr. R. 60.

Wood, Acting C.J. I have no doubt whatever on the point; the Penal Code applies to all persons in the Colony.

Pellereau, J. The objection taken by Mr. Adams was to the jurisdiction, and his point was that the case related to the matrimonial law among Mahomedans and should be left to the tribunal of the Kalis; that by the Charter this Court was to administer the law with due regard to the religion, manners, and customs of the native population and acting according to that rule, the 494th Section did not apply to the prisoner. I have no doubt whatever that the Penal Code applies to all, and the case fell within Section 494, and the Court had jurisdiction.

Goldney, J. It is clear the conviction must be affirmed.

Conviction affirmed.

REGINA *v.* KHOO KONG PEH.

PENANG.

WOOD, AG. C.J. 1889.

October 17.

The evidence given by a prisoner under Section 10 of the Arms Exportation Ordinance 18 of 1887, is admissible against a fellow prisoner tried at the same time with him.

Semble. A prisoner who has exercised his option by refusing to tender himself as a witness under the above section may be allowed on his subsequently changing his mind to tender himself as such. [*per Wood*, J.]

Case stated by *Wood*, J. under Section 38 of the Appeals Ordinance 12 of 1879, as follows :—

1. The appellant Khoo Kong Peh was convicted by Messrs. E. M. Merewether and J. W. Norton Kyshe, two Magistrates, at Penang, for attempting to export on 31st October, 1888, arms, &c., contrary to Ordinance 18 of 1887.

2. There were several other prisoners charged along with him who, with one exception, were all convicted. The present appellant stood as No. 2, one Hajee Hamat as No. 1.

3. On the close of the case for the prosecution the only evidence against No. 2 the appellant was the fact that he was found in a sampan alongside the tongkang or ship in which the contraband arms, &c., were, at the time the Police boarded the latter. This was some time after 9-30 P.M.

4. On the close of the case for the prosecution No. 1 was informed by the Magistrates of his right under Section 10 of the aforesaid Ordinance 18 of 1887, to make his statement on oath. He elected to do so, was sworn and then made his statement in which he alleged No. 2 [appellant] had got him to purchase the tongkang and two smaller boats, had caused the former to be loaded with arms, &c., and directed him to take them to Perak, and that some of the crew of the tongkang [Nos. 5, 6, and 7 as they stood before the Magistrates] were also brought on board by No. 2.

5. He was thereafter cross-examined by Counsel for No. 2 [the appellant] and among other things was asked whether he had purchased the arms, &c., from No. 2. This he denied. He also denied that No. 2 came to ask him for payment of the balance of the purchase-money for the said arms, &c.

6. He was also cross-examined by the Crown with a view to shewing the connection in business with Acheen, and thus to disprove his allegation that he was going to Perak. He denied all connection with Acheen.

7. After the various prisoners had made their statements [not on oath] No. 1 called two witnesses who stated that on some day during the fasting month [October, 1888] No. 2 was seen by them at Klawei enquiring for No. 1 and not finding him, had asked these men if he could go and see a certain tongkang then lying at anchor off the place. One of these men took him in a sampan to the tongkang and having got on board and looked at it, he returned on shore. There was nothing to identify the tongkang with the one in which the contraband arms, &c., were found by the Police.

8. No. 2 in his defence called one witness, the sampan man, with the view of explaining how he came to be alongside the tongkang in which the arms, &c., were found at the time the Police boarded her.

9. On conviction by the Magistrates No. 2 only appealed to the Supreme Court and on 6th May, 1889, on the appeal being heard Counsel on his behalf contended [*inter alia*] 1, that the statement on oath of No. 1 was not evidence at common law against No. 2, and had not been made evidence by Section 10 of the Ordinance 18 of 1887; 2, that with this evidence there was no reasonable evidence as against No. 2 so as to support the conviction against him; 3, that without such evidence there was not such reasonable evidence.

10. I decided the first 2 of these 3 points against No. 2, but not the 3rd point, but at the request of his Counsel reserved all 3 of them for the consideration of the Court of Appeal.

11. The appeal case as stated by the Magistrates is annexed setting out the evidence in the case at length.

WOOD, AG. C.J. PELLEREAU & GOLDNEY. J.J. 1889.

REGINA v. KHOO KONG PEH.

12. The questions therefore for the consideration of the Court of Appeal are:

1.—Whether the statement on oath of No. 1 was under Section 10 of the Arms Exportation Ordinance 18 of 1887, evidence against No. 2.

2.—*If it was*, whether there was sufficient evidence in the case to support the conviction against No. 2.

3.—*If it was not*, whether there is sufficient evidence to support such conviction.

The Arms Exportation Ordinance 18 of 1887, Section 10, is as follows:

"A person charged with an offence against this Ordinance may if he thinks fit tender himself to be examined on his own behalf and thereupon may give evidence in the same manner and with the like effect and consequences as any other witness."

The case now came on before the Court of Appeal [*Wood*, Acting C.J., *Pellereau* and *Goldney*, J.J.]

Van Someren, for appellant. The statement of No. 1 Hajee Hamat though admissible under Section 10 of the Arms Exportation Act is only so "on his own behalf" and is not evidence against No. 2 his co-prisoner. The case of *Regina* v. *Scaife*, 17 Q. B. 241, 3, shews though evidence may be admissible as against one prisoner it does not follow it is evidence against other prisoners tried along with him—the evidence must be considered distributively as against each prisoner. Section 10 aforesaid though not adopting the language is no doubt based on the 48 & 49 Vict. c. 69, Section 20. At Common Law the statement of one prisoner is not evidence *against* a fellow prisoner. *Regina* v. *Appleby*, 3 Stark. 33; *Regina* v. *Swinnerton*, Car. & M. 593; 1 Taylor on Evidence, § 871. It is also not evidence *for* him. *Queen* v. *Payne*, 1 L. R. C. C. R. 347; *Queen* v. *Thompson*, Ibid. 377. Thus the Common Law does not in this respect give a co-prisoner an advantage; but on the other hand it does not place him at a disadvantage. But if Section 10 is held to make the evidence of a prisoner evidence against his co-prisoner it will be placing him at a disadvantage—the evidence will be evidence against him if the other *chooses* to give evidence, but he cannot call the other *for* him if the other does *not choose* to give it. The other gives evidence of his own choice and "on *his own* behalf"—the fellow prisoner *cannot compel* him to give it.

[*Pellereau*, J. You might have applied to be tried separately and then have subpœnaed the other as your witness and he would have been compelled to give evidence.]

That supposes we knew the intention of the other, whereas, there might be cases in which co-prisoners might not know this. In the present case we did not know what Hajee Hamat intended doing. Again, if we had stood No. 1 and had declined to avail ourselves of Section 10 and Hajee Hamat as No. 2 had availed himself of it, and had had his say against us we should be placed at a disadvantage as we had exercised our option and could not answer his statement.

[*Wood*, Acting C.J. In such a case the Court or Magistrate would never consider the election of No. 1 as final, but would allow him to give his evidence if he wishes it.]

Section 10 would seem to imply the choice is final. The words of the English Section 20 already referred to is perhaps more general than our Section 10. It makes the prisoner a "competent witness" though not a "compellable" one. "Competent witness" may mean "competent" for *all* purposes, and yet no case can be found in which it has been attempted to make the statement, evidence against a fellow prisoner. There are three reported cases on the English Sections 4 and 20. *Regina* v. *Adams*, 50 J. P. 136; *Regina* v. *Wealand*, 20 L. R. Q. B. Div. 827 and *Regina* v. *Owen*, Ibid. 829, but in each of those cases the evidence was held admissible against the prisoner *himself*, who gave the evidence—he had exercised his option and had done so for better or for worse. Having exercised his privilege, his statement thereafter was always evidence against him. These cases therefore though they shew the length the English Courts had gone, did not go far enough. Here the prosecution wanted to go much further—our Section 10 too, was more limited than the English Section 20, it enabled the prisoner to give evidence "on his own behalf" only. Those words really were the governing words of the section. The marginal note also shewed this, and the marginal notes of Ordinances of our Legislature can be looked at to interpret the Section. *Cashin* v. *Murray*, anté p. 435.

[*Goldney*, J. I am aware the present Chief Justice, Sir THEODORE FORD, so held in that case, but I may mention in conversation with me he has since told me he considers he was wrong in so holding.]

However that may be without the marginal note here it is apparent the words "on his own behalf" govern the whole section. The latter words of the section however are relied on by the prosecution—"and thereupon may give evidence ..... with the like effect and consequences as any other witness." Without those words the construction of Section 10 would clearly be as we contend; then do those words extend its meaning? It is submitted not. They mean nothing more than the prisoner's statement shall, as regards himself, have the same consideration given it as any witness' statement, and he shall be liable to be punished for perjury if he gave false evidence in the same way as any other witness might be. They were intended to take in such a state of facts as were disclosed in *Regina* v. *Clegg*, 19 L. T. [N. S.] 47. To give that meaning to these words would be to give full scope to the language.

[*Goldney*, J. You cross-examined No. 1—how then can you object to his evidence? The case of *Regina* v. *Burdett*, 24 L. J. M. C. 63 seems to me conclusive on the point.]

In that case it was *not* the evidence of a co-prisoner, but of a *witness* of a co-prisoner. The evidence of the *witness* was always admissible against all the prisoners even at Common Law. *Regina* v. *Ward*, 7 Cox C. C. 421 is to the like

WOOD, Ag. C.J. PELLEREAU & GOLDNEY. J.J. 1889.

REGINA v. KHOO KONG PEH.

effect, but they have no bearing on the question now before the Court. No case can be found which lays it down that when evidence of a witness is not admissible—when a witness is incompetent—the mere cross-examining him makes his statement admissible; even if did it could only be limited to the answers elicited by the cross-examination and no more. *Blewett* v. *Tregonning*, 3 Ad. & E. 554. In the present case nothing of importance was so elicited. The construction sought to be placed on these latter words of Section 10 in effect causes them to break into the Common Law Rule already mentioned that a prisoner's statement is not evidence against his co-prisoner, but to say this language does so break into the Common Law is to do it by "a side-wind." *Queen* v. *Payne*, suprà.

[*Wood*, Acting C.J. Surely you cannot consider the concluding words of Section 10 a "side-wind." I think it would be more proper to speak of it as a "gale."]

At all events the language is not clear and when the Common Law Rules, for the protection of a prisoner are to be broken into, it can only be so by clear and express words. *Regina* v. *Brittleton*, 12 Q. B. Div. L. R. 268, 9. The privilege accorded to one prisoner should not be extended so as to injure a co-prisoner. Without the statement of No. 1, the evidence as disclosed by the stated case is wholly insufficient to support the conviction. With it, it is also insufficient as he is an accomplice and there is no sufficient corroboration of his tale.

Ross, [*Acting Solicitor-General*] for the Crown was not called on.

Wood, Acting C.J. I adhere to the impression I formed at the first hearing that the latter words of Section 10 "with the like effect and consequences as any other witness" have not been cut down by the previous words "on his own behalf." I have a doubt, but not such a doubt as to lead me to desire further time for consideration of the point. The language of the section is very large and I don't think any harm is done by our holding its effect is to make the evidence of No. 1 given under it, evidence against No. 2. No. 2 may have tendered himself as a witness under the section as well, and refuted the allegations of No. 1 if he had wished it. He did not choose to do so. I think the conviction must be affirmed.

Pellereau, J. I agree.

Goldney, J. So do I.

Conviction affirmed.

PENANG.

REGINA *v.* CHAN AH TYE & ORS.

WOOD, Ag. C.J. PELLEREAU & GOLDNEY. J.J. 1889.

A Club at which there is a feast given and those present are *all* guests, is not for the time being, a Common Gaming House within Section 3 of the Gaming Ordinance 5 of 1888, though gaming goes on there among them—the guests not being "the public or a class of the public,"—and others not being guests having then no "access" to the Club.

Semble. A Club to which all its members have access is within the Ordinance. The difference between a Club and a private house pointed out. [*a.*]

October 17.

[*a.*] See *Regina* v. *Din & Ors*, Court of Appeal, Penang, 9th July, 1890, *infrà*.

WOOD, AG. C.J.
PELLERAU & GOLDNEY. } J.J.
1889.

REGINA v. CHAN AH TYE & ORS.

This was an appeal from the decision of J. W. Norton Kyshe, Esquire, Magistrate of Police, Penang. As the appeal raised the question of the proper construction of the new Gaming Ordinance 5 of 1888, on its being called on for hearing before *Pellereau*, J. on 15th August and 19th September, the learned Judge reserved the question for the consideration of the Court of Appeal under Section 38 of the Appeals Ordinance 12 of 1879. The Magistrate had given a written judgment in the case which set out the facts and his findings. That judgment, was as follows:—

"The defendants in this case were charged before me on the 29th June last 'with playing in a Common Gaming House to wit: in house No. 366, situate at Chulia Street, in Penang, contrary to Section 7, Clause 1 of Ordinance 5 of 1888.'

Nos. 1, 2, 3, 4, 7, 8, 12, 13 and 16 are male defendants, the rest being women.

To this charge they all pleaded not guilty and were defended by Mr. E. F. Thomas, Mr. Gregory Anthony, acting as Junior Counsel in the case.

The case was heard on the 27th June, and on the 1st and 8th July.

On the 1st July the prosecution asked for leave to add a second charge to the case against the defendant No. 16 for 'being an occupier of a Common Gaming House, to wit: house No. 366, situate at Chulia Street, in Penang, contrary to Section 5 [a] of Ordinance 5 of 1888,' which amendment was allowed and the said defendant pleaded not guilty thereto.

The facts as adduced by the prosecution went to shew that acting on information received, the Police proceeded on the 21st June, 1889, at 8.30 p.m. to a house situate at No. 366, Chulia Street, in virtue of a "gambling warrant under the hand of the Superintendent of Police. The entrance door of the house was open, and on going upstairs a rush was heard as of persons running about and a noise as of chairs and tables pulled about. In a room at the back of the house, Nos. 1, 2, 3 and 4 defendants were found sitting at a table with 2 of the women defendants [Nos. 5 and 6] near them. On the table besides 2 lamps were found 32 dominoes, 86 counters, 2 dice and 5 small Japanese trays. One of the male defendants was seen with one hand flat on the dominoes and other gaming instruments on the table. The other defendants were arrested in different parts of the house some sitting, others standing. In another back room a number of cards were found scattered on the floor, but no one was seen in that room. The house is a Social Club under the name of "Leisure Hall" and was duly registered on the 4th of June, 1889, at the Chinese Protectorate in the name of the 16th defendant, Chan Lye Kum and 8 members. The house contains a lot of valuable furniture and in nearly every room there is a bed. The prosecution further stated that the house appeared to be a Common Gaming House with fittings and means of escape to enable gamblers to make their escape, but admitted that there was no staircase to the room where defendants were playing. In support of their case the prosecution further called a professional gambler who deponed that the counters produced were used for the game of '*Twah*' and represented money—one black counter being worth $5 and the white $1, and for a rich man 1 counter might represent as much as $50 although on cross-examination this witness admitted that for the game of '*Twah*' one required more counters than those in Court, but added nevertheless that the presence of the counters implied playing for money. Another witness, a man who said he sold durians on the 5-foot path of the Club, stated that some time before the arrival of the Police, No. 13 defendant bought durians from him and asked him to take them upstairs, and that in a back room he saw persons gambling at dominoes, he also saw money—bank notes and silver dollars—white counters being valued at $1 and the black at $5. The man who received the money this witness also stated left the house before the arrival of the Police. Another witness, a cake-seller, deponed to persons playing and to his seeing dominoes and counters, but no money. The women defendants were all of the prostitute class and including Nos. 5 and 6 who were seated along with the male defendants Nos. 1, 2, 3, and 4, none of them were seen gambling. This was the evidence adduced for the prosecution.

WOOD, AG. C.J. PELLERAU & GOLDNEY. J.J. 1889.

REGINA v. CHAN AH TYE & ORS.

On behalf of the defendants, evidence was adduced to shew that on the night in question defendant No. 16, the registered headman of the Club gave a dinner-party and that with the exception of Nos. 4 and 13 *his guests*, all the defendants were members of the Club present *as guests* also on his invitation, Nos. 2 and 7 being his clerks asked merely to receive the guests and that the 8 female defendants were present on the occasion to sing and play after dinner. Playing at dominoes was not denied and it was alleged that the counters were already on the table when the defendants entered the room. Playing for money and the purchase of durians and cakes and the presence of the sellers was entirely denied and evidence was adduced that no gambling at all was going on that night, some of the defendants giving evidence on oath to that effect. Evidence was also offered to disprove the statement of the Police that the house was fitted as a Common Gaming House. This closed the case for the defence.

Counsel for the defence contended firstly, that the game of dominoes was not unlawful and it was necessary for the prosecution to shew by evidence what the game played at was before it could be held that the house in which it was played was a Common Gaming House and for this purpose *Regina* v. *Sheik Hossain & ors.*, 3 Kyshe's Reports, 98, was referred to. I might dispose of this point by simply stating that that decision was under the Gaming Ordinance, 1876, which required the game played at to be "unlawful" gaming and in that respect not dissimilar to the English Statutes on the subject. That Ordinance is no longer law and the Ordinance of 1879 [since repealed] and the present Gaming Ordinance 5 of 1888 differing in this respect that in order to hold a house to be a Common Gaming House within their provisions it is not required that the game be lawful or unlawful. For the same reason I consider the case of *Jenks* v. *Turpin*, 13 Q. B. Div. L. R. 517 and the other cases cited have no bearing on the case before me which must be decided under the Ordinance 5 of 1888 alone.

Under that Ordinance a Common Gaming House is defined to be a 'place kept or used for gaming to which the public or any class of the public has or may have access.' Counsel accordingly as a 2nd point, contended that the present house was a Club, and not a place where the public were admitted and that the members of the Club and people invited by them were not a 'class of the public.' I am satisfied that the house in question is a Club and that the night on which the raid was made by the Police was a feast night, the feast being provided by the defendant No. 16, the registered headman of the Club. I am further satisfied that at the time the Police entered the Club the 1st 4 defendants were playing dominoes, and the evidence of the Police coupled with the presence of the counters and dice [admitted by the defendants] lead me to the conclusion that they were used in connection with the game of dominoes that was then being played. This alone however is not sufficient to bring the defendants within the Ordinance, and it is still necessary for me to decide; firstly, whether they were playing for money; and secondly, whether they were a 'class of the public' within the meaning of the Ordinance. The evidence of the two men, the cake-seller and the durian-seller, I do not believe, nor am I satisfied that the place was fitted up as a Common Gaming House; but at the same time I cannot accept as true all that the defendants have said inasmuch as there are contradictions in their evidence and a strong probability of unlikelihood in certain parts of their story. I am satisfied taking the whole of the evidence together that the game of dominoes was being played for money, and that the counters were used as a substitute for money as a matter of convenience and advisability,—and as a fact sums of money were found on each of the defendants the presence of which although small in some instances they have in no way explained.

After full consideration of the 2nd legal point raised by Counsel, I am of opinion that the people found in this Club were a 'class of the public' both in point of fact and within the meaning of the Ordinance. I construe the words 'class of the public' to be equivalent to 'a portion or any number of the public.' The conclusion I therefore arrive at is, that the house in question is a Common Gaming House within the meaning of the Ordinance. As stated No. 16 defendant is charged with being the occupier of the house and keeping or using the place as a

Common Gaming House. The evidence shews just the one occasion of gaming on the night of the raid by the Police, but under Section 3 it is enacted 'a place shall be deemed to be 'used' for a purpose if it is used for that purpose on one occasion only.' I have held that the house is a Common Gaming House, and with this enactment I am compelled to consider the house was 'used' for a purpose, that purpose as regards that particular night I consider on the evidence to be gaming though possibly not to any great extent and there were probably other purposes to which the place was also put. The defendant No. 16 was practically the master of the house and was there that night and I am satisfied could not but have known that gambling was going on. From the facts I have already set out the presumption under Section 14 that the house was a Common Gaming Home and was so used by the occupier thereof also arises, and I am not satisfied that the contrary has been proved. I therefore hold that No. 16 the registered headman is guilty of the offence on the amended charge. As regards defendants Nos. 1, 2, 3 and 4, I consider they were actually gambling at the time the Police entered, and as to Nos. 7, 8, 12 and 13 they were found in the house and not having proved the contrary to my satisfaction, I am bound under Section 7 to place them on the same footing as Nos. 1, 2, 3 and 4. The female defendants I am satisfied on the evidence were not there for the purpose of gaming. The result is that I impose a fine of $20 on each of the defendants Nos. 1, 2, 3, 4, 7, 8, 12 and 13 under Section 7, and a fine of $1,000 on defendant No. 16 under Section 5 [Clause a]. The female defendants will be discharged."

On the case first being called on before *Pellereau*, J. some doubt arose as to whether in the judgment in question the Magistrate *had found* that the appellants were present as *guests* of, and by invitation of the said Lye Kum, whereupon the case was adjourned, and the Solicitor for the appellants wrote the Magistrate the following letter:—

15th August, 1889.

INSPECTOR DRUM *v.* LYE KUM & ORS.

DEAR SIR,

In this case the Court has intimated that it does not appear distinctly upon the judgment that you found in my favour upon the fact that I had proved to your satisfaction that on the night in question the defendants were present as guests of, and by invitation of Lye Kum, and the case has been adjourned to Monday next on my application as I wished to apply to you for an expression of your opinion on this point.

If you recollect I made a special application to you after delivery of your judgment, but you were of opinion you had found that point in my favour on the judgment.

May I ask as a favour that you will kindly say whether I am right in my statement that you were of opinion that I had satisfactorily proved that the defendants were the guests of Lye Kum on that night?

Yours truly,

[*Signed*] EDW. F. THOMAS.

J. W. N. KYSHE, Esquire.

The following was the Magistrate's reply:—

POLICE COURT,
August 15th, 1889.

DEAR SIR,

Your letter of to-day's date correctly expresses my views of the point submitted.

I found that there was a party at that Club on the night in question. That all the defendants were the guests of No. 16. All of them, except Nos. 4 and 3, being members of the Club as well, but present as guests of No. 16.

Yours faithfully,

[*Signed*] J. W. NORTON KYSHE.

EDW. F. THOMAS, Esquire.

WOOD, AG. C.J. PELLEREAU & GOLDNEY. } J.J. 1889.

REGINA. v. CHAN AH TYE & ORS.

These letters verified by affidavit were produced in Court at the hearing before *Pellereau*, J. on 19th September when the learned Judge reserved the point for the Court of Appeal as aforesaid. The following are portions of Sections 3 and 14 of the Gaming Ordinance 5 of 1888 bearing on the case:—

"3....."Common Gaming House" includes any place kept or used for gaming to which the public or any class of the public has or may have access and any place kept for habitual gaming whether the public or any class of the public has or may have access thereto or not and any place kept or used for the purpose of a public lottery.

14. If any instruments or appliances of gaming are found in any place entered under this Ordinance or upon any person found therein or if persons are seen or heard to escape therefrom on the approach or entry of a Justice of the Peace or if a Police Officer or any other person having authority under this Ordinance to enter or go to such place is unlawfully prevented from or obstructed or delayed in entering or approaching the same or any part thereof it shall be presumed until the contrary be proved that the place is a Common Gaming House and that the same is so kept or used by the occupier thereof."

One of the prisoners in his evidence stated that the Club consisted of "ten or more members." Eight only appeared in the Register at the Chinese Protectorate.

The Appeal was heard on the 17th and 18th October before the Court of Appeal, consisting of *Wood*, Acting C.J., *Pellereau* and *Goldney*, J.J.

Thomas, for appellants contended, [*inter alia*] the house being a Club and a dinner given by Lye Kum to his guests who probably engaged in a game of dominoes for more or less money, was not within the Gaming Ordinance 5 of 1888. If the Ordinance applies to a private Club, it also applies to a private house, for a gentleman, his wife and guests are as much a "class of the public" as the members of a Club. The Ordinance will then be most inquisitorial. To neither a Club, nor a private house, can the public or a class of the public be said to have or might have "access."

[*Goldney*, J. Your argument goes too far. To a private house there is no access: it must be asked for. To a Club the members *have* access.]

They have access it is true, but not as of the "public," but as members. The word "public" must be construed according to its ordinary meaning—the members as to that Club cease to be a "class of the *public*" as they are admitted only after ballot and are otherwise qualified.

[*Pellereau*, J. If that is so, all that need be done is for a hundred gamblers to get together and form a Club and they would cease to be of the public?]

My argument I admit goes that length. The Legislature never could have intended to include a private house and a Club as on the same footing. The definition of a Common Gaming House in *Jenks* v. *Turpin*, 13 Q. B. Div. L. R. 515, 6, is much wider than in our Ordinance; the Legislature have defined what in the Ordinance we are to understand as a Common Gaming

House. The definition is not inclusive but the reverse. This Club was no more than a private house.

[*Wood*, Acting C.J. I think my learned brother GOLDNEY has pointed out the distinction between a private house and a Club.]

The room here was a private room.

[*Wood*, Acting C.J. There is no evidence it was a private room.]

The Magistrate finds there was a feast and all present were guests so that none could be there except those invited.

[*Goldney*, J. There is nothing to shew other members could not go in that night.]

There were only eight members at the time and they were all present as guests.

[*Pellereau*, J. There is no evidence they were all the members—that there were no more.]

There was no allegation there were more.

[*Pellereau*, J. According to Section 14 there is a presumption against you. Section 3 says one occasion is sufficient. You would say I suppose that as the presumption is only "until the contrary be proved" that you have disproved it by shewing the gaming only took place one night, that night was a feast night and was given to guests? The prosecution don't shew there was gaming going on on other nights.]

[*Goldney*, J. The charge is only as regards that specific night. We have nothing to do with other nights.]

There was no gaming on other nights. No. 16 Lye Kum, had rented the house; he opened it as a Club which was just about to begin—he gives a feast to his friends and promoters of the Club as a start. To that house that night no person of the public or class of the public *quâ* public had access.

[*Wood*, Acting C.J. You say the Magistrate having found it was a feast night and those present were all guests he has negatively found no one else could go there that night—that there was no "access to the place"?]

Yes. If the Ordinance were not construed as I contend for nobody would be safe. It would be contrary to all law and public policy.

Ross, [*Acting Solicitor-General*] for respondent contended, [*inter alia*] the attempt to make out that a Club is the same as a private house has failed, the distinction has been pointed out by *Goldney*, J., and if it were not so, the Ordinance would be perfectly useless.

[*Pellereau*, J. If it was merely a Club I should be with you, but that night was a feast night, confined to guests.]

[*Goldney* J. So would I. Can the Club that night be considered a Club? It was not open to the other members.]

The Magistrate has not found it was not—he only finds those present were guests. There might be a dinner at a Club and yet all the members could go to the Club.

[*Pellereau*, J. If all the members *had* access that night your contention would be a good one. But had they?]

The Magistrate has not found they had not.

WOOD, AG. C.J. PELLERAU & GOLDNEY. J.J. 1889.

REGINA v. CHAN AH TYE & ORS.

[*Pellereau*, J. The clause in Section 3 as to habitual gambling would apply to a private house in which there is habitual gaming—the other clauses to cases to which the public or a class of the public have access.]

[*Wood*, Acting C.J. It is clear to me four persons regularly sitting down in a private house to a game of whist for small stakes would not be within the Ordinance.]

[*Pellereau*, J. I will not express an opinion on that point.]

The evidence is that the Club consists of "ten or more" members. There were only 8 present—the Magistrate has not found the others had not access that night. There is nothing to shew privacy was intended and was not to be broken into. His finding it was a Club, a feast night, and those present at that feast, were guests, does not imply he negatived access to the Club on part of other members.

Wood, Acting C.J. On the finding of the Magistrate that the night in question was a feast night and those present were all guests, it necessarily follows none could go there but those invited—not even the other members of the Club. The place was not therefore a place to which the public or a class of the public had or might have had access, and the conviction cannot stand.

Pellereau, J. I agree.

Goldney, J. I agree, but in doing so, I limit myself to the concluding words of the Magistrate's reply. Without these words I think the conviction ought to stand.

Conviction quashed.

BROWN *v.* VENGADASHELLUM.

PENANG.

WOOD, AG. C.J. PELLERAU & GOLDNEY. J.J. 1889.

October 18.

The mere enticing of a labourer from the service of his employer is no offence under Section 13 of Ordinance 3 of 1877, and it is necessary for the prosecution to shew by evidence that the labourer was being enticed in order to enter into service elsewhere.

It is *not* however necessary to shew that it was to enter the service of any particular person either by name or designation—[*per Pellereau & Goldney*, J.J., *Wood*, Acting C.J., dissenting.]

Ramsamy v. *Low*, [*a*.] corrected and approved of.

This was an appeal from the decision of A. H. Capper, Esquire, Magistrate of Bukit Martajam, dismissing the charge against the prisoner and was reserved by *Pellereau*, J. for the consideration of the Court of Appeal. The charge against the prisoner was for knowingly taking away from their employment two labourers named Narainasami and Suba Naidoo who at the time were under contracts to labour at Prye Estate, in Province Wellesley, for a period of not less than one month in order that they should serve some person unknown within the Colony, to wit: Singapore, and thereby committed an offence under Section 13 of Ordinance 3 of 1877.

The evidence in the case shewed that the two labourers were under contract to serve as such on Prye Estate, Province Wellesley, for a period exceeding one month which contract was still in

[*a*.] *Antè* p. 396.

force; that on 21st August the defendant having met the labourers at a theatrical performance on the Estate enticed them to leave the Estate and go with him assuring them that "they could get $12 a month *for working on the roads*, in Singapore." The Magistrate had dismissed the charge feeling himself bound by the decision of the Supreme Court in the case of *Ramsamy* v. *Low*, [*a.*] as there was no evidence that the labourers were enticed to serve *any particular person*. The appeal was reserved by *Pellereau*, J. with the view of obtaining the opinion of this Court on the correctness of the decision in *Ramsamy* v. *Low*. The appeal now came on for hearing before the full Court of Appeal. [*b.*]

Presgrave, for appellant contended, that the word "any" shewed that it was immaterial who the person was for whom the labourer was enticed. The learned Judge in *Ramsamy* v. *Low*, used the expression "another person" not "any other person", the latter expression was more general. It was sufficient if the Magistrate was satisfied that it was for another service; that is service other than that of the employer.

[*Pellereau*, J. suggested that the words "any other person" meant other than the person enticing, and so meant the employer, that is that the words referred to the person with whom the contract for service was made and *not* the service of any person *for whom* the labourer was enticed.]

If that was the meaning of the section, then the ruling in *Ramsamy* v. *Low*, was clearly wrong, but even if the words "any other person" referred to the person for whom the labourer was being enticed, still there was no necessity for the prosecution to shew *who* that person was. In Section 498 of the Penal Code the same expression occurred "illicit intercourse *with any other person*," yet it had never been suggested that it was necessary for the prosecution to shew who that person was. There was no reason why under this section it was necessary to do so. The employer suffered equal loss whoever the person was for whom the labourer was enticed and why was it necessary then to shew who the person was? The decision in *Ramsamy* v. *Low*, simply nullified the section,—it was not possible to obtain a conviction under it. The intent of the enticer could only be inferred and it was a reasonable inference he meant to get the labourers employed elsewhere in order to obtain gain for himself.

[*a.*] *Antè* p. 396.

[*b.*] Ordinance 3 of 1877, Section 13, is as follows: "Any person who shall knowingly seduce or take, or attempt to seduce or take from his service or employment any labourer bound by any contract of service, such contract being for a period of not less than one month to serve any other person whether within or without the Colony, or who shall knowingly take any labourer while so bound into his service or employment, or who shall knowingly harbour or conceal any labourer who shall have absented himself without leave from the service of such other person to whom he is so bound whether such service is to be performed within or without the Colony, or who shall knowingly retain in his service any labourer bound under any such contract to serve any other person whether within or without the Colony after receiving notice in writing, that such labourer is so bound as aforesaid, shall be liable, on conviction, to a fine not exceeding twenty-five dollars, or to imprisonment which may be of either description for any period not exceeding three months, or to both in respect of each and every such labourer."

WOOD, AG. C.J. PELLERAU & GOLDNEY. J.J. 1889.

BROWN v. VENGADASHELLUM.

Ross, [*Acting Solicitor-General*] contended, that the reading of the section suggested by *Pellereau*, J., could not be the right one as if it was the words "any other person" would follow the words "contract of service" and not the enticing; reading the whole section one could not but see the words referred to some one other than the employer, the labourer and the crimp himself. The decision in *Ramsamy* v. *Low* was correct in holding some evidence was necessary to shew that the labourer was being taken for somebody else, but possibly it had gone too far in ruling that it was necessary to shew "by name or designation" who that person was. If, for instance, it was shewn the labourer was being enticed in order to serve on an Estate in Singapore, and the employer could state that he had no Estate in Singapore, the only conclusion the Magistrate could come to was that the crimp enticed the labourer in order that he might serve some "other person," and that was all that was necessary under the section.

Presgrave, replied.

Goldney, J. Unfortunately the Court is not unanimous. My judgment is very simple. I think the case should be referred back to the Magistrate for re-hearing, and see if in his opinion there is evidence forthcoming shewing that the labourer was enticed for some other service. I entirely agree with the ruling in *Ramsamy* v. *Low* that the mere enticing away of a labourer is not an offence under the section; it must be done in order that the labourer should serve "any other person," but I think that to hold that that other person must be shewn "by name or designation" is too restricted. It is not workable as no crimp would give the name of his employer. The only words I disagree with in the judgment in that case are "by name or designation." With those words struck out, I entirely agree with that case. The mischief arrived at by the section is the enticing in order to serve another—some other person. There must therefore be evidence of that other service, but not so as to specify or identify who the person is. If the Magistrate at the re-hearing should think there is evidence of that other service he should convict. As to the suggestion of my brother PELLEREAU, I must say it is very taking, but I am not satisfied it is the true reading of the section.

Pellereau, J. I made the suggestion that I did at the outset of this case, because I thought it was much better that it should be fully known, but on that suggested reading of the section I do not give any opinion, because we are able to come to some decision while leaving it aside for the present. Reading the section as my learned brother WOOD has read it, that is, that the words "any other person" refer to the enticing away, and not to the contract of service referred to immediately before, I agree with him in everything he said in *Ramsamy* v. *Low*, except as to his construction of the words "any other person." It is sufficient in my judgment that the labourer is enticed from the person he is under contract with in order to procure service or employment elsewhere in order that the section should be applied. As Mr. Presgrave has remarked it is not to serve "another person," but "any other person." The words used are sufficiently broad to mean anybody

else, and as this construction is more suited to the general policy of the Ordinance, I adopt it. My learned brother said there must be some evidence shewing who that person is: the words of the section are general, but I think he has restricted them. I think it is sufficient that the labourer has been enticed for the purpose of employment elsewhere than with his lawful employer. I think therefore, the Magistrate was wrong in his decision, but he has followed the ruling of a Judge of this Court, as we follow the decision of higher tribunals, but after the decision we now give he will have to accommodate himself to it. His order as it stands cannot be sustained, and the case must be referred back to him for re-hearing.

WOOD, AG. C. J. PELLERAU & GOLDNEY. } J.J. 1889.

BROWN v. VENGADASHELLUM.

Wood, Acting C.J. I unfortunately differ from my learned brothers. I hold to the opinion I expressed in 1888 in my judgment in *Ramsamy* v. *Low*. I think the general intention of the Ordinance can be called in aid to explain the meaning of an ambiguous section; but where the language of the section is explicit the policy of the Ordinance has no bearing on its construction. The words here are explicit—"any other *person*." I understand by them that a *person* must be pointed out. If it intended other "service" or other "place" it would have been so stated. The words are "any other person" and they must have their meaning. There is only one mode of arriving at the meaning of the Legislature by adopting the language it has used. "Any other person" can only mean "any other *person*," and that person must be shewn by evidence before a conviction under this section can be had. I therefore adhere to my former opinion.

Order of dismissal quashed. Case remitted to Magistrate for rehearing [*a.*]

WEE SWEE HIN *v.* OPIUM FARMER.

SINGAPORE.

WOOD, AG. C. J. 1889.

October 29.

Section 5 of the Excise Ordinance 4 of 1870, gives no discretion to the Opium Farmer as to whether he will sign an export permit brought to him for signature, or not. He is bound by the section to sign it, and his refusal to do so is ground for an action in damages as at Common Law, and it is not necessary to allege or prove malice on his part under Section 88.

This was an action to recover damages for breach of duty. The statement of claim alleged that the Governor in Council in pursuance of the power given by Section 12 of the Excise Ordinance, had prohibited the export of opium to Bengkalis and some other places in Netherlands India, but the plaintiff, an Opium Farmer, in Bengkalis, had obtained a concession in his favour to export a certain quantity on certain conditions. The Ordinance,

[*a.*] The following was dictated by *Pellereau*, J. to the Registrar as the minute to be made in the Appeal Minute Book:—"The majority of the Court do not agree with the ruling of Mr. Justice WOOD in the case of *Ramsamy* v. *Thompson Low*, and they think it not necessary that "any other person" should be proved by name or by such description as is referred to in that ruling. They consider that the words "any other person" are a general expression that no individual need be pointed out, and that it is quite sufficient that the evidence should satisfy the Magistrate that the labourer is seduced or taken away to be employed some where else. The Magistrate's order is therefore reversed, and the case remitted to him that he should proceed in accordance with the present ruling."

WOOD, Ag. C.J. 1889.

WEE SWEE HIN v. OPIUM FARMER.

Section 5, provided that the Opium Farmer, when the permit-form to allow the export of opium was presented to him, should sign it. This the Opium Farmer had declined to do, and damage was sustained by his refusal.

The defendant demurred.

Everard, for the defendant in support of the demurrer contended, the statement of claim disclosed no cause of action; that by Section 88 of the Excise Ordinance no action could be brought against the Opium Farmer for anything done under it, unless it was alleged and proved that he acted maliciously.

T. de M. *Braddell* for the plaintiff contended, that the Ordinance was a disabling law restricting the right of the subject to sue, and as such, should be construed strictly; that the defendant's refusal was not for "anything done" within Section 88, which did not include an omission of duty or refusal to do what the Ordinance prescribed; that Section 5 gave the Farmer no discretion as to signing or not signing the permit, but was imperative.

Wood, Acting C.J., held that if there was a discretion to be exercised by the Farmer, the exercise of it would render an allegation of malice necessary; but Section 5 gave him no discretion, and the action was maintainable as an action of *tort* at Common Law.

Demurrer over-ruled.

SYED HASSAN BIN OMAR AL HADEED

v.

KHOO SOON TJIO & ORS.

SINGAPORE.

WOOD, Ag. C.J. 1889.

October 31.

The law of general average contribution, which is derived from the Civil Law and has become part of the Common Law, imposes on the master of the ship the duty of having the contribution settled, and *of collecting the amounts*. This duty is thrown upon him as agent for the owner, and the owner is liable to a shipper of goods if the master neglects his duty.

It is not necessary in an action to enforce such duty to shew the nationality of the ship.

The facts of the case sufficiently appear in the judgment.

Donaldson, for plaintiff.

Bonser, [*Attorney-General*] and *Drew* for defendant.

Cur. Adv. Vult.

November 5th. *Wood*, Acting C.J. In this case the plaintiff in his statement of claim alleged as follows:—

1. "The plaintiff is a trader carrying on business at Singapore. The defendants were at the date of the occurrences hereinafter mentioned, the registered owners of the steam-ship *Banjermassin*.

2. On or about the 30th day of April, 1889, one Shaik Ronbaya bin Moobarah shipped in good order and condition on board the defendant's vessel the *Banjermassin*, one box of silk cloths [of the kind known as *Kain Batek*] and which were of the value of $2,131.97 for transport to Singapore and consigned to the plaintiff, and the said Shaik Ronbaya then paid a sum of 10 rupees for such transport.

3. At the time of paying the freight a bill of lading in respect of the said goods was made out by the defendants or their agent and handed to the said Shaik Ronbaya and which is now in the hands of the plaintiff. By the terms of the said bill of lading the said goods were to be delivered to the plaintiff or his order on the arrival of the ship in Singapore.

4. On the arrival of the said ship at Singapore the said goods were not delivered to the plaintiff or his order.

5. The defendants informed the plaintiff that the said goods had been jettisoned.

6. The defendants obtained from each of the persons liable to contribute to the loss by reason of general average [other than those whose goods were jettisoned] a bond or agreement for the payment of what should be found from such person for his proportion of the loss.

7. It was referred by the parties liable to contribute [other than those whose goods were jettisoned] to Mr. Wm. MacBean of Singapore to adjust the average as between the said ship and the persons liable to contribute.

8. The said Wm. MacBean has made his award or average statement in writing, on or about the 15th day of August, 1889, by which he finds that the plaintiff is entitled to receive the sum of $1,959.20 being $2,131.97 the value of his said goods less $172.77 his share of the loss by jettison.

9. The defendants have taken no steps to collect their average contributions from the persons liable therefor and still refuse to do so.

The plaintiff claims [1] $1,959.20, [2] such other relief as the nature of the case may require."

To this, the defendants demurred on the ground that there is no obligation in law upon a ship-owner to collect and sue for the average contributions from the persons liable to pay the same. Two points were raised, [1.] That the statement of claim did not state the nationality of the ship. [2.] The point above adverted to.

As to the first I hold, that it is immaterial to state the nationality of the ship, and that it may be assumed, until the contrary is shewn, that the law of England is the law of every other country, and the statement of claim may as it stands be held to contain the allegation that so far as relates to the matter before us the law of all countries is the same. The law affecting this case is the law of merchants as affects shipping presumably common to all civilized nations, and it has not been suggested or shewn that the law would be different as regards any other than a British bottom.

On the 2nd point referring to the case of *Crooks* v. *Allan*, 5 Q. B. Div. 42, I find it laid down by LUSH, J., delivering the judgment of the Court, as follows :—

"The right to detain for average contributions is derived from the Civil Law which also imposes on the master of the ship the duty of having the contribution settled and of *collecting the amounts* and this usage has always been substantially in accordance with this law and has become part of the Common Law of the land."

If this be a true statement of the law, as I cannot but think that it is, the only question that remains is, whether the duty thus apparently thrown on the master, is thrown upon him as a personal responsibility *quâ* individual or *quâ* servant and agent of the owner? Upon this point, I entertain no doubt that it is as agent for the owner that the master acts in settling and collecting average contribution. In no authority that I can find, is the

WOOD, AG. C. J. 1889.

SYED HASSAN BIN OMAR AL HADEED v. KHOO SOON TJIO & ORS.

matter looked upon in any other light than as the servant of the owner. It may in many cases be clothed with certain powers and be subject to certain liabilities, but he is not the less an agent. See on this point *Story on Agency*, s. s. 36, 216-223—and when he acts "within the ordinary scope of his powers and duties, he is, in general, personally responsible, *as well as the owner*, upon all contracts made by him, for such matters as the employment and repairs and supplies of the ship," Ch. X. Section 294. See also s. s. 294 to 300 and 496.

In the case of settling and collecting average contributions, it cannot be said that he acts for himself in any way as an individual, but in the service and for the benefit of the owner whose interest it is that questions of average should be promptly settled, and if we take the judgment cited as a true exposition of the law he acts strictly within the line of his duties, and if that be so, it seems to follow that for negligence in the discharge of those duties, his employer, the owner, is liable on the general principle, so long established, that the master is liable for the negligence of his servant, when properly employed in the usual course of the master's business, [Blackstone's Com. 429] and for his benefit. *Underhill* v. *Stamp*, 1 Ld. Ray. 254 & 3 Ld. Ray. 375.

Demurrer over-ruled with costs.

Leave to defendant to file statement of defence and to plaintiff to amend his statement of claim by inserting the nationality of the ship *Banjermassin*.

SABAPATHY CHETTY *v.* SITRA MOOTAR.

In re SAMEH MOORDEE.

PENANG.

PELLERAU, J. 1889.

NOV. 6.

The fact that an Execution-creditor had notice of a Bill of Sale given by his debtor to a third party for value and to which he [the Execution-creditor] has actually subscribed as an attesting witness does not prevent him afterwards seizing the property comprised in such Bill of Sale and insisting that the Bill of Sale is void for non-registration or defect of registration or otherwise under the Bills of Sale Ordinance 12 of 1886.

Edwards v. *Edwards*, 2 L. R. Ch. Div. 291, followed.

A document acknowledging that the debtor had received a sum of money from the claimant for personal property [describing them seriatim] that day sold by him to the claimant, is a "Bill of Sale" within Section 5 of the Bills of Sale Ordinance 12 of 1886.

The claimant having *bonâ fide* purchased certain carts and bullocks of the debtor [some two years prior to the execution put in by the plaintiff] immediately on the execution of the Bill of Sale [to which the plaintiff was an attesting witness] took possession of the carts and bullocks, but left them in the same shed adjoining the debtor's house as they had previously been, and took in the debtor as a servant at fixed monthly wages who drove the said carts, conveyed and sold red earth and sand therein as he had previously done, but now for the benefit of the claimant on whose account he paid all the earnings to a Chetty, in liquidation of the claimant's debt to the Chetty on the mortgage of the said carts and bullocks—but the claimant personally, monthly paid the rent for the said shed to the landlord and took his receipts therefor in his own name.

Held, the carts and bullocks were in the "apparent possession" of the debtor and the Bill of Sale not having been registered under the abovementioned Ordinance, the same was void against the plaintiff, the Execution-creditor, notwithstanding he was aware of the purchase by the claimant of the said carts and bullocks.

In an Interpleader case when the Court has a doubt as to the *bonâ fides* of the sale by the debtor to the claimant, which sale is alleged by the Execution-creditor to be fraudulent, the Court is bound to decide in favour of the claimant, as the person alleging fraud is bound to prove it.

This was an Interpleader. The facts giving rise to it were as follows: the defendant Sitra Mootar was in 1887 indebted to the plaintiff on the mortgage of certain carts and bullocks which the plaintiff was about to seize and sell under his mortgage. To prevent such seizure and sale, the defendant sold the said carts and bullocks to the claimant Sameh Moordee by private contract, and the money obtained by such sale was paid in satisfaction of the plaintiff's said mortgage. At the time the claimant paid his purchase-money for the carts and bullocks the defendant granted him a document, which was as follows:—

PENANG,
4th August, 1887.

Received from Sameh Moordee, the sum of $300 for three white bullocks, one brown cow, one white cow, one black calf, two red calves, two bullock carts, two copper-chatties, and one wooden box, sold by me to him this day.

SITRA MOOTAR.

Witness:
SABAPATHY CHETTY.

The plaintiff attested the execution of this document, was present at the whole transaction and well knew thereof. This document was never registered under the Bills of Sale Ordinance 12 of 1886. Immediately after his purchase the claimant took possession of the property; but he left them in the same shed [adjoining the house of the said debtor] as they were when they were the property of the said debtor. The claimant also took the debtor in as his servant at wages of $6 per month, and then got the debtor to tend the carts and bullocks, to drive them, to procure and carry red earth and sand, and to sell the same and collect the proceeds thereof, and to pay the same towards liquidating the claimant's debt to one Narainan Chetty to whom the carts and bullocks had been mortgaged by the claimant; the defendant accordingly so acted and in fact, did exactly as he had done prior to the sale to the claimant. The claimant however, paid the monthly rent for the said shed to the landlord and regularly obtained receipts therefor in his own name. The defendant was indebted to the plaintiff in another sum of money as surety for one Supaya and the plaintiff having in September, 1889, got judgment therefor against both Supaya and the defendant, a day or two after issued a *fi. fa.* thereon and seized the aforesaid carts and bullocks which were still then in the same shed and in the possession of the defendant. The claimant put in a claim to them under the aforesaid document of 4th August, 1887, and the present Interpleader was the result. The plaintiff alleged the whole transaction between the defendant and claimant was merely colourable and there was no *bonâ fide* sale by the former to the latter. Certain facts were elicited in cross-examination by the plaintiff which threw suspicion on the *bonâ fides* of the alleged sale.

PELLEREAU, J. 1889.

SABAPATHY CHETTY v. SITRA MOOTAR. *In re* SAMBU MOORDEN.

Van Someren, for the Execution-creditor [plaintiff] contended, that there was no *bonâ fide* sale by the defendant to the claimant, but even if there was, the claimant must fail. The document of 4th August was a "Bill of Sale" within the meaning of Section 5 [*a.*] of the Bills of Sale Ordinance 12 of 1886. *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Railway Co.*, 35 L. R. Ch. Div. 191; *Haydon* v. *Brown*, 59 L. T. [N. S.] 330, 810, s. c. W. N. 1888, 49. It was also clearly an "assignment" or "transfer" within Section 5. There was no evidence that there had been a sale apart from the document. Its execution and the payment of the purchase-money took place at one time, and delivery of possession followed immediately after. Being a "Bill of Sale", it was void for want of registration under Section 6 [*b.*] of the Ordinance. The property according to the facts disclosed in evidence was in the "apparent possession" of the defendant within Section 6 [*c.*]—*Pickard* v. *Marriage*, 1 L. R. Ex. Div. 364; *Gibbons* v. *Hickson*, 55 L. J. Q. B. [N. S.] 119—possession having continued to appear to the world the same as before. The fact that the Execution-creditor had notice of the Bill of Sale and could not be injured by its non-registration did not prevent his relying on the Bills of Sale Ordinance, to invalidate the Bill of Sale on the ground of non-registration. *Edwards* v. *Edwards*, 2 L. R. Ch. Div. 291.

[*Pellereau*, J. I was inclined to think the fact that the Execution-creditor *had* notice of the Bill of Sale prevented his insisting on its non-registration as an objection, but the case of *Edwards* v. *Edwards*, is certainly conclusive the other way.]

Adams, for the claimant contended, the sale was *bonâ fide* and the property was not in the "apparent possession" of the grantor the defendant; the Execution-creditor knew his possession was that of the claimant—the landlord also new it. The claimant paid the defendant his wages monthly and the landlord his rent, and took receipts therefor in his own name. These facts did not appear in *Pickard* v. *Marriage* or *Gibbons* v. *Hickson*, supra.

Pellereau, J. I have great doubts as to the *bonâ fides* of the purchase by the claimant, and what gives rise to that doubt is the

[*a.*] "Bill of Sale" includes Bills of Sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipt for purchase-money of goods and other assurances of personal chattels....."

[*b.*] "Every Bill of Sale shall be duly attested and shall be registered under this Ordinance within three clear days after the execution thereof.....otherwise the following consequences shall ensue [that is to say]:—

.....

In the case of any other Bill of Sale it shall as against.....all Sheriff's officers and other persons seizing any chattels comprised in such Bill of Sale in the execution of any process of any Court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such Bill of Sale which at or after the time of..... ... ..executing such process.....and after the expiration of such three days are in the possession or apparent possession of the person making such Bill of Sale....."

[*c.*] "Personal chattels shall be deemed to be in the "apparent possession" of the person making or giving a Bill of Sale so long as they remain, or are in, or upon any house, warehouse, shop, building, vessel, works, yard, land, or other premises occupied by him or are used and enjoyed by him in any place whatsoever notwithstanding that formal possession thereof may have been taken or given by or to any other person."

after conduct of the parties in dealing with the property, and the payments to Narainan Chetty, the present mortgagee, always by the defendant, and an account being kept in reference to this property in the name of the claimant separate from the general account the Chetty had with the claimant. The Execution-creditor however, is the person who alleges fraud in the purchase, and he has to prove it. Having only a doubt as to the *bonâ fides* of the sale and purchase, I must decide on that point against the Execution-creditor and in favour of the claimant. I have no doubt however, that the document of 4th August, 1887, is a "Bill of Sale" within the meaning of the Bills of Sale Ordinance, and I am equally clear that on the evidence and law the property was in the "apparent possession" of the grantor, the defendant. The mere fact of the claimant having paid the rent for the shed to the landlord and taken the receipts therefor in his name is not sufficient to prevent the property being in the "apparent possession" of the grantor. What is necessary is, that to the public, the world at large, it should appear that there had been a change of possession. Under the circumstances, the Bill of Sale not having been registered, is void against the Execution-creditor. Judgment will therefore be entered for him with costs.

Judgment for Execution-creditor, with costs.

SHERIFA SHAIKA *v.* HAUGHTON.

The defendant, as Collector of Land Revenue, under Ordinance 4 of 1886, caused certain lands and house of the plaintiff to be attached for arrears of rent. Sometime before the attachment, he had made search in the Land Office to find out who was the owner of the lands and house, but he made no further search immediately before proceeding to a sale. In the interval, the plaintiff, the owner, had registered her title, but she was not aware the defendant intended selling the property. The owner not having been found, the defendant sold the property.

Held, [reversing the judgment of the Court below] that he was not guilty of negligence.

Held also, that as the owner could not be found, the defendant was not guilty of negligence for not addressing the notice to her, but to the "present occupier" of the house.

Held also, that as the owner could not be discovered, it was not possible to discover her "last residence," and therefore, there was no negligence on the part of the defendant in not putting up the notice [under Section 5 of the above Ordinance and Rule III. made in pursuance of the Ordinance] on such residence, but

Held further [reversing the judgment of the Court below] that "his house" mentioned in Rule III. was not the last residence of the owner, but the house with reference to which the claim for arrears is made, and a notice placarded on that house was a notice "published in the prescribed manner" within Section 5.

It is not sufficient in a memorandum of appeal simply to state that the appeal is for "wrong determination in point of law," but the grounds of the appeal should be set forth.

The nature of this case, the facts giving rise to it, and arguments of Counsel, fully appear in the judgment of the Court.

The case was heard on the 6th and 7th of November, and on this day.

Donaldson, [*Bailey* with him] for plaintiff.

Bonser, [*Attorney-General*], W. *Nanson* with him, for defendant.

Cur. Adv. Vult.

WOOD, Ag. C.J. 1889.

SHERIFA SHAIKA v. HAUGHTON.

18th November. *Wood*, Acting C.J. In this case Sherifa Shaika sues the defendant, the Collector of Land Revenue for the Settlement of Singapore, for the improper sale by him of a certain house and lot belonging to her on account of arrears of rent and some expenses incident thereto amounting to $3. This sale the defendant denies was improperly made. The facts of the case, as found by me, or admitted by the parties, are as follows:—

The plaintiff, Sherifa Shaika, a resident in Palembang, in Java, the wife of one Syed Abdullah Al Jaffree, the latter a person well-known in Singapore, became the purchaser on 22nd July, 1885, for the sum of $2,025, of a piece of land with a house thereon No. 10, Upper Macao Street, Singapore, which land was held under a lease from the East India Company from January 1st, 1843, for 99 years, at a yearly rent of $1.50, the original lessee being one Syed Maistry. This lease was not registered in the Land Office until December 16th, 1887. In June, 1886, "The Land Revenue Collection Ordinance 4 of 1886" was passed. By this Ordinance, Section 4, it is enacted that—

"Every sum now due or payable, or which shall hereafter become due and payable to the Crown on account of rent of, or assessment on land may be recovered in the manner hereinafter provided."

By Section 5.

"When any such sum has fallen due and a written notice of demand for it has been served *on any one of the persons liable for it or published in the prescribed manner*, and fifteen days, or such further time as may have been allowed by the Collector of Land Revenue of the Settlement or district in which the land in respect of which the sum is due is situated [who is hereinafter called "the Collector of Land Revenue"] have elapsed from such service or publication without such sum having been paid or satisfied *such sum shall be deemed to be an arrear and every person liable for it shall be deemed to be a defaulter*."

By Section 6.

[1.] "With a view to the recovery of an arrear the Collector of Land Revenue may issue an attachment and may seize by virtue thereof any personal property of the defaulter and may also seize any effects or any crops to whomsoever belonging which may be found on the land in respect of which the arrear is due and may after the prescribed notice sell the same by public auction in the prescribed manner.

[2.] The attachment may be made by an officer deputed by the Collector of Land Revenue for the purpose who shall publicly notify the attachment in the prescribed manner and shall take an inventory of the property attached. Such officer shall be deemed to be a public servant within the meaning of the Penal Code."

By Section 7.

"If the arrear cannot be recovered in the manner aforesaid the Collector of Land Revenue may proceed against the land in respect of which the arrear has accrued as next hereinafter provided."

By Section 8.

[1.] "The Collector of Land Revenue may by notice of sale [to be served or published in the prescribed manner] declare his intention of selling at the

expiration of three months from the date of such notice of sale the land in respect of which the arrear has accrued, and if at the expiration of such period such arrear has not been paid or satisfied the Collector of Land Revenue may sell by public auction the whole of such land or such portion thereof, or such interest therein, as he may deem sufficient.

[2.] The proceeds of such sale shall be applied in the first place in satisfaction of the arrear together with interest thereon at the rate of eight per cent. per annum and costs, and in the event of there being any surplus remaining the Collector of Land Revenue shall if he is satisfied as to the right of any person claiming such surplus pay the amount thereof to such person, and if he is not so satisfied shall hold the amount in trust for the person who may ultimately succeed in due course of law in establishing his title thereto."

By Section 11.

"If any person having any interest in any property liable to be sold under the provisions of this Ordinance at any time previous to such sale tenders to the Collector of Land Revenue the arrear with interest and costs the Collector of Land Revenue shall thereupon desist from all further proceedings in respect thereof."

By Section 14.

"The Governor in Council may, from time to time make, and when made, vary and revoke rules for all or any of the purposes following, viz.:—

[*a.*] To determine the costs and fees payable in respect of proceedings under this Ordinance;

[*b.*] To prescribe the mode of service or publication of notices issued under this Ordinance;

[*c.*] Generally to carry out the provisions of this Ordinance in relation to any matters whether similar or not to those abovementioned as to which it may be expedient to make rules."

Acting under the powers conferred by Section 14 of the Ordinance abovementioned, Rules were made by the Governor in Council on June 30, 1886, of which the following are those material to the consideration of this case:—

1. The Collector of Land Revenue shall prepare or cause to be prepared for every division or sub-division of his district or Settlement, a separate Rent-roll containing the following details:—

[*a.*] The number of allotment, or of the document creating title, of every holding liable to rent or assessment.

[*b.*] The name of the person liable for the payment of such rent or assessment.

[*c.*] The sum payable.

2. He shall cause to be prepared annually from such Rent-rolls general notices, sub-division by sub-division, in the form prescribed in Schedule A. specifying the name of each person from whom revenue is due and the amount due by him. The notice shall be affixed to the house of the headman, or to a mosque, or other conspicuous building in the village.

3. If a person liable to pay any sums due under the said Ordinance cannot be found, the notice required by Section 5 of the Ordinance shall be published by affixing a copy in the form prescribed in Schedule B. to his house, or to a mosque, or other conspicuous building in the town or village in which such person last resided.

6. Under Section 6 of the Ordinance the Collector of Land Revenue may at his own instance, or on the oral application of a notice server, headman, or other officer of his department, issue an attachment in he form prescribed in Schedule D.

WOOD, AG. C.J. 1889.

SHERIFA SHAIKA v. HAUGHTON.

7. The bailiff or other officer to whom the attachment is addressed shall notify the same by affixing a copy thereof to a conspicuous part of the premises in which the seizure is effected.

8. The attachment of moveable property shall be executed by actual seizure, and an inventory shall forthwith be taken of such property by the attaching officer, who shall keep the property in his own custody, or in the custody of one of his subordinates and shall be responsible for the safety thereof.

9. He shall not enter any dwelling-house after sunset or before sunrise, nor shall break open the outer door of a dwelling-house. But when he has duly gained access to any dwelling-house he may unfasten or break open the door of any room in which he has reason to believe there is any property liable to attachment.

12. On the expiration of ten days, if no good cause to the contrary has been shewn and the arrear and costs are still unpaid, the property may be sold.

18. The notice under Section 8 of the Ordinance shall be in the form in Schedule F. and shall be served personally on the person named therein or, if that be impracticable, shall be published, by beat of gong or other customary manner, at some place on or adjacent to the land to be sold. A copy of the notice shall also be posted up on the land itself, and at a mosque or other public place in the vicinity.

23. The Collector of Land Revenue may, if he think it desirable, advertise in such manner as he shall think fit, any sale held under these Rules, and any expenses incurred in so doing shall be costs of the sale.

25. On payment of the purchase-money, the purchaser shall receive from the Collector of Land Revenue a conveyance of the land or interest in land, as the case may be, sold to him, and he shall forthwith be put in possession of the purchased property, the aid of the Police being afforded if needful."

In 1886 a Rent-roll was made of rents due in 1885, in which, the following entry appears:—

No. in general register.	Lessee.	Annual rent.	Amount received.
958	M. K. Raman Chetty ...	$1.50	$1.50

The rent for this year thus appears to have been paid, and was in fact paid by one Sultan, who then occupied the premises, or by some one else. Notice of demand of rent had been made, and as to this it is remarkable that the notice of demand served on the occupier of the premises and the counterfoil contains in the space left for the name of the owner or occupier, the name of Mana Kana Raman Chetty struck out, and the words added "sold to Syed Abdullah Al Jaffree."

The Rent-roll for rents due in 1886 was duly made in 1887, and in this, the following entry appears:—

No. in general registry.	Lessee.	Annual rent.	Amount received in 1886.	Remarks.
958	M. K. Raman Chetty [struck out].	$1.50	$1.50	Sultan.

The rent for this year thus appears to have been paid, and was in fact paid by Sultan, the occupier of the premises. Notice of demand of rent was made, and on the face of the notice and on the counterfoil on the space for owner or present occupier appears the word "Sultan," who was in fact the occupier. After this no rent was paid and there being then no occupier of the house and land notice of demand was posted on the house for the rent due in 1887, and an attachment issued on which no effects were seized. As to this latter part it may be taken as a fact that although an entry was made into the premises no effects were then found of any applicable value. In subsequent Rent-rolls the name of Sultan is retained as the person liable either as owner or occupier.

By notifications in the *Government Gazette* in December, 1886, January, 1887, December, 1887, and January, 1888, under the hand of the defendant as Collector of Land Revenue, all lease-holders of Crown Lands were reminded that for default of payment of rents due proceedings would be taken under Ordinance 4 of 1886, for the recovery of quit-rents in arrear, which notifications were posted up in conspicuous places and after advertisement of the intention of the defendant or Collector of Land Revenue, dated 24th January, 1888, to sell among others the land and lot in question on the 7th of May, 1889, at the Land Office, the land and house were eventually sold by Mr. Dunlop, after some bidding, for $840.

In this advertisement in the *Government Gazette* of the intended sale, the land is described as—

Name of Lessee.	Lease No.	Situation.
Sultan.	958, 16th June, 1846.	Upper Macao Street.

As to this it is to be remarked that the name of Sultan is incorrectly entered as the lessee. The lease is described as of the date of 16th June, 1846, instead of 1st January, 1843, and no number is given to the house. Before the sale, copies of the advertisement in the *Gazette* were distributed by the auctioneer among many persons whom he knew to be purchasers of land at land sales, and advertisements were put into the local papers of the intended sales, but no hand-bills in native languages were generally distributed, as was shewn to be usual in ordinary land sales by auction.

For the plaintiff it was urged that the defendant as Collector of Land Revenue had taken, sold, and handed over to the purchaser the land of the plaintiff when the land was not liable to sale, and was, when sold, sold without the proper and usual advertisement. The land it was contended could not be sold at all unless under certain specific circumstances, which circumstances had not occurred, and that the defendant had neglected

WOOD, AG. C.J. 1889. — SHERIFA SHAIKA v. HAUGHTON.

reasonable opportunities of knowing who the persons were who were owners, or liable for the payment of rent. The law affecting the matter is contained in the Ordinance 4 of 1886, and in the Rules made by its authority and without the sanction of their combined provisions no sale of the plaintiff's lot could legally be made. By the Ordinance the defendant as Collector of Land Revenue is the person charged with the duty of carrying out the provisions of the Ordinance and Rules. And in doing so, he has seriously overlooked the rights of the plaintiff. By the Ordinance, Section 5:

"When any sum has fallen due and a written notice of demand for it has been made, on any one of the persons liable or published *in the prescribed manner* and 15 days or more have elapsed from such service or publication without such sum having been paid or satisfied such sum shall be deemed to be *an arrear* and every person liable for it shall be deemed to be a defaulter."

Then follow provisions for proceeding against the defaulter for the recovery of the arrear, but it is obvious that it is only in the case of an "arrear" thus technically defined that such proceeding can be had. Here there was no *arrear*, the persons liable for the rent are only the original lessee, and the assignee of the lessee, and no notice of demand was ever served upon any one of these. Nor was any such notice of demand "published in the prescribed manner." The prescribed manner is given in Rule III., as follows:—

"If a person liable to pay any sums due under the said Ordinance [3] of 1886 *cannot be found* the notice required by Section 5 of the Ordinance shall be published by affixing a copy in the form prescribed in Schedule B. *to his house* or to a mosque or other conspicuous building in the town or village in which such person *last resided*."

Here "found" means "discovered," and not merely found within the Colony, and "his house" in the singular number and coupled with the words of residence which follow must mean his "dwelling-house" and not any house which happens to be his property, as the house in question. As a fact, the person liable was never looked for, and defendant seems to have been satisfied without any inquiry that Sultan was the owner. Abundant means existed to enable the defendant to discover the person liable. In 1886 he seems to have had notice from some quarter or another that the land had been sold to Syed Abdullah the husband of the plaintiff and although this was not so, yet had Syed Abdullah, a well-known person in Singapore, been communicated with, the true owner, his wife, could have been ascertained. Then although the land was not registered until December, 1887, yet had the defendant made enquiries at the Land Office any time between the time of registration by plaintiff in December, 1887, and the time of the sale he could have found who was the person liable for the rent, a precaution which no person with such a power of sale as possessed by the defendant should reasonably have abstained from making before proceeding to the extreme resource of selling

land for unpayment of quit-rent of so small an amount as $3, and again by making enquiries of the Municipal authorities it could have been ascertained who as owner had paid assessments. Thus no reasonable effort was made to discover the person liable for payment of rent. But had reasonable effort been made and the real owner or person liable not have been "found out," or not "found within the Colony," no notice of demand had ever been served in the prescribed manner by affixing it to the door of his or her *house* or to any conspicuous place in the place where he or she last resided. It is obvious that the rules did not meet such a case as this. But that is no fault of the plaintiff, and it is enough to say that the rent is not an "arrear" unless the prescribed rules are followed.

But even supposing that the property was liable to sale, defendant has been negligent in not properly advertising the property. The spirit of the Ordinance and its Rules is that the owner should be ascertained, in order that he may come forward even at the last moment and by paying the amount of rent under Section 11 of the Ordinance stops the sale. In the defendant's advertisement in the *Government Gazette*, [an advertisement adopted by the auctioneer,] the premises are misdescribed, or imperfectly described. The No. of the House is not given as it should have been, and the name of the lessee is incorrectly stated to be "Sultan" and the date of the lease is also incorrectly stated as of the 16th of June, 1846, instead of 1st of June, 1843, an error which is calculated to mislead an agent or friend of the plaintiff who might read such advertisement of sale; then again, the property was not fairly and reasonably advertised by issuing as is usual in order to attract purchasers—advertisement in the native languages and it is unreasonable to suppose that the defendant as Land Collector is justified in selling except as others would sell and that as measure of damages the value as put upon the premises by Mr. Crane $1,500 may fairly be taken to be its true value at the time of the sale.

A further objection is that the defendant most unnecessarily put up the whole lot for sale instead of such an interest in the land as would have realised the small sum of $3 with it may be some small additional sum for the expenses of the sale. By Section 8, Sub-section 1 of the Ordinance, "The Collector of Land may sell by public auction the whole of such land or such portion thereof, or such interest therein, as he may deem sufficient." In this case it is obvious that although it may be hardly reasonable to sell a portion of a house, yet a minutely small interest in the house say a right to occupy for a month or two might easily have been disposed of without resorting to the extreme measure of a sale of the entire lot.

At the close of the case for the plaintiff it was urged for the defendant that there was no case, inasmuch as a mere sale without delivery of possession of another person's property was not a wrong, but as I was of opinion that the pleading evidently meant to imply what was not in fact denied, that the defendant was charged with the delivery as well as the sale and in fact

WOOD, AG. C.J. 1889.

SHERIFA SHAIKA v. HAUGHTON.

delivered to the purchaser and as in case it were not so, I would allow an amendment of the pleading to meet this difficulty, this objection was withdrawn. For the defendant in answer to the case it was contended, that the plaintiff was herself guilty of negligence. Being resident abroad her agent was negligent in not properly looking after the property and in not paying rent. That the defendant had not neglected his duty in serving the proper notices. That the plaintiff should have properly and duly registered herself before the new Registration Ordinance which rendered registration in a manner compulsory, and that defendant by his officer had made an inquiry at the Land Office in October, 1887. That the defendant had by himself or his agents made reasonable inquiries as to the owner or person liable. That such person could not be found, and was in fact. resident out of the jurisdiction, and that nothing found, the defendant was at liberty to sell. As to the provision for sales "found" means "found within the Colony." And the notices having been affixed to her house, *i.e.*, the house in question, were properly served and the rent became an arrear. That there was in fact no negligence in the performance of anything necessary to be done before the sale. In the sale itself no negligence was apparent. The defendant did advertise in a proper manner so as to attract purchasers, that by Rule 23, he has authority to advertise in such manner as he shall think fit, and the publishing of notices in the native languages is not, in the case of a Government sale, of practical consequence, due publicity having been given to the sale. Extreme rigour of judgment in the matter of such a sale is not exacted as in cases of a mortgagee with a power of sale a case which is analogous to the present, and the errors in description of the premises are immaterial. It may be reasonably held that the land and house were sold for their true value, and the plaintiff has no reason for complaint.

It was further argued that the defendant is not himself answerable for the errors of his subordinates. He being a public officer is acting in the discharge of a public duty, and who in the discharge of such duties must necessarily employ subordinate officers. In this case, DeSouza, the bailiff, states that it was his duty to make enquiries and may have failed to do so, and he, if anyone, is the person liable, not the defendant. This principle is established by many cases referred to in the text of *Story on Agency*, 9th Ed. [1888,] pages 390-2, para. 319, 319a. in which the cases of postmasters and others are specifically dealt with.

In this case I have little hesitation in finding for the plaintiff. Dealing with the last point first, I think the defendant is personally and primarily liable for any negligence in proceeding to the sale and to some extent in the mode of selling. Looking at the Ordinance and the Rules, it is obvious that the defendant, as Collector of Land Revenue, is the person upon whom devolves the duty of selling land for rent in arrear and upon him rests the responsibility of satisfying himself that all these things have happened which enable him so to act. It may be true that had a bailiff disobeyed his order in not affixing or serving a notice

which he was ordered or which it was his duty to serve, such person might have been the person liable and not defendant, but that is not the case in the present case. The defendant was not called to give evidence in his own behalf, and DeSouza, his bailiff, although he says it was his duty to make inquiries generally, and did make inquiries in October, 1887, at the Land Office as to who was the owner, and generally in the neighbourhood, and did not act wisely in not making inquiries of the Municipal Commissioners although the idea crossed his mind, yet there is no evidence to shew that he was ever specifically ordered so to do. What he did do was no doubt in the interests of the Office of the Land Collector, but was no part of his regular assigned duty. Nor do I think it could be assumed to be so, nor that the defendant as Land Collector, could reasonably so order him. When a public duty is clearly thrown upon any one public officer it is obvious that he cannot evade the due performance of that duty by forcing upon another the performance of a duty which personally devolves on himself. The text of *Story*, in p. 391, para. 319, is, that "public officers are not responsible for the negligence of their sub-agents properly employed by and under them in the discharge of their official duties," and again in page 392, para. 319a. that "public officers may be responsible for the negligence of their sub-agents in not exercising a responsible supervision over their acts and doings." As before stated the duty of proceeding to a sale is a duty cast upon the defendant as Land Collector, and even supposing that he was justified in delegating the duty of making proper inquiries as to the person liable for rent to his bailiff, he was at least bound to see that his bailiff had effectively performed his duties. But as a fact, I find that he did not delegate to such bailiff or to any one else the duty of making all necessary inquiries. That the rent was not in "arrear" I think is clear, and that unless it was in "arrear" no sale could be legally had. I think it clear that the real owner or person liable might have been easily and reasonably discovered before the sale, and that the reasonable duty was cast upon the defendant to ascertain from the Land Registry Office and the Municipal Books who was the person liable, no less than by following up the clue given by the knowledge to be obtained from the notice of demand of rent counterfoil, in which it is stated that the land had been sold to Syed Abdullah Al Jaffree, the husband of the plaintiff. I think this ought to have been done, in particular the inquiry, and repeated at the Land Office on the eve of the sale, and that the inquiry in October, 1887, of the Land Registry Office was not sufficient; this also I find as matter of fact.

As matter of law, I hold that in the proper construction of Rule 3 the "person liable" means the "lessee or his assignee," and not the mere occupier; that "found" means "discovered" or "found out" and not "found in the Colony;" that "his house" in the singular and followed as it is by words referring to residence must mean "dwelling-house," and not any house that may happen to be his, or "the house intended to be sold;" that

WOOD, AG. C.J. 1889.

SHERIFA SHAIKA v. HAUGHTON.

the notice having to be affixed in the way prescribed, if that prescription fails in meeting the case of the plaintiff in this action there is no proper affixing of the notice, and that thus the rent is not in "arrear."

On the question of the negligence of the plaintiff, seeing the origin of the loss to her, I must say that the Ordinance was passed to meet the case of tenants who either wilfully or negligently suffer their rent to fall into arrear, and the power of sale given to the Collector necessarily presupposes such wilfulness or negligence.

As to the manner of conducting the sale, I think also, as matter of fact, that there was negligence in not properly describing the property to be sold in the *Government Gazette* and subsequent advertisements. The Ordinance very obviously and very justly aims at preserving the rights of owners who may even at the last moment come in, and by paying the rent stop the sale. An advertisement of the sale of land for rent due to Government should be such as, if seen by persons interested or their friends might inform them of the intended sale, and it is quite probable that had the No. of the house been stated and the name of the lessee and the date of the lease been truly stated, they would have had this result. Again, I think that the effect of Rule 23 is not to give to the Land Collector the right to advertise as little as he pleases, but only to enable him to retain the expenses of advertisement, and I think that it was not reasonable to sell, as this lot was sold without advertisement in the native languages, a proceeding which is shewn to be usual in ordinary sales. As to the responsibility of the defendant however for this latter act of omission on the part of the auctioneer, I doubt if the defendant is liable.

With regard to the argument of the plaintiff that the defendant might have sold an interest in the land and not the entire lot, I am of opinion that the defendant might well have done so, and as a discretion seems to be thrown upon him to sell only such an interest "as he may deem sufficient," he has not reasonably exercised such discretion in so doing. Such a sale of a small interest in the land might have been troublesome in its details, and involved some small expense, but would have been in my judgment feasible.

Although giving judgment against the defendant, I do not by any means wish to impute to him any grave blame. The exercise of the powers conferred upon him by the Ordinance and the Rules above referred to require at his hand much of the knowledge and skill of a practised Lawyer in acting on the provisions of a new and somewhat involved branch of the law, and that of an experienced Solicitor in duly carrying out a power of sale. Still it must not be lost sight of that the spirit of the Ordinance and the Rules is obviously to enable the Crown to realise its rents with the least possible amount of loss to the tenant, and that it is the duty of the officer exercising the power of sale to do so with much circumspection and care not only in the interests of the owner, but also in that of the Crown, whose credit would suffer if it were supposed to be indifferent to the interests of its

tenants. Holding, however, that the defendant is liable, I have to consider the question of damages, and looking to the evidence of Mr. Crane and Mr. Dunlop, the price given for the land in 1885, the number of years which the lease has to run, the bad state of repair of the house, with the difficulty of finding a tenant and the value of the land without the house, I estimate the loss to the plaintiff at the sum of $1,250.

Judgment for plaintiff for the amount, with costs.

The defendant appealed, and the Appeal was heard on the 20th and 21st March, 1890.

Bonser, [*Attorney-General*] and *Nanson* for appellant.

Bailey, for the respondent.

O'Malley, C.J. said they had made up their minds upon the case and he was of opinion that the judgment should be reversed as no cause of action has been established. In his opinion the defendant complied substantially with the requirements of the Ordinance. It was contended for the plaintiff that he [the Collector] failed in his duty in several respects, and thereby deprived the plaintiff of the opportunity of preserving her property. The first complaint was that no due and proper search was made for the plaintiff. He would say, that the proper search in the first instance would be at the Deed office, where search was made, and there was nothing there to indicate the residence of the plaintiff or any relation of hers, and there was nothing to shew that reasonable means were not taken to ascertain the plaintiff or her agent, and he thought it must be taken that reasonable means were taken to search for the plaintiff.—It was then alleged that having failed to find the plaintiff, the Collector ought to have served or published a notice under Section 5 and Rule 3. The Collector did publish a notice, but it was alleged that the notice was bad because it was not addressed to the plaintiff, but to the present occupier; but if the plaintiff could not be found, and it could not be found who was the assignee, then he did not think that it could be called negligence. The next best thing was to serve a notice on the only person who allowed himself to be recognised as a lessee or present occupier.—Then it was urged, that the notice was not put up in the right place, and he would be inclined to say, that there was a great deal in Mr. Bailey's contention as regards the words "person's last residence," Rule 3. The last residence of the lessee could not be found; of course, it would have been impossible therefore to have complied with a provision of that kind, but he did not think that if they took Section 5 and Rule 3, that it was intended that you must serve this notice or publish this notice, at the place or residence of the owner, but at the house with reference to which the claim was made, and it was so published in this instance. These were the grounds upon which it was contended that the Land Officer had exceeded his duties, but he did not think that there had been any negligence on the part of the Land Officer. There was nothing to shew that he could have done anything more substantially for the purpose,

O'MALLEY, C. J. PELLEREAU & GOLDNEY. } J.J. 1890.

SHERIFA SHAIKA v. HAUGHTON.

It was said he might have searched the register at the last moment, but he did not see that this was the duty of the public officer under these circumstances; there was reasonable diligence,—if you have nothing to define reasonable diligence, you must judge what is reasonable diligence. As regarded making the auctioneer liable, the auctioneer was appointed by the Government. The judgment of the Court below would be reversed, with costs.

Pellereau and *Goldney*, J.J., concurred.

Judgment reversed.

SIMONS *v.* TEO GUAN TYE.

SINGAPORE.

GOLDNEY, J. 1889.

November 13.

If a person having actual knowledge—not mere suspicion—that a Company has suspended payment, sell shares therein to another knowing that other was ignorant of that fact and not disclosing it to him, but representing that the financial position of the Company was sound and that large profits would accrue from a purchase of such shares, the sale will be set aside by the Court as obtained by fraud and misrepresentation.

Suit for specific performance of a contract for the purchase of certain shares in the late Rawang Tin Mining Co., Limited, or damages for breach of contract.

In his statement of claim the plaintiff alleged that on the 26th August, 1889, the plaintiff, through his broker, Charles Schomburgh, sold to the defendant 50 shares in the Rawang Tin Mining Company, Limited, at $7 per share, delivery to be made on the 28th August, 1889. The contract for the said sale was in writing, and signed by the defendant. On the 28th August, 1889, the plaintiff tendered to the defendant a share certificate and a duly executed transfer of 50 of the said shares, but the defendant refused to complete the said contract, and still refused to do so. The plaintiff claims [1] Specific performance of the said contract; [2] Damages for breach of the said contract, in addition to, or in substitution for, such specific performance and costs.

The statement of defence, was as follows:—

The defendant was induced to make the alleged contract by the fraud of the plaintiff or his broker, and within a reasonable time after he had notice of the said fraud, and before the share certificate and transfer were tendered to him, he repudiated and abandoned the said contract. Particulars of the fraud are as follows: The plaintiff's broker, at the time of the sale of the shares to the defendant, represented to the defendant, for the purpose of inducing him to purchase the said shares, that the Rawang Tin Mining Company, Limited, was a strong company, meaning thereby that its financial position was sound; that if defendant bought the shares, they would be sure to go up in value; and that in three days defendant would be able to sell the said shares at a profit, whereas the said Company was then insolvent and about to stop payment as the said broker then well knew.

The further facts material to this report sufficiently appear in the judgment. The case was heard on the 13th, 14th and 19th days of November.

Drew, for plaintiff referred to *Rudge* v. *Bowman*, 3 L. R. Q. B. 689; *Kerr on Fraud*, 39; *Benjamin on Sales*, 387; *Dimmock* v. *Hallett*, 2 L. R. Ch. Ap. 27; *Evans* v. *Wood*, 5 L. R. Eq. 9; *Paine*

v. *Hutchinson*, 3 L. R. Eq. 257, on Appl. 3 L. R. Ch Ap. 388; *Chapman* v. *Shepherd*, 2 L. R. C. P. 228; *Coles* v. *Bristow*, 6 L. R. Eq. 149; *Hodgkinson* v. *Kelly*, 6 L. R. Eq. 496; *Lindley on Partnership*, 713; *Fry on Specific Performance*, §§ 370, 1468-9, 1490, 1500-1; *Hawkins* v. *Maltby*, 4 L. R. Eq. 572.

W. *Nanson*, for defendant referred to *Barwick* v. *English Joint Stock Bank*, 2 L. R. Ex. 259; *Mackay* v. *Commercial Bank of New Brunswick*, 5 L. R. P. C. 394; *Hawkins* v. *Maltby*, suprà; *Re London, Hamburg, &c. Bank*, 2 L. R. Eq. 231; *Cadman* v. *Horner*, 18 Vesey, 10; *Wall* v. *Stubbs*, 1 Madd. 80; *Waddell* v. *Blockey*, 4 L. R. Q. B. Div. 678; *Redgrave* v. *Hurd*, 20 L. R. Ch. Div. 1; *Fry on Specific Performance*, §§ 317, 368, 625, 1,490.

Cur. Adv. Vult.

November 25th. *Goldney*, J. This was an action for the specific performance of a contract for the sale of certain shares, and, in the alternative, for damage for the breach of the said contract. On the 26th of August the plaintiff, through his broker, sold 50 shares in the Rawang Tin Mining Company to the defendant, at $7 a share, delivery to be on the 28th August. The defendant has refused to take the shares or to pay for them. The defendant admits making the contract, but alleges that he was justified in refusing to take delivery of, or to pay for, these shares, on the ground that he was induced to make the contract by fraud. At the time that the contract was made [and there is no dispute as to the time], the Rawang Tin Mining Company had suspended payment. The defendant alleges that the plaintiff's broker being well aware of this fact, and that he [defendant] was ignorant of it, represented to him in effect that the Company was a strong Company, and that its financial position was sound, and that the low price of the shares was the consequence of a combination of persons who wished to bear down the shares for their own advantage. If the evidence on the part of the defendant convinced me that the broker had actual knowledge, not a mere suspicion, of the Company having suspended payment previous to his selling these shares to the defendant, and was also aware that the defendant was ignorant of this, and that, having this knowledge, he did not disclose the fact, or rather concealed it from the defendant, and that he did make the alleged representations, I should have no hesitation in finding a verdict for the defendant. In my opinion, in all mercantile contracts, if, at the time of negotiating the contract, one party to the contract suppresses or neglects to communicate a material fact within his knowledge which the other party has not the means of knowing, or is not presumed to know, that is a fact which, if communicated, would induce the other party either to refrain altogether from the contract or not to enter into it on the same terms, the doing so is a concealment amounting to fraud, and such concealment will avoid the contract. I am not, however, prepared to say that there was such a concealment or misrepresentation in this case. That the broker and those who instructed him were anxious to get rid

GOLDNEY, J. 1889.

SIMONS v. TEO GUAN TYE.

of these shares, because they knew that the Company was in a bad way, there can be no doubt. But this unsatisfactory condition of the Company was, at the time of making the contract, common knowledge to the general public; I am not satisfied on the evidence that the broker knew that the Company had actually stopped payment, or that he made the representations which the defendant alleges induced him to buy these shares. I think, therefore, that the defendant has failed to make out his defence, and that the plaintiff is entitled to succeed. Since the contract was made, there has been a call of $5 per share, which the plaintiff has had to pay. The Company now being in liquidation, to grant specific performance of the contract would be of no use, damages therefore must be substituted for specific performance. Damages for the breach of a contract for the sale of shares in ordinary cases is the difference between the contract price and that at which the plaintiff was able to re-sell them. The plaintiff did not, on the refusal of the defendant to take the shares, re-sell them. I am not satisfied on the evidence that there was any market in which he could have re-sold the shares; if there was, I think it was for the defendant to shew this, and he has failed to do so. I think, therefore, that under the circumstances, the plaintiff is entitled to recover the contract price of the shares, viz., $350, and $250 the call which the plaintiff has had to pay subsequent to the sale.

Verdict for the plaintiff $600, with costs.

SPIRIT FARMER *v.* TOK KIM TONG.

SINGAPORE.

WOOD, AG. C.J. 1889.

December 3.

The Spirit Farmer has authority under Section 25 of the Excise Ordinance 4 of 1870, to limit by the permit he issues for the removal of spirits, the hours within which the removal shall be made, and any removal outside of those hours is a removal without a permit, and an offence under the section.

The Court of Appeal has power to amend a charge by charging a person as a principal who was formerly only charged as an accessory; and also by substituting a proper charge under Section 34, Clause 6, even when the appeal is from an order of a Magistrate *discharging* the accused.

This was an appeal by the Spirit Farmer from an order of S. Leslie Thornton, Esquire, acting First Magistrate, dismissing a summons against the abovenamed Tok Kim Tong, who was charged with abetting one Low Pok Keam, a coolie, in removing from the accused's shop on 7th October last, a bottle of brandy, in contravention of the terms of a permit granted by the Spirit Farmer, and thereby committing a breach of Section 25 of the Excise Ordinance 4 of 1870. That section, is as follows:—

25. "Every person desirous of removing Spirituous Liquors from one place to another, or from the possession of one person to that of another person, shall apply to the Spirit Farmer of the Settlement in writing, in form of Schedule [G.]; stating the quantity and description of Spirituous Liquors, the places to and from which they are to be removed and the person from and the person to whose possession they are to be removed, and the time of removal, and except as is next hereinafter provided, and except when the

duty leviable under this Ordinance shall have been already paid thereon, shall pay, or cause to be paid such duty to the Spirit Farmer, whereupon the said Spirit Farmer shall deliver to such person a written permit to remove the same in form of Schedule [H]. Every person offending against any of the provisions of this section shall be liable on conviction to a penalty not exceeding two hundred dollars, and the Spirituours Liquors shall be seized and forfeited."

Schedule G. referred to in the Section, is as follows:—

EXCISE SPIRITS.

Notice to remove under Section 25.

To

The Spirit Farmer, at .

Take Notice, that I desire to remove under Section 25 of the Excise Ordinance of 1870, gallons bottles of contained in distilled at or imported by on the day of 187 , ex-ship , and now stored in at [and I hereby tender to you payment of being amount of duty chargeable on the same] and require from you a Permit for the removal of the same from [ ] to the godown, shop or house of situated at [or if duty already paid] the duty on the said having been already paid by the Importer [giving the name].

Yours, &c.,

Importer.

Date————.

Schedule H. referred to in the Section, is as follows:—

EXCISE SPIRITS.

Permit to remove under Section 25.

[is] authorised to remove under Section 25 of the Excise Ordinance of 1870 from [ ] to [ ] gallons bottles of contained in package [ ] imported by on the day of 187 , ex-ship and now stored in at [the duty having already been paid on the same.]

Spirit Farmer.

Date————.

The Magistrate, in the case he stated on the appeal, gave the following reasons for his dismissing the summons, from which also the facts of the case will appear.

"A coolie went to the shop of a retail spirit shop-keeper about 9 a.m. on the 7th day of October, 1889, and orders a bottle of brandy. He is then told that a permit will have to be procured, and after the defendant's clerk has taken the name and address of the person to whom the spirit is to be removed he is told to come back later in the day for the brandy. In order to ensure that the brandy shall be given out to the same person who ordered it, the coolie is given by the defendant's clerk a slip of paper acknowledging the receipt of the price of the brandy. The defendant's clerk then made out the application [the form of which is provided by the Farmer] took it to the office of the Farmer, and, after some delay, obtained the permit from the clerk who issues permits at the Farm. Some time after 3 p.m. on the same day the

WOOD, Ag. C.J. 1869.

SPIRIT FARMER v. TOK KIM TONG.

coolie returned for the brandy and took it, with the permit, away with him; about 4.30 p.m. he was arrested at no great distance from the defendant's shop by a Revenue Officer, for a breach of the provisions of Section 25 of the Excise Ordinance, 1870. On the following day he was brought before Mr. Hudson, the Third Magistrate, was bound over to come up for judgment when called upon, and these proceedings taken, the defendant being the principal offender. The Revenue Officer did not state for what special breach of this section he arrested the coolie. It may have been because the coolie, on being asked his name, gave a name which did not correspond with that in the permit, or it may have been that the time at which he was found removing the spirits, *i.e.*, 4.30 p.m. was contrary to the time mentioned in the permit, *i.e.*, 11 a.m. to 1 p.m.; but Mr. Drew, for the Farmer, admits that the only breach the prosecution relies on is, that the spirits were in course of removal at 4.30 p.m. when the time named in the permit expired at 1 p.m. It is to be noted that in the application made by the defendant's clerk for the permit, the time of removal is given as from 11 a.m. to 1 p.m., but the defendant's clerk alleged and in this he is confirmed by the manager of the Spirit Farm, that the Farmer refuses to issue permits allowing a longer period for removal than 2 or 3 hours. It is also to be noted that the Farmer carries on the trade of selling spirits, and from the manager's evidence it appears that no restrictions as to the time of removal, or even as to the place to which the spirits are to be removed, are imposed on purchasers of spirits from the Farm, though in the case of purchasers from other spirit traders such restrictions are strictly enforced. The reason given for this difference of treatment is that the duty on spirits purchased direct from the Farm cannot fail to be paid before the spirits are allowed to leave the Farm, whereas there is no such check on purchasers from other traders unless these additional precautions are taken. I may here add, that it is the practice of many retail Spirit Traders with the approval of the Farmer to have a store or bonded warehouse in which their stock of spirits is stored, and a separate shop for the retail of such spirits, no duty is paid while the spirit remains so to speak in bond, but on removal from the store to the shop a permit is required and the duty is then paid. Consequently in these cases [and in the present instance] all the duty to which the Farmer is entitled has been paid on all spirits in the retail shop, unless in breach of the provisions of the Ordinance any spirits have been received therein without the Farmer's permit, and for the detection and punishment of such an offence, various, distinct, and stringent provisions are given by the Ordinance. Section 25 under which this prosecution has been instituted seems to me to have been made to protect the rights of the Spirit Farmer. Now, the rights of the Spirit Farmer differ materially from those of the Opium Farmer. The latter has a monopoly of the trade given him, the former has nothing more than an exclusive right to levy a duty on all spirits used or consumed in the Colony at a fixed rate. The whole of the privileges conferred by the Ordinance on the Farmer being in restraint of trade and the provisions of the Ordinance protecting those privileges being of a highly penal character, it seems to me that their exercise cannot be too jealously watched and that any extension or abuse of such privileges should in the interests of the public be prevented. For the removal of spirits from one place to another or from one person to another person by this section a permit is required and an application must be made in the form G., so that it would seem if two or three persons proposed to picnic at Bukit Timah and one of them were for that purpose to take a bottle of whisky to that place without a permit from the Farmer he would apparently render himself liable to the penalties imposed by the section. Further than this when the duty has not already been paid he would render himself liable to the penalties imposed by this section. Further than this when the duty has not already been paid it must be paid before the permit can be granted; as, however, as has been stated, all duty on the stock in the retail shop is usually already paid, in the majority of cases, as in this instance, there is no question of defrauding the Farmer of the duty to which he is entitled. Having regard to these circumstances, the question in this case is whether either by the terms or the spirit of the Excise Ordinance the Spirit Farmer can restrict the removal of spirits from other Spirits Trader's shops than his own by his permit to a limited portion of the day, or whether

the permit must not allow the removal at any time during the course of the day on which it is issued. The inconvenience of having to obtain a permit at all is great, but in a large town like Singapore where many of the retail shops are at a distance from the Farm and the purchasers may be equally distant the inconvenience is considerable. The forms of application and permit are supplied by the Spirit Farmer and the latter is filled up by the Farmer's clerk. Both forms as at present used have little or no resemblance to the forms G. and H. in the Schedule to the Ordinance the use of which is by Section 25 made compulsory. Without discussing the validity or invalidity of the form of application [which issued as it was by the Farmer and accepted by him as a good application, I think he cannot now question] I had to determine whether there has been any substantial infringement of the terms of the permit as required by the Ordinance. I do not suppose a literal compliance with the statutory form is necessary, but there must be a substantial following of its terms.

The only difference so far as this case is concerned between the permit issued by the Farm and that prescribed by the Ordinance is that the time of removal in the former is restricted to two hours, and in the latter it seems to be extended to the whole day, and it is for not having complied with this condition of the permit that the defendant is charged with having aided or abetted a breach of the provisions of Section 25.

The whole argument of the prosecution is based on the assumption that the terms of the permit must be explicitly complied with, but, except by inference, there is no express direction in the section to that effect; all that the person desirous of removing spirits is required by the section to do, is to send in an application in the form G., and assuming that application to be in accordance with the provisions of the Ordinance. there his duties would seem to end; and it then becomes the duty of the Farmer enforceable by fine under Section 28, to grant a permit for such removal. On a strict construction of the section there is nothing whatever to show that the person desirous of removing the spirits must remove them according to the terms of the permit. But even assuming that this may fairly be inferred, it seemed clear to me that this section, when read with form H. in the Schedule, does not empower the Farmer so to limit the time of removal, and any attempt to do so, I held to be an unwarrantable extension of the Farmer's powers under the Ordinance, and bearing in mind that the object of these provisions is not to foster the Spirit Farmer's business as a Spirit Trader at the expense of other Spirit Traders, or to enable him by imposing hampering restrictions on their trading to attract business to himself, I thought the restriction was so to speak *ultra vires* and that the non-compliance with such condition did not constitute an offence under this section. I therefore dismissed the summons."

The present appeal was brought by the Spirit Farmer to test the correctness of this judgment.

Bonser, [*Attorney-General*]—*Drew* with him, for the appellant contended, that the Farmer had power under Section 25 to restrict the hours of removal. That the defendant had not complied with the spirit of the Ordinance, as at one o'clock his application to remove the liquor had determined, and by removing it after one o'clock he had conceived a new desire which he did not communicate to the Spirit Farmer as bound to do by the Ordinance. No fresh application had been made. The permit and the application ought to be read together. If the permit could be used after one o'clock it could be used next day—next week—next month or year. The charge on which the defendant was tried should be amended, and should read as follows: "That being desirous of removing spirituous liquors at three o'clock in the afternoon from one place to another, he did not apply to the

WOOD, AG. C.J. 1889.

SPIRIT FARMER v. TOK KIM TONG.

Spirit Farmer in writing, stating the time that it was to be removed in accordance with Section 25."

Sisson, for respondent contended, that the charge could not at this stage be amended; firstly, because it was sought to make the accessory into a principal; and secondly, because Section 34, Clause 6 of the Appeals Ordinance 12 of 1879, which authorised the substitution of a new charge, only applied in cases where the accused had been convicted, and not where he was *acquitted* as in this case: and if a new charge was to be made against the respondent, a new summons should be issued against him at the Police Court.

Wood, Acting C.J. said he was of opinion that the section applied to *all* cases, and he would allow the amendment.

Sisson then contended, that the Spirit Farmer had no power to limit the duration of the passes, because the word "time," in Section 25, could be shewn by reference to other sections of the Ordinance to refer to the day, and not the hour. The pass must be in form "H." appended to the Ordinance, which contains no limit as to time, and the Ordinance, as it created artificial offences, should be strictly construed against the prosecution. If the Farmer can fix a limit of two hours, he can equally fix one hour, or five minutes for removal, and crush the trade. Fraud could not possibly be practised by using a pass twice, as suggested by the prosecution, because under Section 36 the Farmer has power to search any spirit store five times a month and check the quantity with the passes issued, and if any deficiency is found [which would be the case if one pass were used twice], a penalty of $300 is enforceable. The Legislature never meant to specify the exact time of the delivery of spirits or else as in the Opium farm regulations, words to that effect would have been used—there could not be any offence recognised by law in the alleged charge against his client. The Spirit Farmer was a large dealer himself, and it appeared by the evidence that these restrictions were not enforced against persons who bought the spirits from him. He therefore wished to throw every impediment in the way of the other dealers, so as to get the whole trade into his own hands. The defendant had previously applied for passes available for the whole day and had been refused, so he was not bound by the limit of two hours mentioned in his application.

Wood, Acting C.J. said that although Section 25 was not expressly so worded, still he had no doubt that the spirit of the Ordinance was that the Farmer should have power to limit the hours of removal. The respondent had technically committed an offence under the section, but as this was the first case of the kind he would fine him one cent as a warning. The appellant did not ask for costs, so the Magistrate's order would be reversed without costs.

Order of discharge reversed.

HÜTTENBACH *v.* MUNICIPAL COMMISSIONERS.

PENANG.

PELLEREAU, J.
1889.

December 4.

The elected Municipal Commissioners under Section 32 of the Municipal Ordinance 9 of 1887 have power to resign and *to accept their own* resignation.

This was a suit asking for an injunction restraining the defendants and their Secretary, Mr. J. W. Hallifax, from proceeding with certain elections which had been advertised to take place this day. The following were the affidavits filed by the plaintiff in support of his application.

"I, August Huttenbach, of Penang, Merchant, make oath and say:

1. I am a rate-payer of the Municipality of George Town, Penang.

2. Hearing that three of the elected Municipal Commissioners, Messrs. R. A. P. Hogan, C. W. Barnett, and F. M. McLarty, had resigned their offices on the Board on the 15th day of November last, and having read the account of the proceedings in the *Pinang Gazette* and having seen advertisements for the election of new Commissioners in the same paper, I this morning went to the Office of the Municipality and requested the Secretary to allow me as a rate-payer to inspect the minutes of the proceedings.

3. I thereupon found a minute at the end of the speeches made by the Commissioners as to the resignations of the three gentlemen beforenamed stating that the Commissioners accepted their resignation. I also found that the only other Commissioners present were the President and Mr. David Comrie.

4. I questioned the Secretary as to this minute and he said that nothing actually took place beyond the speeches by the different Commissioners and the retirement of the three gentlemen from the Board-room, but that he entered this minute under the impression that the action of the Board was an acceptance of the resignation, and that it never struck him that there was no quorum present for the purpose. The Secretary also stated that there had not been any other acceptance of their resignation or permission to resign.

5. The next minute after the one above quoted is one to the effect that Captain Cameron [another Commissioner] arrived, and the ordinary business of the day was proceeded with.

6. I am advised that under Section 32 of the Municipal Ordinance, 1887, it is necessary for the Commissioners, as a body, for sufficient cause shewn, to permit an elected Commissioner to resign and that the proceedings above stated do not amount to any permission to resign or acceptance of their resignation, inasmuch as there was no quorum present to deal with the matter, and that therefore Messrs. R. A. P. Hogan, C. W. Barnett, and F. M. McLarty are still Commissioners, and that consequently there are no vacancies to be filled up by the elections now advertised.

7. The number of Commissioners named by the Governor in Council for Penang under Section 6 of the Municipal Ordinance is six, and this appears in the *Government Gazette* of the 21st October, 1887.

8. The advertisements for the elections of three Commissioners appear in the *Pinang Gazette* now produced by me and marked B; one of the elections by such advertisements appears to be fixed for the 4th instant, and the other two for the 16th and 17th.

9. I am informed that the President has appointed the defendant J. W. Hallifax to preside at the elections under Section 37, Clause [4].

10. I am also advised that it is in the public interest that these elections should not proceed at present. There is, I believe, a large body of voters of whom I am one who disapprove of the action of the three Commissioners who purported to resign, and if we had had any idea that they would stand again we should have been ready with eligible candidates to oppose them. The three gentlemen have however now on the eve of the first election, announced their intention of standing and we have no time to get candidates and we fear that the election to-morrow of one of the three will prejudice the chance of any successful opposition for the following elections. We are all the more unready from the fact that one of the three gentlemen distinctly told me he would not stand."

PELLERAU, J. 1889.

HUTTENBACH v. MUNICIPAL COMMISSIONERS.

"I, Bernard Christopher Doral, Reporter to the *Pinang Gazette*, make oath and say:

1. I was present at the meeting of the Municipal Commissioners of George Town, Penang, on the 15th day of November last, when Messrs. R. A. P. Hogan, C. W. Barnett, and F. M. McLarty purported to resign their offices as Municipal Commissioners and took notes of their proceedings for the *Pinang Gazette*.

2. The report contained in the *Pinang Gazette* of the 19th day of November last, a copy of which is now produced and shewn to me marked A. is a full and complete report of all that occurred with reference to the said resignation.

3. No vote was taken thereon either before or after the three resigning Commissioners retired from the Board-room and nothing whatever more than is mentioned in my report took place with reference to such resignation."

A Rule *nisi* was, the previous day, on these affidavits granted calling on the defendants to shew cause why the injunction applied for should not be granted. The following are the sections of the Municipal Ordinance 9 of 1887, bearing on the case:

"3.....'The Commissioners' means a body corporate described in Section 6.

6. [1].—The Municipal affairs of every Municipality shall be administered by such number of Commissioners as shall in each case be determined by the Governor in Council.

[2].—Such Commissioners shall be elected and nominated in manner hereinafter provided, and shall be styled the Municipal Commissioners of the Town of Singapore, or of George Town, or of the Town and Fort of Malacca, or other their Municipality as the case may be, and shall by such name be a body corporate and shall have perpetual succession and a common seal and power subject to the provisions of this Ordinance to acquire, hold, and sell property, and by such name sue and be sued.....

32. It shall be lawful for the Governor in the case of a Commissioner nominated by him, and for the Commissioners in the case of an elected Commissioner at any time for sufficient cause shewn to permit a Commissioner to resign the office.

70. A Commissioner shall not vote or take part in the discussion of any matter before the Commissioners or a Committee in which he has directly or indirectly by himself or by his partner any pecuniary interest.

72. [1].—A minute of proceedings at a meeting of the Commissioners or of a Committee signed at the same or the next ensuing meeting by the President or by a Commissioner describing himself as or appearing to be Chairman of the meeting at which the minute is signed shall be received in evidence without further proof....."

Ross, for the defendants shewed cause; he contended that the plaintiff had misunderstood the Secretary in certain particulars which he pointed out, and that para. 10 clearly shewed that this application was a mere electioneering dodge or an act of political manœuvering. The minutes of the meeting of the 15th November last under Section 72, Sub-section 1 of the Municipal Ordinance [which he put in and read] conclusively proved that the resignation had been accepted by the Commissioners. Those minutes had been confirmed and signed by the President. He further contended that the retiring Commissioners were entitled to consider the question of their own retirement as until their resignations were accepted they were still Commissioners. This view was supported by Section 32 and 70. The plaintiff, if he denied this contention, would be in a dilemma for

he could only contend that they were unable to act by admitting that they had ceased to be Commissioners; and if he said so, he could not argue now that they were still Commissioners.

Clutton, for the plaintiff in support of the Rule contended, that the Commissioners could not accept their own resignation. The Commissioners by Section 32 were only to do so for sufficient cause shewn. He denied that he was in any dilemma by this line of argument as he contended that they could not act, not because they had ceased to be Commissioners, but because they could not be judges in their own cause. Were it otherwise, they could have swamped the meeting and accepted their own resignation in the teeth of the wishes of the President and the other Commissioner, Mr. Comrie. Section 70 by which a Commissioner shall not vote or take part in a discussion of any matter where he is pecuniarily interested was not against him. On the question of fact he submitted, there was no acceptance and referred to the speeches published in the *Pinang Gazette* more particularly to that of Mr. Comrie who so far from accepting the resignations asked the three retiring Commissioners to re-consider the matter.

Pellereau, J., after reading the minutes of the Commissioners and Section 72 Sub-section 1, said he held as a matter of fact, that there had been an acceptance of the resignations by the Commissioners. It was so minuted in those records which had been signed by the President and he was bound to consider that such minute truly stated what took place at the meeting of the Commissioners held on the 15th November last. Against that, there was only the statement of what Mr. Huttenbach had heard from Mr. Hallifax, the Secretary, but the Secretary was not on oath when he made it, and the statement therefore resolved itself into hearsay. In coming to this decision he had not considered the explanation made by Mr. Ross as to any misunderstanding of what Mr. Hallifax had stated, and he, Mr. Hallifax, had not been put into the box. By Section 32 it was "the Commissioners" [not some of the Commissioners] who were to permit a Commissioner [not any other Commissioner] to resign. By Section 3 "the Commissioners" was defined to be the body corporate described in Section 6. He could not hold that the expression "the Commissioners" in Section 32 meant anything different from "the Commissioners" in other sections of the Ordinance. Until the resignations were accepted the three Commissioners who had tendered their resignations were still Commissioners. They could have voted and taken part in any discussion on any other matter which had been brought before the Board. Section 70 was in favour of this contention, and as a matter of law, he must hold that the then retiring Commissioners had a right to act in accepting their own resignations. On the question of fact he had already held that there was an acceptance, and the Rule *nisi* granted by him yesterday must therefore be discharged with costs.

Rule discharged with costs.

LEE QUEH SENG *v.* MUNICIPAL COMMISSIONERS.

SINGAPORE.

WOOD, AG. C.J.

1889.

December 4.

A person is liable to be convicted under Section 124 of the Municipal Ordinance 9 of 1887, although the Commissioners have not done their duty in providing under Section 126, convenient places for the deposit of filth, &c.

The language of Section 124 is clear, and there is nothing in the other sections of the Ordinance to neutralise it.

The appellant was convicted by S. Leslie Thornton, Esquire, Acting First Magistrate, for allowing on 6th September, 1889, a quantity of offensive liquid matter, viz., night-soil, to flow into a surface drain in Circular Road, under Section 124 of the Municipal Ordinance 9 of 1887. The evidence before the Magistrate proved that the house occupied by the appellant had been drained in the manner now complained of for upwards of forty-two years, and that when the Commissioners two years ago made the present cemented drain in front of the house, they connected with it the house drain which was then used for carrying off the night-soil. The Commissioners had proceeded under the above section against every occupier in Boat Quay and Circular Road. The Commissioners had not provided [under Section 126] places for the deposit of night-soil. The following were the sections bearing on the case.

56. "The purposes for which the Commissioners are authorised to expend the Municipal Fund, are the following, viz.:—

.....

[b.] Construction maintenance supervision and control of public markets and slaughter-houses latrines privies urinals drains sewers drainage works and other works for the removal and disposal of sewage night-soil and town refuse.....reclamation of unhealthy localities and other sanitary measures of a like nature.

124. Whoever.....causes or allows the water of any sink or sewer or any other offensive liquid matter belonging to him or being on his premises to run drain or be thrown or put upon any street or causes or allows any offensive matter from any sewer or privy to run drain or be thrown into a surface drain, shall be liable for each offence to a fine not exceeding five dollars.

126. The Commissioners shall from time to time provide places convenient for the deposit of night-soil dung and other filth and the dust dirt ashes and rubbish and filth collected and removed under the authority of this Ordinance; provided that no such dust dirt ashes rubbish night-soil dung and other filth collected and removed under the authority of this Ordinance shall be deposited in any place so as to become a public nuisance.

157. [1.]—The Commissioners shall maintain and from time to time repair and as they see fit enlarge alter arch over or otherwise improve all or any of the sewers and drains culverts gutters and water-courses made by and vested in them and may discontinue close up or destroy such of them as they may deem useless or unnecessary. [2.]—Provided always that the discontinuance closing up or destruction of any of them shall be so done as not to create a nuisance; and if by reason thereof or of any such alteration as hereinbefore mentioned any person is deprived of the lawful use of any sewer drain culvert gutter or water-course the Commissioners shall with due diligence provide some other as effectual as the one of which he is so deprived.

161. If any house or building be at any time not drained to the satisfaction of the Commissioners by a sufficient drain or pipe communicating with some sewer or drain or with the sea or some other place at which the Commissioners are empowered to empty the sewers and if there be such means of drainage within one hundred feet of any part of such house or

building the Commissioners may after fourteen days' notice in writing construct or lay from such house or building or drain or pipe of such materials of such size at such level and with such fall as they think necessary for the draining of such house or building; and the expenses incurred by the Commissioners in respect thereof to an amount not exceeding three months' rent of the house or building if not forthwith paid by the owner shall be recoverable as hereinafter provided.

169. [1]—All drains privies and cess-pools shall be altered repaired and kept in proper order at the cost and charges of the owners of the land and buildings to which the same belong or for the use of which they are maintained. [2]—If the owner of any land or building to which any such drain privy or cess-pool belongs neglects during eight days after notice in writing for that purpose to alter repair and put the same in good order in the manner required by the Commissioners the Commissioners may cause such drain or privy or cess-pool to be altered repaired and put in good order in the manner required and the expense incurred by the Commissioners in respect thereof shall be paid by the owner and shall be recoverable as hereinafter provided. [3]—If any such drain or privy or cess-pool be constructed after the commencement of this Ordinance contrary to the provisions of this Ordinance or of any rules or by-laws made hereunder or if any person without the consent of the Commissioners construct any new drain or privy or cess-pool or construct re-build or unstop any drain or privy or cess-pool which has been ordered by the Commissioners to be demolished or stopped up or not to be made every person so doing shall be liable to a fine not exceeding fifty dollars and the Commissioners may cause such amendment or alteration to be made in any such drain or privy or cess-pool as they think fit and the expenses thereof shall be paid by the person by whom such drain or privy or cess-pool was improperly constructed re-built or unstopped and shall be recoverable as hereinafter provided."

Bailey, for the appellant contended, that the facts proved at the hearing did not constitute an offence punishable under Section 124, and that section did not apply to a mode of drainage or disposal of excreta in use before the passing of the Ordinance. The section was meant to apply to some overt act of a temporary nature, and was not intended to enable the Commissioners to alter the system of disposal of night-soil which had been in use for a long period. This was what the Commissioners were seeking to do, as they were proceeding under the section against every occupier in Boat Quay and Circular Road. The proper course they should have taken was under Section 169. One of the objects for which the Commissioners were incorporated was to provide a proper system of drainage under Sub-section [b] of Section 56. The drain, the use of which was complained of in this case, was not a "surface" drain within the meaning of the Ordinance, but it was made for the purpose of the disposal of night-soil and other sewage. Under Section 157, the Commissioners might close it up, but not until they had provided another as effectual, and within one hundred feet of the house under Section 161. The Commissioners had not fulfilled the duties imposed upon them by this section, nor by Section 126; and until they had done so, the penal sections of the Ordinance such as Section 124, were not enforceable. The occupiers were told they must have their night-soil removed by coolies, but it was difficult to get coolies, and the Commissioners had not provided a convenient place for its deposit under Section 126. The conviction was therefore wrong and ought to be quashed.

Drew, for the respondents was not called on.

WOOD, AG. C.J. 1889.

LEE QUEH SENG v. MUNICIPAL COMMISSIONERS.

Wood, Acting C.J. The language of Section 124, is too clear to be misunderstood and there is nothing in the other sections which had been referred to sufficiently strong to neutralise it. If the Commissioners have not fulfilled their duties, the appellant has his remedy against them. The conviction must be affirmed, and the appeal dismissed with costs.

Conviction affirmed.

REGINA *v.* MONTEIRO.

SINGAPORE.

WOOD, AG. C.J. 1889.

December 4.

A prisoner charged with assault was discharged by a Magistrate on the prosecutor informing the Court that he did not wish to prosecute as the prisoner had settled the matter to his satisfaction. The Police disapproving of this step, summoned the prisoner for the same assault before another Magistrate who considered that the discharge under the circumstance was equivalent to an acquittal, and refused to entertain the charge, and dismissed the summons. The Police appealed.

Held, the proceedings in the first instance implied an acquittal, and the prisoner could not be tried a second time.

Case stated by S. Leslie Thornton, Esquire, Acting First Magistrate, as follows:

"The defendant was charged before the Second Magistrate on September 30th, with assault; the prosecutor did not wish to prosecute as the defendant had settled the matter to his satisfaction, whereupon the Magistrate had discharged the prisoner. On October 22nd, the case was brought up again by the Police before the Senior Magistrate, when Mr. Joaquim appeared for Monteiro and submitted that the facts were the same as in the previous case, that the charge was the same; that the offence was one which might lawfully be compounded under the Penal Code—Sections 213, 214, and 104 of Indian Act 13 of 1856; and that if the Magistrate entertained that charge he would be in effect entertaining an appeal from the decision of the Second Magistrate. The charge sheet of cases for trial before the acting 2nd Magistrate on the 30th September, 1889, was then produced and the acting 2nd Magistrate's note as to his decision in the charge against the present defendant read by me and found to be as follows: "Withdrawn, Discharged." Acting Chief Inspector Jennings then in answer to a question from me admitted that the statement of facts made by Mr. Joaquim was a correct statement. Under these circumstances as it seemed to me a matter within the discretion of the Magistrate who hears the case to permit or to refuse to allow the withdrawal of such a charge as the one in question, and as the acting 2nd Magistrate had in the exercise of such discretion permitted the charge against the defendant to be withdrawn, and had discharged him, I considered that it would be improper for me to allow the same charge on the same facts to be re-opened before me. It seemed also to me that the defendant having on that occasion been charged with the same offence as that with which he was charged before me and been discharged, that such discharge was equivalent to an acquittal [See Burn's Justice of the Peace, Vol. 1 pp. 352, 353, 30th Ed., and the case of *Bradshaw* v. *Vaughton*, there referred to, and compare Sections 248 and 345 of the Indian Criminal Procedure Code of 1882]. I therefore dismissed the summons without hearing evidence."

Bonser, [*Attorney-General*] for appellant contended, that the proceedings in the first instance were not a trial within the meaning of Section 69 [1] of Ordinance 6 of 1873, and that the cases relied on by the Magistrate, viz., *Bradshaw* v. *Vaughton*, 30 L. J. M. C. 67, and *Tunnicliffe* v. *Tedd*, 17 L. J. M. C. were cases under 9 Geo. IV. c. 31, and were applied solely to the provisions of that

Act. There was no evidence taken before the Magistrate in either instance, and therefore, there was no trial; there was nothing to shew whether the Magistrate was acting as such, or as a Justice of the Peace.

Joaquim pointed out that the statement of the case was signed by a Magistrate.

Wood, Acting C.J. The proceedings before the Magistrate in the first instance implied an acquittal, and therefore, there could not be a second trial. The appeal is dismissed.

OPIUM FARMER *v.* LEE HO NAM.

"Opium Pills" are "Chandu" within the Excise Ordinance 4 of 1870.

A "recognised druggist" under Section 13, is a person "recognised" as such by some authority.

The appellant was charged before H. Hudson, Esquire, Acting Magistrate, with having in his possession, custody, or control, a quantity of "chandu" to the value of $910, which had not been purchased from the Opium Farmer, and thereby committing an offence under Section 13 of the Excise Ordinance. The defendant was found guilty, and fined $1, or three days' imprisonment and the chandu forfeited. The chandu was what was generally known as "Opium Pills" usually sold by Chinese druggists. The appellant appealed.

The grounds of appeal were: 1.—That no chandu was found in the prisoner's possession, custody, or control. 2.—That medicinal pills were found in prisoner's possession of which opium was one of the ingredients, which opium was proved and admitted to have been purchased from the Opium Farmer, and therefore exempted prisoner from conviction under Section 13 of the Excise Ordinance. 3.—By Section 19 of the Excise Ordinance the provisions of Section 13 did not apply to the prisoner, he being a druggist.

Vaughan, for the defendant argued on these grounds and said that the nine tins of pills found in prisoner's possession were to be sold to Chinese as a cure for opium-smoking and that the pills were swallowed and not eaten. That moreover prisoner had in 3 months bought from the Farmer over $2,000 worth of poppy leaves in which opium balls had been rolled in for the purpose of making these pills, and that the Farmer must have been aware of his object. That prisoner was a druggist and widely recognised as such, and he sold quantities of these pills.

Bonser, [*Attorney-General*] for the Farmer said, that prisoner was not a recognised druggist by law, and that these pills were eaten as a stimulant by those to whom it was impossible to smoke opium. That therefore prisoner had no right to sell them and had been warned by the Farmer to discontinue their sale, but without effect. The Magistrate had decided the case on the ground that they were not used for medicinal purposes; the quantity in stock was inordinate; taking the pills was merely a

WOOD, AG. C.J.

OPIUM FARMER v. LEE HO NAM.

convenient form of absorbing opium, and Section 19 only was intended to protect recognised druggists in their business.

Wood, Acting C.J. dismissed the appeal, he had no doubt that the business was for the purpose of selling the pills as a stimulant and not as medicine. He thought the pills were within the definition of "*chandu*" and intended to be eaten, by which he understood swallowing or taken into the system by the throat. When the leaves were bought from the Farmer it was not "*chandu*" and the defendant's plea on that score could not be sustained. He also thought "recognised druggist" must be one "recognised" by some authority. With regard to the heavy character of the penalty—the forfeiture—he thought the Attorney-General might perhaps communicate to his client with a view to some compensation for that, as the trade was allowed for some time and the plaintiff had apparently acted rather on principle.

Conviction affirmed.

WEE NGA NEO *v.* YEO KIAN GUAN & ANOR.

SINGAPORE.

GOLDNEY, J. 1889.

December 9.

Executors in this Colony have a right of retainer, out of the estate of their testator, for disbursements made by them and for commission due to them for administering the estate in preference to creditors of the estate.

This was a suit for the administration of the estate of a testator. The defendant's accounts had been taken by the Registrar, and he reported *inter aliâ* that a sum was due to them for disbursements and commission. A sum of money was in Court and the question was whether the defendants, the executors, had a first charge on this money for the amount so found due to them.

J. D. *Vaughan*, [*Drew* with him] for plaintiff.

Joaquim, for defendants.

Cur. Adv. Vult.

Goldney, J. The question raised by Mr. Joaquim is whether the executors have a right to retain the sum of $877.25, being the balance found by the Registrar to be due to them. That is, as the fund is now in Court, whether the defendants, the executors, are entitled to be paid this sum before the fund is distributed. There is no doubt that an executor can appropriate a sufficient part of the assets to satisfy his own debt, due to him from the deceased in preference to all other creditors of equal degree. A debt is merely a right to recover the amount by way of action, and as an executor cannot maintain an action against himself, the law allows him this right of retainer. The Registrar has not found that the balance of $877.25 wos a debt due from the deceased to the executors, to recover which from the deceased a right of action had accrued to the executors, nor could the Registrar have so found, for the indebtedness did not arise until after the death of the deceased. In my opinion, this balance of $877.25 found by the Registrar to be due to the executors is not

GOLDNEY, J. 1889.

WEE NGA NEO v. YEO KIAN GUAN & ANOR.

a "debt" within the meaning of the rule which gives executors a right of retainer. But, in addition to a right of retainer for debts due from the deceased to the executor, funeral expenses, and disbursements made by executors for the benefit of the estate can be retained in preference to all other creditors.

This balance of $877.25 is composed, as I understand, of certain disbursements and of commission. This commission has been allowed by the Court and must be considered as part of the expenses of administering the estate which the executors are entitled to recover. If the executors cannot retain, how is this money to be recovered? They cannot sue themselves? I can come to no other conclusion than that such expenses form a first charge upon the estate, and that the right of retainer applies in the same manner as it applies to funeral expenses and other disbursements made by executors. I find therefore, that the executors have the right as against the creditors to a preference in the payment out of Court of the said balance of $877.25, and so order accordingly.

PALANIAPAH CHETTY *v.* HASHIM NINA MERICAN & ANOR.

PENANG.

PEL-LERKAU, J. 1890.

January 6

Although a creditor who takes interest in advance for several months, cannot sue for his claim till those months have elapsed, yet if the note or contract entered into provides that in default of payment in a particular manner within that time the whole amount remaining unpaid should become immediately due and payable, he is entitled to sue although those months have not elapsed.

Blake v. *White*, 1 Y. & C. Ex. Eq. 421, distinguished.

Such a clause does not act as a forfeiture, and no rebate of interest can be claimed.

This was an action to recover $515 balance due on a Promissory-note, dated 17th September, 1888. The note was for $1,000 payable by twenty monthly instalments of $50 per month, and "in default of payment of any one of such instalments, the whole amount remaining unpaid was to become immediately due and payable." The defendants had paid $485 being nine of such instalments, and a portion of the tenth, leaving the balance now sued for—they having made default in payment of the subsequent instalments. At the time of the making of the note, the plaintiff deducted the sum of $200 for interest for the full twenty months, so that he actually paid the defendants the sum of $800 only on the said note. The action was begun on the 29th November, 1889, so that the twenty months mentioned in the note and for which interest had been taken by anticipation had *not* expired. The defendants entered appearances to the writ of summons which was specially endorsed, and the plaintiff took out a summons under Section 93 of the Civil Procedure Ordinance 5 of 1878, for final judgment for the amount claimed and costs, stating in an affidavit filed by him that in his belief the defendants had no defence to his claim. The defendants filed an affidavit setting out the above facts and submitting that the plaintiff having taken interest in advance for the twenty months he could not sue till that time had expired.

PELLEREAU, J. 1890.

PALANIAPAH CHETTY v. HASHIM NINA MERICAN & ANOR.

E. W. *Presgrave*, for the plaintiff now moved for judgment.

Gawthorne, for the defendants submitted, that the taking of interest by anticipation for the twenty months was a giving of time for valuable consideration for that whole time—and the note could not be sued on till that time had expired. *Blake* v. *White*, 1 Y. & C. Ex. Eq. 421; that the clause in the note making the whole amount due on default of payment of one instalment, operated as a forfeiture or penalty and would be relieved against in equity either by the staying of the action or compelling the defendant if he wanted his money earlier, to give a rebate of interest for the unexpired period. The defendants therefore, shewed good grounds of defence, and the Court would not order judgment to be entered up for the plaintiff.

Presgrave contended, that the case of *Blake* v. *White* did not apply as in that case there was the clause making the whole remaining unpaid amount immediately due and payable on default of payment of any one instalment. This clause was not a forfeiture. It was a special contract the defendants had chosen to enter into in consideration of their getting the loan from the plaintiff.

Pellereau, J., said that this case was distinguishable from the case cited in argument as had been pointed out—and the only question was, the effect of the clause making the whole unpaid amount due and payable immediately there was a single default. It was true that default might be long *before* the expiration of the twenty months [for which interest had been charged] had expired—but did that make any difference in the case? He thought not. The clause was a special and express contract the defendants had consented to enter into and to submit to, at the time they got the loan, and they could not now get over it—there was no defence to the claim and the plaintiff was at liberty to enter up final judgment for the amount claimed and costs.

Order accordingly.

REGINA *v.* LEE KAN & ORS.

PENANG.

GOLDNEY, J. 1890.

January 20.

Where two Magistrates sitting as a Court of two Magistrates under Ordinance 13 of 1872, Section 1, as amended by Ordinance 17 of 1876, Section 3, disagree as to their finding, they have no power to commit the accused for trial at the Assizes.

The accused had been charged before a Court of two Magistrates sitting under the aforesaid Ordinances with the offence of theft in a ship, and the Magistrates [Messrs. W. Egerton and R. C. Jacobson] disagreeing as to whether the accused were guilty or not, they committed them for trial at the next Assizes on the said charge and sent up their notes of evidence as depositions, and bound over the prosecutor and witnesses to appear at the Assizes. The accused were accordingly indicted at the present Assizes for the said offence. On their being arraigned and asked to plead to the charge,

GOLDNEY, J. 1890.

REGINA v. LEE KAN & ORS.

F. H. *Gottlieb*, for the prisoners took the objection that the accused could not be indicted as the Magistrates sitting as a Court of two Magistrates had no authority to convict them to the Assizes. Only a single Magistrate could do so under Ordinance 6 of 1873, Sections 2 and 3, and that, after a preliminary enquiry.

Ross, [*Acting Solicitor-General*] contended, that what might be done by one Magistrate could be done by two or more.

Goldney, J. retired and consulted *Pellereau*, J. on the point, and returning into Court stated that both his learned brother and himself were of opinion that the Magistrates had no power to commit. The accused could not therefore be charged here, as there had been no "examination and commitment duly made" within the meaning of Ordinance 6 of 1873, Section 2, and they must be discharged from custody.

Prisoners discharged. [*a.*]

CARR *v.* TEO GUAN TYE.

SINGAPORE.

WOOD, AG. C.J. 1890.

January 29.

A broker being instructed by three distinct principals to sell three distinct sets of shares in a Company, sold the shares in a lump to the defendant; and he and the defendant signed one contract for the sale and purchase of the whole number of shares. This contract the broker signed as "broker"—the defendant knew this, but never enquired who the principals were or how the total number of shares was made up. On the whole number of shares being tendered, the defendant declined to accept them as the Company had failed. The one principal then sued the defendant on the contract for the number of shares he had ordered the broker to sell and recovered judgment. Another principal then sued the defendant on the contract for the number of shares he had ordered the broker to sell, and the third principal also sued the defendant on the contract for the number of shares he had ordered the broker to sell.

Held [by *Wood*, J.] that there were three distinct contracts on the one paper, and each principal as he came to light was entitled to sue on the contract in respect to the number of shares in which he was interested.

Held on appeal [the Court being equally divided]—*per Pellereau*, J.—That there were three distinct contracts; that the broker having signed as such, the defendant knew he was acting for one or more principals—that not having enquired, he was fixed with knowledge of the true relationship of the respective principals and the broker—that the rule in *Cooke* v. *Eshelby*, 12 L. R. App. Cas. 271, applied to the case of several principals as also to one principal, and also to the interests of each respective principal—that each principal was entitled to sue alone in respect of his number of shares—that the judgment for the one principal was not *res judicata* as to the others, and that he was entitled in so suing in respect of his number of shares, to rely on the contract made by the broker, and there was no variance between the contract he so sued for and the contract made by the broker which he adduced as evidence of his contract—

Per O'Malley, C.J. That there were no grounds for objecting to want of parties in such an action, nor was the judgment in the suit by the one principal *res judicata*, in respect to this action by the other principal—but this action being in respect to certain only of the shares was not maintainable by proof of the contract for the whole number of shares, as the contract made by the broker was for a larger number of shares and such a contract was not the contract the plaintiff-principal had authorised him to make; that the contract that the plaintiff-principal had authorised him to make was only a contract for a less number of shares, but that was not the contract the defendant had bound himself by as he had contracted for a larger number of shares—That there

[*a.*] At the Assizes of 15th April, 1890, in the case of *Regina* v. *Tan Joo Teok* [*Penang case—not reported*] charged with breach of the Bankruptcy Ordinance, under similar circumstances, *O'Malley*, C.J. ordered the prisoner to be discharged. He was however, subsequently re-arrested by the Official Assignee, again prosecuted before two other Magistrates and convicted. For the reasons of the learned Judges in the above case, for their opinions, see *Vanjoor* v. *Kaliapah Chetty*, 29th April, 1890, *infrà*.

WOOD, AG. C.J. 1890.

was therefore a variance, and the action must fail, and that *Cooke* v. *Eshelby* [supra] did not apply to such a case. The Court being equally divided, the judgment in the Court below stood affirmed with costs.

CARR v. TEO GUAN TYE.

Action for damages for non-acceptance of certain shares in the Rawang Tin Mining Company. Mr. Schomburgh, a Broker, was instructed by a Mr. Simons to sell for him 50 shares in the above Company; he also had instructions from the plaintiff to sell for him 100 shares in the same Company, and he also had instructions from a Mr. Shelford to sell for him 25 shares in the same Company. Simons, plaintiff, and Shelford had nothing to do with each other, and gave their instructions separately to Schomburgh, unknown to the others of them. Having these 175 shares for sale, Schomburgh sold the whole of them to the defendant, but for convenience sake made one contract for the whole number of 175 shares. This contract did not disclose who the principal or principals were, but it was signed by Schomburgh as "broker." The defendant had no reason to suppose there were three distinct and separate principals, but he did not enquire who the principals were, or how the 175 shares were to be made up. On the whole, 175 shares being tendered by Schomburgh to defendant, he refused to take them as the Company had failed. Simons then sued the defendant for non-acceptance of his 50 shares, and relied on his contract as proof of the purchase—the claim was contested by the defendant before *Goldney*, J. who gave judgment for Simons [*a*]. The defendant was then sued in this action by Carr who relied on the same contract as proof of the purchase from him. Shelford also sued defendant as regarded his 25 shares, but awaited the decision in this case.

Napier, for plaintiff.

W. *Nanson*, for defendant contended, that a cause of action could not be split. It was either on a contract between defendant and Schomburgh, or between defendant and his principals jointly. The principals were bound to sue jointly as it was a joint contract made by Schomburgh as agent of all three—there was nothing to point to the contract being made with each of the principals. *Walshe* v. *Provan*, 8 Exch. 852, per Martin B. If it were otherwise, there might have been 175 principals instead of 3 and so 175 actions.

Napier, in reply contended, that each principal was answerable for his own share. *Hoar* v. *Dawes*, Douglas, 371; if he was answerable he also had a right to sue as there must be reciprocity. Several actions might be brought on one contract—*Brice* v. *Bannister*, 3 L. R. Q. B. Div. 569; *Nelson* v. *Couch*, 15 C. B. [N. S.] 99.

Wood, J., said the agent was only the shell that contained all the principals, and that when these chose to come to light, each had a right to sue for his own account—there were three distinct contracts on the one paper.

Judgment for plaintiff.

June 12th. The defendant appealed, and the Appeal was

[*a*.] See *Simons* v. *Teo Guan Tye*, antè p. 544.

now heard before *O'Malley*, C.J. and *Pellereau*, J.

Nanson, for appellant contended [1] the action was not maintainable by plaintiff alone; [2] that the contract was joint and the judgment of Simons against defendant [*a*] on the contract, was a bar to further actions thereon by the others; [3] the contract sued on was not the contract proved, as the contract sued on was one for 100 shares, that proved for 175 shares. He cited *Lucas* v. *Beale*, 10 C.B. 738; *King* v. *Hoare*, 13 M. & W. 494; Taylor on Evid. § 1702; *Kendall* v. *Hamilton*, 4 L. R. App. Ca. 504; *Bagot* v. *Williams*, 3 B. & C. 235; *Walshe* v. *Provan*, suprà.

Bonser, [*Attorney-General*,] *Napier* with him, for the respondent contended, that a purchase from a broker implied principals behind. Defendant therefore had knowledge, but made no enquiry—if he had, he would have found the distinct principals for distinct number of shares. *Cooke* v. *Eshelby*, 12 L. R. App. Ca. 271; there were really three distinct contracts on one paper, therefore the judgment on one could be no bar to an action for another. Each party had his remedy. *Hoar* v. *Dawes*, suprà.

Nanson, replied.

Cur. Adv. Vult.

June 20th. The Court being equally divided, each of the Judges delivered his own judgment.

Pellereau, J. It is contended for the appellant that the contract alleged was not proved and did not exist; also that the contract entered into by him with the broker for 175 shares is one and indissoluble, that if the three principals, Simons, Shelford, and Carr are substituted for the brokers, it becomes a joint contract, so that in either case the appellant cannot be liable to more suits than one, as his position would thereby be made worse than he contracts for; and further, that a suit having been disposed of as between him and Simons, the cause of action has merged into a judgment which forms *res judicata*, and is a bar to the present suit. The main question involved in this contention is, what is the construction to be put upon the contract? If the appellant entered into a contract with one individual only his position would undoubtedly be made worse, if he were sued as if liable to several parties on several contracts; and he might rest a good defence upon the decision in the case of *Sims* v. *Bond*, 5 B. & Ad. 389 in which *Denman*, C.J. says:

"It is an established rule of law that where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it, the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party. This rule is most frequently acted upon in sales by factors, agents, or partners in which cases either the nominal or real contractor may sue; but it may equally be applied to this case."

It will however be noticed that that decision only states a rule common to all agents, and is not meant to lay down any

[*a*.] Antè p. 544.

O'MALLEY, C. J. & PELLEREAU, J 1890.

CARR v. TEO GUAN TYE.

which may be peculiar to each class of agents. We have therefore to ascertain from the documents and facts, what the special nature of the contract in this case may be, and to decide on the effects of a disclosure of principals, or principals by a broker. The bought and sold notes being signed by Schomburgh as a broker, the appellant must have known that the broker could disclose his principal, and that through him he was possibly contracting with a party unknown to him, while he was stipulating for a certainty as to the shares which he was entitled to receive. He consented to an uncertainty as to the principal who, through the broker, dealt with him. To me it is clear that there might be a certainty that the broker is liable in any event, but the principal was uncertain. The case of *Cooke* v. *Eshelby*, 12 A. C. 271 is in point to shew that if the party thus contracts with a broker, the subsequent disclosure of a principal fastens upon him a contract with the principal as from its date. There intervenes a privity between him and that principal who is taken to have been a party through his agent, and this in such a manner, that a set-off which might but for the disclosure have been disposed to the broker cannot be urged against the principal, who has become from the date of the contract the real party to the transaction. This is nothing else but the application of the rule *quod fecit per alium fecit per se*. According to the case last quoted the third party cannot complain; he might have asked who the principal was and made all necessary enquiries so as to know the person for whom the broker acted; but having chosen to leave the matter in uncertainty, he is bound to the person whom the broker discloses and who has instructed him. It has been argued that this decision enables the disclosure of one principal, but not of several, and that the enquiry must at any rate be touching the individuals, but not touching their interests in the contract. I cannot admit this reasoning, nor can I see that it is supported by that decision. The ostensible party having left in uncertainty the real principal with whom he contracts, there is no reason why that uncertainty should be limited to one principal. A broker may represent several parties, and if the other party is contented with certainty as to the subject bought, and leaves the principals or their number uncertain, he is bound to offer no objection to that number. The same argument applies to their interest in that subject; it mattered little to the ostensible party in what proportion the principals would supply it; he has chosen also to leave this an uncertainty, and when the truth is disclosed by the broker the contract exists with the principals each for his own interest. If he had made the enquiry he would have had an answer, or he could have refused to enter into the contract. Should the answer have been that there were three principals, the contract offered would have been a joint one, and it should have been that there were three, one for fifty shares, a second for twenty-five shares, and a third for 100 shares. The agreement would have comprised several contracts and the ostensible party, if he accepted, could not complain against this so long as he was tendered the 175

shares stipulated for. The case of *Hoar* v. *Dawes*, Douglas, 371, seems to me to support this view of the law of agency, and the case of a disclosure of principals who have separate interests. There the third party sued the principals jointly and severally, but a verdict was found for the defendants who were concerned in the transaction for two-sixteenths only. In his judgment, Lord MANSFIELD says "that the nature of the transaction and of the loans having been more clearly explained he was satisfied with the verdict, and was confirmed in his opinion." That opinion, as appears from the report of the case, was that the different employers were only liable for their own shares, the contract as to them was therefore only for their own shares. On applying the foregoing views to the facts of the case, I find that although there was only one writing, it discloses, together with the other facts of the case, a contract between the appellant for 175 shares,—with Simons for 50 shares, Shelford for 25 shares, and Carr for 100 shares. The evidence shews that the 175 shares were tendered to the appellant, and the latter having committed a breach of the contract, each of the other three parties had a right to sue him for the damage as measured by his interest. The consequence is that Carr having alleged a contract for 100 shares has proved it, and a further consequence is that a plea of *res judicata* cannot be sustained; what was decided with Simons being alien to the claim of Carr. The appellant urged that this leads to a multiplicity of suits, but against this he had his remedy—he could have applied for the joinder of all the parties—it was not for Carr to have intervened in an action which was not based upon his right, and the appellant having neglected to do so, cannot now argue that Carr must now in consequence lose his own right. The last point is that the respondent asked for specific performance in regard to 100 shares, whilst the appellant would be entitled to 175 and that being unable by himself to give 175, Carr cannot obtain damages in substitution for specific performance. I have found that there was a contract with Carr, who was to give 100 out of the 175 shares. It is true that specific performance cannot now be decreed owing to circumstances which have occurred since the contract, but this impossibility has resulted from the fault of the appellant himself. Carr was ready to perform his part, he tendered his 100 shares when the balance was also tendered, and the contract with him being several, I cannot see how the defaulter can urge that Carr cannot obtain damages in substitution of that specific performance up to the amount of his interest in it. The judgment appealed from should therefore be affirmed.

O'Malley, C.J. I give my judgment with some diffidence, as it is unfortunately in conflict with that of my two brother Judges. Three objections to the judgment of the Court below were urged by the appellant. The first was an objection founded upon want of parties. The second was to the effect that the matter in dispute was *res judicata*. I may say shortly that I do not think that either of these objections was sustainable. The third objection

O'MALLEY, C.J. & PELLERAU, J. 1890.

CARR v. TEO GUAN TYE.

was on the ground of a variance between the contract alleged in the plaintiff's petition, and the contract proved in evidence.

The plaintiff alleges a contract between himself and the defendant whereby he, the plaintiff, agreed to sell, and the defendant agreed to purchase, 100 shares in the Rawang Tin Mining Company, and claims specific performance of the contract or damages for breach of contract. The contract is denied by the defendant, and the plaintiff is put to the proof of it. The facts proved or admitted at the trial, shew that the transactions which gives rise to this claim, was as follows:—

The plaintiff authorised one Schomburgh, a Broker, to sell for him 100 shares, and no more. About the same time, Mr. Simons, without any agreement or communication with the plaintiff, commissioned Schomburgh to sell 50 shares for him, and no more, and about the same time also, Mr. Shelford, likewise without any agreement or communication with the plaintiff, commissioned Schomburgh to sell 25 shares for him, and no more. Schomburgh being thus commissioned by three separate and independent persons to make three separate and independent sales of 100, 50, and 25 shares respectively, proceeded to sell 175 shares in one block to the defendant, the notes of sale being:

"Sold to Guan Tye,
Bought of Schomburgh, 175 Shares.
[*Signed*] SCHOMBURGH, *Broker*.
Confirmed,—GUAN TYE."

This written contract was set up by the plaintiff as the foundation of his claim, and was put in evidence as part of his case, and he contends that this contract between Schomburgh and the defendant together with the authority which he, the plaintiff, gave to Schomburgh to sell 100 shares on his behalf, are sufficient to prove a contract between himself and the defendant for the sale of 100 shares, and so to entitle him to a judgment in this action. I do not think it is enough. The written contract under which the defendant makes himself liable is for the purchase of 175 shares, neither more or less. The note being signed by Schomburgh, as Broker, makes the defendant liable either to Schomburgh or to any principal who has authorised Schomburgh as his agent to enter into that particular contract for him, and to sell the 175 shares in one lump.

The form of the note gives the defendant notice that his liability is in this way in the alternative, viz., either to Schomburgh or to Schomburgh's principal for whom Schomburgh is authorised to make the contract. Is there any such principal in this case?

The plaintiff, Simon, and Shelford are not joint principals inasmuch as they had no agreement amongst themselves to be joint principals, and gave no authority to Schomburgh to make them joint principals, or to deal for them otherwise than separately for their respective lots. Nor is the plaintiff a principal who can insist upon a performance of the contract, because he never authorised Schomburgh to make such a contract on his behalf. The contract is for 175 shares, whereas the only authority that the plaintiff

gave to Schomburgh was to deal in 100 shares. It was contended, that the defendant by entering into a contract in this form, that is to say, signed by Schomburgh, as broker, makes himself liable not only to any principal or joint principals who may have authorised Schomburgh so to contract for them, but also to any persons who may have authorised Schomburgh to deal for them in any smaller number of shares. But I do not think any of the authorities relied upon establish that position. The case of *Hoar* v. *Dawes* did at first sight appear to me to give some support to that contention. In that case there was a contract by which an agent borrowed money in one lump sum and upon the security of a single dock warrant, and borrowed it part in the interest of one principal, and part in the interest of another, and another up to some sixteen in all. The decision, and the only decision in the case, was that these different persons were not liable jointly, but there are words in a remark made by Lord MANSFIELD in the course of the argument, which seem to indicate that under the circumstances proved he would have been inclined to hold them liable separately in respect of their respective shares if they had been so sued. But as I gather from the report the ground upon which we would have done so, if at all, was that there was a well recognised custom applicable to these borrowings upon tea warrants according to which these separate rights and liabilities were understood to arise out of such a borrowing in a lump sum as occurred there. There was probably a custom to go upon, and there was no written contract to be contradicted. But here there is no evidence at all of any custom, and you have a contract in writing for the sale of 175 shares. I do not think the substance of this contract can be varied as against the defendant by any evidence of the relations between Schomburgh and other persons although undoubtedly another party or joint parties might prove their right to be substituted for Schomburgh as a party to the contract as it stands. It seems to me that the right to sue upon a contract or to enforce a contract can belong to none but to the party who makes the contract, or who is entitled to stand as contracting party in the shoes of the person who made the contract, and unless he can shew that the contract he authorised is the contract to which the other party bound himself, or that the contract to which the other party bound himself was the contract he authorised, he must fail; and I think he so fails here. As the Court is divided, the judgment appealed from stands. Costs follow the event.

We have considered the question of allowing costs for two Counsel, and we think that as the amount at stake is small, two Counsel should not be allowed for.

Judgment affirmed with costs.

MOOTYAH CHETTY *v.* YACOB.

In re NYAH HAMZAH.

PENANG.

PELLEREAU, J.

1890.

A house built on "Wakoff land" though constructed of brick with its foundations in the ground, if assigned separately from the land itself, is a "fixture" and "personal chattel" within the meaning of Section 5, Clauses 4 and 7 of the Bills of Sale Ordinance 12 of 1886, and unless the assignment is registered, the same is void as against an Execution-creditor.

February 10.

The abovenamed Mootyah Chetty had recovered judgment against the abovenamed Yacob, and took in execution on a *fi. fa.* a certain house No. 20, Pitt Lane, built on the Mahomedan Mosque or Wakoff land. The house had some years before belonged to the said Yacob, but on its seizure the same was claimed by Nyah Hamzah [and one Letchman Chetty who held a mortgage of the house from the said Nyah Hamzah] to whom four years ago the said Yacob had sold it. The house was a brick-built house with granite and brick foundations well-built into the ground, but according to usage of Wakoff land, the owner could at any time he wished have not only disposed of the house but pulled it down and removed it elsewhere. On the sale, Yacob had executed to the said Nyah Hamzah, a document which was in the ordinary printed form for conveyance of lands, but it was so worded and adapted as to be an assignment of the house only, which it was therein stated, was built on Wakoff land. This document was never registered under the Bills of Sale Ordinance 12 of 1886, but Yacob continued to reside in the house, though another person, one Noor Mahomed also did so and paid rent to the said Nyah Hamzah. On the property being claimed by Nyah Hamzah as aforesaid, the Sheriff took out an Interpleader Summons under Section 379 of the Civil Procedure Ordinance, which now came on for hearing. The following are the portions of the Bills of Sale Ordinance material to this report:—

"Section 5, Clause [4]—"Personal Chattels" means goods furniture and other articles capable of complete transfer by delivery and trade machinery as hereinafter defined and [when separately assigned or charged] fixtures and growing crops; but does not include chattel interests in real estate nor fixtures [except trade machinery as hereinafter defined] when assigned together with a freehold or leasehold interest in any land or building to which they are affixed nor growing crops when assigned together with any interest in the land on which they grow nor shares or interests in the stock funds or securities of any Government or in the capital or property of incorporated or joint-stock companies nor *choses in action.*

[7]—No fixtures or growing crops shall be deemed to be "separately assigned or charged" by reason only that they are assigned by separate words or that power is given to sever them from the land or building to which they are affixed or from the land on which they grow without otherwise taking possession of or dealing with such land or building or land if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed or in the land on which such crops grow is also conveyed to the same persons or person."

Adams, for the Execution-creditor contended, that the assignment was void against him for non-registration under the Bills of Sale Ordinance 12 of 1886, Section 6. He contended that the

house was a "personal chattel" within Section 5, Clause 4, as being removeable and separately assigned.

E. W. *Presgrave*, for the claimant contended, that a house could not be a "fixture" within Section 5, Clause 4—the more so as this house had its foundations in the ground and formed part of the soil.

Cur. Adv. Vult.

February 13th. *Pellereau*, J., said that the house was removeable at will of its owner and it was dealt by the assignment as distinct from the land, though built on it; that it was a "fixture," and being "separately assigned" was "personal chattels" within Section 5, Clause 4. The fact that it was a brick house with its foundations in the soil, was immaterial, as Section 5, Clauses 4 and 7 clearly contemplated and included even things so fixed to the ground,—as "growing crops" were treated in the same way as "fixtures"—and a power of severance "from the land to which they are affixed," it was distinctly provided should not be deemed itself to operate as a separate assignment, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures were affixed, or in the land on which such crops grew, were also conveyed to the same persons or person. In this case there was no conveyance of any freehold or leasehold interest in the land—on the contrary, the assignment dealt with the house alone as something separate and distinct from the land. It followed from this that the assignment ought to have been registered, and not being registered, it was void against the Execution-creditor.

Judgment for Execution-Creditor, with costs. [*a.*]

In re CHOA HONG.

A person examined under Section 26 of the Bankruptcy Ordinance 2 of 1888 as to a debt alleged to be due by him to the bankrupt, is not entitled to the assistance of Counsel; but the Official Assignee in person, or Counsel in his behalf, is not by the section, excluded from carrying on such examination.

February 24.

This was a summons taken out by the Official Assignee in the above bankruptcy for the examination of one Chang Tim Sam, who was alleged to be indebted to the bankrupt. The summons was taken out under Section 26 of the Bankruptcy Ordinance.

On the examination being begun,

Shearwood, claimed a right to appear for the said Chang Tim Sam. He contended that the Ordinance, in Section 17, provided that the bankrupt when publicly examined should not be represented by Counsel, but there was no similar provision in Section 26 to the effect that any debtor of his should not be represented.

[*Goldney*, J. It is not the practice to allow it under the English Act.]

Shearwood, then drew a distinction between the provisions in the Act of Parliament and the Ordinance on this head, that

[*a.*] See also *Letchman Chetty* v. *Hassan Kudus & Ors.*, 7th October, 1890, *infrâ*, and *Lavery* v. *Pursell*, 39 L. R. Ch. Div. 508.

GOLDNEY, J. 1890.

In re CHOA HONG.

whereas the Ordinance gave total power to the Judge in allowing or disallowing a debt claimed from the witness, the English Act only permitted the Judge to direct payment when the debtor admitted that it was owing, and not when he disputed his liability. That in the former case there was no issue as to liability raised, and hence professional assistance was unnecessary, whereas in the latter, if the witness could not be represented by Counsel he would be at a disadvantage, the skill of Counsel being able to be used against him and not for him; that in fact he would be totally undefended, and it was probably for this reason that the clause in Section 17 prohibiting Counsel to appear was advisedly omitted in Section 26. He further argued that according to the strict wording of the Ordinance, the Official Assignee had no right to examine, under Section 26 personally, or by Counsel. The Section [26] expressly said that the witness should be examined by the Court, whereas Section 17 [Clause 7] directed that the Official Assignee should take part in the examination; that the Ordinance, by its silence, either intended both parties or neither party to be represented; if it did speak at all, it was the Official Assignee whom it interdicted, and the probable intention was that the Judge should alone examine and draw his conclusions.

Bailey, for the Official Assignee was not heard.

Goldney, J. said that personally, in such a case, he would never think of deciding the question himself, and directing the debt to be paid, but would order a trial if there was the slightest possible doubt as to its being due. He understood Mr. Shearwood with that assurance would not press the matter. However, in view of there being any desire to have the true construction of the Ordinance thrashed out in the Court of Appeal, he thought it best to give a formal decision to the effect that Section 26 intended the Official Assignee personally or through Counsel to examine any person called as a witness under it, but did not intend the witness to have the assistance of Counsel.

In re THE RAWANG TIN MINING Co., LIMITED, & THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA.

SINGAPORE.

O'MALLEY, C. J. 1890.

March 3.

Although by Act 15 of 1852, Section 7, the certificate of a judgment of a Foreign Court can only be proved if certified under the seal of that Court, or accompanied by a statement that the Court has no seal, yet if such certificate is admitted without objection, this Court will not, on review, reject such certificate.

The above Bank having obtained a judgment against the above Company in Selangor—after notice of a winding-up order made by this Court in Singapore, of the above Company—levied execution at Selangor under order of that Court made on an arrangement between parties, and received a large sum of money thereon; but out of this sum had to make certain payments, ordered by the Court in Selangor to certain Selangor creditors, which left a sum still due to the Bank for balance of their judgment. The Bank sought to prove for this balance in Singapore under the liquidation.

Held, [by *O'Malley* C.J.] that the effect of the Companies' Ordinance 5 of 1889 was to fix a trust for equal distribution on all assets of the Company, as from the date of the winding-up proceedings, and that the Bank having had notice of the proceedings, and now seeking to prove thereunder, was bound to refund the whole amount received to the Official Liquidator.

Held also, [by *O'Malley* C.J.] that the Selangor Court was a Competent Court and one whose decisions this Court would recognise, and its judgment would have been an answer to the claim of the Official Liquidator, had the Bank not had notice of the winding-up order.

On appeal, affirming the judgment of the Court below, [by *Wood,* J.] that it was doubtful whether the Selangor Court was a Court properly constituted and one whose proceedings this Court would recognise; but that the so-called order by arrangement, of the parties before it, for their own purposes, in absence of other parties interested, was not an order establishing any valid claim of any of such parties, and was no protection to the Bank against the claim of the Official Liquidator.

Held, [by *Pellereau,* J.] that the document put in as the order of the Selangor Court disclosed an order made by a Court having jurisdiction in Selangor; but the so-called order merely gave effect to a private arrangement between the parties before it, and was not such an order to which the trust created by the Companies' Ordinance, 1889, could be made subject, and was no protection to the Bank against the claim of the Official Liquidator for a refund.

Held further, by both Courts, that the trust created by the Companies' Ordinance, 1889, affected the property at Selangor, a Foreign State, as being assets of the Company.

The Oriental Inland Steam Navigation Co. v. *The Scinde Railway Co.,* 9 L. R. Ch. App. 557, followed.

This was an application by the Official Liquidator of the abovenamed Mining Company, to have the certificate of the Registrar as to the debts due and owing by the Company, rectified by expunging the amount certified by the Registrar to be due to the abovenamed Bank from the list of debtors. The following facts need alone be mentioned in addition to the facts set out in the various judgments. The debts paid by the Bank in supposed pursuance of the order of the Selangor Court, were a large sum alleged to be due to the coolies on the Mines as to whose claims, as preference claims, there was serious doubt—but in addition thereto, were certain debts due at Selangor paid to the Straits Trading Co., Messrs. Riley, Hargreaves & Co., and one Lim Kim Lee, as to whose claims, as not being preference claims, there was no doubt. The supposed order of the Supreme Court of Selangor was as follows:—

IN THE SUPREME COURT, SELANGOR.

Before W. E. Maxwell, Esq., C.M.G., British Resident, and H. Conway Belfield, Chief Magistrate. In the matter of the Rawang Tin Mining Co., Limited, on a petition in bankruptcy against the abovenamed Company presented by Messrs. Riley, Hargreaves and Co. Mr. L. Sanderson appears on behalf of the petitioning firm, and applies to withdraw the petition in favour of an arrangement which will be stated in Court.

G. Bruce Webster: I am Agent of the Chartered Bank of India, Australia and China, and appear on its behalf. The Bank holds a judgment of this Court against the Rawang Co., dated September 3rd, 1889, for a sum of $26,261.67, and the whole of that sum is still due and unpaid. I am prepared to pay everything which may be sanctioned by this Court as payable to the coolies on the Rawang Mine, in full, without any deduction whatsoever, being approximately a sum of $14,000, and also to pay off the following creditors: Straits Trading Co. $1,654.83, Messrs. Riley, Hargreaves $680.68, Lim Kim Lee $1,211.32. on condition that this Court will allow the Bank the first claim of all the assets of the Company within its jurisdiction to the full amount of the judgment-debt.

The abovementioned creditors by their representations in Court express their willingness to agree to the above arrangement. The petition in bankruptcy is withdrawn. [*Then followed a list of other small claims which Mr. Webster, on behalf of the Bank also agreed to pay.*] It is thereupon ordered by the Court that upon payment of the abovementioned amounts, including such sums as may be found to be for coolies' wages, &c., the Chartered Bank may

O'MALLEY, C. J. 1890

In re THE RAWANG TIN MINING CO., LTD. & THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA.

proceed to levy execution in respect to the said judgment-debt and costs, upon the property of the Rawang Co. within the jurisdiction of the Court, and it is also further ordered that the said Bank shall have a prior claim as preference creditors upon the said property, both in respect to the said judgment-debt and costs, and in respect to such further payments as may be made by the said Bank in pursuance of the arrangements above set forth.

Certified and signed by H. Conway Belfield, Chief Magistrate, Selangor.

Another document was also put in, which was as follows:—

Sundry charges and wages paid by the Chartered Bank of India, Australia and China in account with the Rawang Tin Mining Co., Ltd.—

Gharry and Police escort hire to Rawang with money ...	$	25.00
Court fees		0.50
Telegrams, Stamps, &c.		0.99
Interest		99.12
As per statement attached		15,029.00
Do. do.		996.49
		$16,151.10

Kuala Lumpor, 7th December, 1889.

For the Chartered Bank of I. A. & C.

G. BRUCE WEBSTER, *Manager.*

Bonser, [*Attorney-General*] *Napier* with him, for the Official Liquidator, in support of the application.

W. *Nanson*, for the Bank, contrà.

Cur. Adv. Vult.

March 10th. *O'Malley*, C.J. This is a motion on behalf of the Official Liquidator to vary the report of the Registrar, adjudicating upon debts and claims against the Rawang Tin Mining Co. Ltd., a Company which is being wound-up by this Court under the provisions of the Companies' Ordinance 5 of 1889.

The Registrar by his report allows a claim by the Chartered Bank of India, Australia and China against the Company for $26,790.09, and finds that after allowing for $17,758.71 received by the Bank in Selangor in respect of that claim, there is still payable to the Bank a balance of $9,031.38. The motion is in form limited to the varying of the report by the striking out of this item, but it was explained by the Attorney-General upon the hearing that its object is in the alternative to refer the report back to the Registrar in order that further evidence may be taken as to the facts upon which the validity of this claim turns.

The Rawang Tin Mining Co. was a Company registered, and having its principal Office in this Colony, but having the greater part of its property and carrying on its operations in the Native State of Selangor; and the Chartered Bank of India, Australia and China is an English Banking Corporation, having its head Office in London, with branches, among other places, in Singapore and Selangor. In August, 1889, the Company was in difficulties. On the 26th of the month the Bank commenced a summary action against it in this Court to recover a sum of some $26,000 due on certain Bills of Exchange, and on the 3rd September entered judgment by default. On the 2nd September, the Chartered

Mercantile Bank of India, London and China, another creditor of the Company, presented a petition to this Court for the winding-up of the Company under the Companies' Ordinance 5 of 1889, the provisions of which, with regard to the winding-up, correspond to those of the English Companies Act of 1862.

On the 5th September, the Chartered Bank of India, Australia and China was restrained, by injunction of this Court, from levying execution under its judgment. On the 23rd September, a winding-up order was made by this Court upon the petition of the 2nd, and the Official Liquidator was appointed to carry it out.

Meanwhile, legal proceedings were taking place in Selangor. On the 3rd September, the Chartered Bank of India, Australia and China obtained a judgment against the Company for its debt of $26,000.

A day or two later, a petition in bankruptcy against the Company was presented by Messrs. Riley & Hargreaves, Selangor, creditors of the Company, and the Bank was thereby prevented from levying execution under its judgment. The Bank proceeded to negotiate for a withdrawal of the bankruptcy petition, and in the result, on the 10th September, application was made in the Court by the petitioning-creditor for leave to withdraw the petition in favour of an arrangement which had been come to between the Bank and the petitioning-creditors, and agreed to by certain Selangor creditors, and on the same day the Court granted the application and sanctioned the arrangement and embodied it in an order of the Court. The material parts of the proceedings in the Court, were as follows:—

The Agent of the Bank says:—"I am prepared to pay everything which may be sanctioned by this Court as payable to the coolies on the Rawang Mine, in full, without any deduction whatsoever, being approximately a sum of $14,000, and also to pay off the following creditors, viz.:

The Straits Trading Co...	$ 1,654.83
Messrs. Riley, Hargreaves & Co.	„ 680.68
Messrs. Lim Kim Lee & Co.	„ 1,211.32

on the condition that this Court will allow the Bank a first claim on all the assets of the Company within its jurisdiction to the full amount of the judgment-debt and cost, plus such additional payments as I now offer to make." And the Court orders "that upon payment of the abovementioned amounts, including such sums as may be found to be due for coolies' wages, etc., the Chartered Bank may proceed to levy execution in respect of the said judgment-debt and costs upon the property of the Rawang Co., within the jurisdiction of the Court. And it is further ordered, that the said Bank shall have a prior claim as preference creditors upon the said property, both in respect of the said judgment-debt and costs, and in respect of all such further payments as may be made by the said Bank in pursuance of the arrangement above set forth."

O'MALLEY, C. J. 1890.

In re THE RAWANG TIN MINING CO., LTD. & THE CHARTERED BANK OF INDIA, AUSTRALIA & CHINA.

Looking to the facts above stated and to the evidence before the Registrar, I am of opinion that there is nothing from which it can be reasonably inferred that the Court of Selangor, when it made this order of the 10th of September, had any notice of the winding-up proceedings in Singapore, which had been commenced on the 2nd. It is another question whether the Bank, which had itself been restrained by injunction of this Court on the 5th September from realising its judgment here of the 3rd of September, on the ground that a winding-up petition had been presented on the 2nd September, must not be taken to have been affected with notice in Selangor of that petition before the order of the 10th September, and if it were necessary to decide the point I should hold that it was. But be that as it may, there can be no doubt that before the Bank was in a position to claim the money under the order in Selangor, before execution was levied under the order, and before the money realised out of the assets was paid over to the Bank under the order, the Bank had notice not only of the winding-up petition, but of the winding-up order of the 23rd September.

Taking the figures as they have been given, the Bank judgment in Selangor on 3rd September was for $26,790.09. The payments made by the Bank to coolies and other creditors coming within the order of the 10th September amounted to $18,570.18, and the proceeds of the property of the Company obtained by the Bank under the execution, and under the orders of the Court of the 10th September, amounted to $36,268.89, so that the Bank, after satisfying its judgment, and reimbursing itself as far as possible for what it had paid to coolies and creditors, had a claim for $9,031.38, the amount for which it claims in the liquidation.

The Official Liquidator objects to the allowance of the claim. His contention is that the Bank having received the Selangor $36,000 out of the assets of the Company there, is bound to bring that sum into the common fund here, and that until he does that, he is a debtor to the estate rather than a creditor.

The Bank argues that these moneys were received by legal process in Selangor and were paid to it under a valid judgment or order of the Court of Selangor, and are thus removed from the jurisdiction of the Court, and the Attorney-General replies—1st. That the Bank did not make out its position by proper evidence before the Registrar, and that some evidence was improperly received. 2nd. That the Court of Selangor, whose orders are relied on, is not a Court of competent authority and jurisdiction, and that its decrees are not entitled to the recognition given to the decrees of the Courts of civilised States; at all events without some further evidence of its status and character than was given before the Registrar.

I deal first with the question as to the sufficiency of the evidence before the Registrar. It was objected that the proceedings in the Court of Selangor were not duly proved before the Registrar according to the requirements of Section 7 of the Indian Evidence Act 15 of 1852 which rules here, inasmuch as the certified copy of the record of those proceedings which was put

in, purporting to be sealed with the seal of one of the Judges of the Court, and not with the seal of the Court itself did not contain a written statement by the Judge that the Court had no seal. This was a strictly technical objection having nothing to do with the real merits of the case, and I think it is sufficiently met now by the reply that the objection was not taken on the proceedings before the Registrar, and it is best to go into it now. Then it was said that the Registrar ought to have had evidence before himself, that the claims of coolies and other creditors, for which the order of the Selangor Court made arrangements, and which were said to have been paid by the Bank, were real debts properly due by the Company. But as to this, I think that if the Selangor Court is to be recognised as a Court of competent authority, this Court cannot in the present proceeding go behind the order that it made, or discuss the sufficiency of the grounds for making it. Again, it was said that the payments made by the Bank were not shewn to be the payments provided for by the arrangement. I do not see how this contention is material to the real issue here, but if it were, I think that the certificate of the Chief Magistrate which is annexed to, and refers to the proceedings in, the Selangor Court, furnishes sufficient evidence on that point.

I come then to the main contention of the Bank, viz., that it is not liable to refund or to bring into account the proceeds of the Selangor property, inasmuch as it obtained them by legal process and under the jurisdiction and order of the Selangor Court.

The object of the Ordinance under the operation of which it is said that these assets are recoverable is to make an equitable provision in the nature of a bankruptcy for the distribution of the effects of the Company amongst the persons entitled; to secure that, all the assets of the Company shall be collected and made available for equal distribution among the creditors. Its provisions are framed to carry out this object, and the effect of those provisions is to make the property of a Company which is being wound-up, trust property, affected with an obligation to be dealt with in a particular way, and to fix all the assets with a trust for equal distribution among the creditors. Then, at what stage of the winding-up must we take it that the trust is so created? We must look at the purpose of such a trust, and at what is needed to make it effectual, and also at Sections 195 and 212. Those sections provide that all dispositions of property of the Company made between the commencement of the winding-up and the order of winding-up shall be void unless sanctioned by the Court, and that all attachments and executions put in force after the commencement of the winding-up, without leave of the Court, shall be void. I think, these shew that the control of the Court is absolute as from the commencement of the winding-up, that is to say, by Section 135, from the filing of the petition, and that the trust should be regarded as being created as from that date, and that would be in the present case, 2nd of September. Then comes the question: When did the Selangor charge on the assets, in the

O'MALLEY, C. J. 1890.

In re THE RAWANG TIN MINING CO., LTD. & THE CHARTERED BANK OF INDIA, AUSTRALIA & CHINA.

Bank's favour, and on which the Bank relies, attach in Selangor? Was it at the date of the original judgment, or at the date of the order of the 10th September, or when? As to this, I think that there was no such charge until the Bank had put itself in a position to claim the money under the terms of the order, which would not be until it had paid the coolies and others, that is till November or December; so that there was a clear priority for the Singapore trust. Even if the charge were held to attach from the date of the order in Selangor, viz., the 10th September, there would still be a priority of a week for such trust, but I think the former is the true date. Then, as I have already stated, I think that the Bank had notice of the proceedings in liquidation before these dates. This being so, the case of *The Oriental Inland Steam Nav. Co.* v. *The Scinde Railway, Co.*, reported in 9 L. R. Ch. App. 557, seems to be an authority to shew that when the Bank appears, as it does, in the liquidation, and puts in its claim as a creditor, the assets received by it in Selangor are not protected, and must be paid into the Court here.

In that case the Companies were both English Companies, having their chief offices in England, but carrying on business in India. On the 23rd of May, 1867, the Scinde Company obtained in India judgment against the Oriental Company for Rs. 40,122. On the 8th November, 1867, an order to wind-up the Oriental Company was made in England, and on the 12th March, 1868, the Scinde Company came in under the winding-up, and proved their debt. On the 28th of January, 1869, the Scinde Company, proceeding under their judgment, attached certain property in India belonging to the Oriental Company. By an order made on the 4th March, 1869, in the winding-up, the Scinde Company was ordered to withdraw the attachment, without prejudice to any question; and upon the Scinde Company undertaking to abide by any order of the Court, the Official Liquidator was ordered, out of the proceeds of the sale of property in India belonging to the Oriental Company, to pay the Scinde Company the amount of principal, interest, and costs then due to them. The attachments were accordingly withdrawn, and Rs. 19,813 were paid by the Official Liquidator to the Scinde Company in satisfaction of their claim, the remainder of their claim having been satisfied by sales under attachments before the winding-up. The Official Liquidator applied by summons that the Scinde Company should re-pay this sum of Rs. 19,813, and Vice-Chancellor MALINS, on the 18th April, 1874, made an order accordingly. The Scinde Company appealed, and the order was upheld. *James*, L.J., says:—

"These were assets fixed by the Act of Parliament with a trust for equal distribution amongst the creditors. What is the case? One creditor has, by means of an execution abroad, been able to obtain possession of part of those assets. The Vice-Chancellor was of opinion that this was the same as that of one *cestui que* trust getting possession of the trust property after the property had been affected with notice of the trust. If so, that *cestui que* trust must bring it in for distribution among the other *cestuis que* trust. So I too am of opinion that these creditors cannot get any priority over their fellow creditors by reason of their having got possession of the assets in this way. The assets must be distributed in England upon the footing of equality."

And Lord Justice *Mellish*, says:—

"It is said that the assets are subject to the law of the place where they are. I quite agree that if the law of the place where they are had given a charge of that nature on the assets prior to the time when the petition for winding-up was presented, or possibly prior to the time when the winding-up order was made, and a judgment, for instance, had been put on the register, that might, by the Law of Bombay, have constituted a charge on the property of the Company, and then the trust for the benefit of the creditors would have been subject to that charge. But here there is no allegation that the judgment in Bombay, any more than a judgment here, simply *quâ* judgment, operates as any charge at all. It is quite clear that it does not, and that until the execution and attachment have been issued and executed, there is no actual charge on the property. That charge is subsequent to the creation of the trust, and is made by the particular appellants here with full notice of the trust. The consequence necessarily follows that in this Court these creditors cannot be allowed by such means to obtain priority; and that they must give up, for the benefit of the creditors, what they have so obtained."

This appears to me to be in point, and sufficient for the decision of the present case.

There remains the question raised by the Attorney-General as to the status and authority of the Court in Selangor, and as to the amount of recognition to which its decrees are entitled in this Court. The Attorney-General contends that the Protected State of Selangor is not a civilised State, and that the comity under which, according to our law, the judgments of the Courts of civilised powers are treated with respect and held valid as legal proceedings, does not apply in relation to Courts of such States as Selangor. The contention is to the point in the present case and in this way. That if the order of the Court of Selangor were not to be regarded as of legal validity, then the Bank would be in the position of a creditor who had collected the assets abroad without any legal process or authority, and there would then be no doubt as to its liability to pay these assets into the liquidation.

As I understand the contention, it was urged, first, that in this particular case the proceedings of the Court were so contrary to natural justice as to disentitle its judgment to respect. But there is nothing relating to the subject-matter of that judgment, or to the parties which throws any doubt upon the jurisdiction of the Court, nor is there anything that I can see in the facts before us to warrant the conclusion that it exercised the jurisdiction in a manner inconsistent with the rules of natural justice.

If the Court in Selangor had had notice of the liquidation, there would be more to be said for this contention. In that case, if it had decided to act upon the principles of well-regulated justice, as English Courts regard them, there is no doubt that it would have confined itself to getting control of the Selangor assets until proceedings here had made them available to Selangor creditors *pari passu* with creditors here, but there is no evidence that it had such notice. It may reasonably have anticipated winding-up proceedings here, but that is another matter, and in the absence of that evidence, I repeat that its action does not appear to be necessarily unreasonable or contrary to natural justice.

Then there is the more general suggestion that the Courts of these Protected States are semi-barbarous, and as such *primâ facie*

WOOD & PELLERAU. } J.J
1890.

In re THE RAWANG TIN MINING CO., LTD. & THE CHARTERED BANK OF INDIA, AUSTRALIA & CHINA.

disentitled to recognition as Courts. That raises a question of some importance as affecting the rights and security of traders embarking capital and carrying on business in the Protected States, and also I think, as affecting the good understanding which one would wish, that the law should, as far as possible, assist to maintain between the British power and these States. But the objection upon which we are asked to act, comes before this Court only as a suggestion thrown out, but not supported by any argument from evidence or from facts within the judicial notice of this Court, and there is nothing to sustain it. The authority of these Courts may be examinable, but I think that *primâ facie* and upon general principles it is to be accepted, and that it is for those who object to shew good reason for their objection, and such reason has not been shewn here. That disposes of the legal questions, but with reference to this last point, I think it may be as well to observe that the conclusion so far, negative though it be, is in accordance with public convenience. The status of these particular States is matter of general knowledge, and what we know of them would lead us to wish that the title of their Courts to respect should be liberally construed. Those Courts I believe administer English Law through the medium of English Judges. They are an evidence of a wish on the part of the Protected States to take a wise advantage of one of the best features of our system of order. It would be obviously a matter of regret if on legal grounds this Court were forced to the conclusion that such Courts ought not to be considered competent to administer justice.

The effect of this decision is that the Bank must bring in the $36,000 of assets that it received in Selangor for distribution here, and it may then claim in respect of its judgment-debt, and also in respect of any debts of the Company that it can shew that it paid in Selangor.

The Bank appealed, and the appeal was, under Ordinance 19 of 1889, Section 6, heard by *Wood* and *Pellereau*, J.J. only, [*Goldney*, J. being absent from the Colony] on the 9th, 10th and 11th days of June, 1890.

Nanson, for the appellants, *Bonser*, [*Attorney-General*] with him.

Napier, for the respondent.

Cur. Adv. Vult.

June 16th. The following judgments were delivered on Appeal.

Wood, J. In this case I am of opinion that the judgment of His Honor the Chief Justice should be upheld, subject to the modification agreed upon by the parties in the suit. Although agreeing with the result at which the Chief Justice has arrived, I do so upon grounds not precisely identical, which grounds I now proceed to state. In *The Oriental Inland Steam Co., ex-parte Scinde Railway Co.*, 9 L. R. Ch. App. 559, occurs the following passage :—

"There may no doubt be some difficulty in the way of dealing with assets and creditors abroad. The Court abroad may sometimes be not disposed to assist this Court, or to take the same view of the law as the Courts of this country have taken, as to the proper mode of dealing with such companies, and also with such assets. If so, we must submit to these difficulties when they occur."

This view, which is adopted by MELLISH, L.J., is, as I take it, law, and the authority of the case is, as I understand it, to the effect that the assets in Selangor are, by reason of the notice which the appellants had of the proceedings here, subject to a trust in favour of the general body of creditors, unless there be a judicial decision dealing with those assets in another and a different manner. Here it is, as I understand, asserted by the appellants that the foreign Court of Selangor has dealt with respect to these assets and the rights of the appellants in a definite way, and that the assets were by force of that decision subject to the rights conferred by it in favour of the appellants. Also, that its effect was to decide not only the amount alleged to be due to the coolies, but the validity of their claim and its priority over that of other creditors, or again, should it be clear that the Court of Selangor rightly or wrongly decided that the appellants should not be allowed to touch the assets, except after payment of a certain sum, even arbitrarily imposed, the Courts here being satisfied that the appellant had really paid the sum would allow them to deduct that sum from the assets in Selangor which they bring into Court here to be duly administered by the Official Liquidator in this Colony. This dealing with the assets and the right of the appellant is evidenced by a record of the proceedings in the Supreme Court at Selangor. I have considered that, in this appeal, the judgment of the Court below as to the force and effect of this so-called order of the Court at Selangor is open to question, as being, although in some sense a matter of fact, still matter of law, as being the judgment of the Court below as to the construction and force of a document. I confess that from the first I had much difficulty in regarding in a serious light this so-called order. Judging not only from the form in which the proceedings come to us, but also from the nature of the order made, one might well doubt whether there exists in the State of Selangor any Supreme Court at all, in the sense in which it is understood to exist by the comity of civilized nations, a Court formally constituted and presided over by Judges, with no political bias,—but leaving these considerations out of the question, and looking at the proceedings as the proceedings of a foreign Court of competent jurisdiction, we have, as I take it, to see whether this order of the Court is in reality an order, or whether it is not a mere contract entered into between the parties, to which the Court has assented as a matter of convenience and expediency to the parties concerned. When a Court simply exemplifies the result of its judgment, it may be taken that the matter decided is final, and we should give effect to its judgment without regard to the reasoning whereon that judgment is founded. But where, as here, the proceedings are a part of the record of such judgment, it seems to me that the law has a right to consider these proceedings, with a view to seeing what matter was in dispute and what findings of law or facts are apparent on its face. It appears to me on perusal of these proceedings that no matter of fact or law is raised or decided, but that it is merely a contract entered into

WOOD & PELLEREAU. } J.J. 1890.

In re THE KAWANG TIN MINING CO., LTD. & THE CHARTERED BANK OF INDIA, AUSTRALIA & CHINA.

in a place which was a Court of Justice, and to which the Court has given the countenance of its approval under the form of an order. This contract I consider to have been made under circumstances which give it no validity as evidencing the status of any person or any thing. The proceedings in the Court of Selangor are proceedings in bankruptcy, and we may assume that the assets of the party bankrupt are to be distributed according to the law of Selangor. Thereupon the appellants, creditors of the bankrupts, were at liberty to proceed in bankruptcy before the Court of Selangor, or to try to arrange matters in a different way, and they accordingly did try to arrange matters in a different way—the way of a contract between the parties there in Court. That the Court did insist on the condition of the coolies being paid, as having prior claims, is not, so far as I can see, apparent on the proceedings, nor reasonably to be inferred therefrom. I assume that when a matter is in dispute before a Court and all parties are before it, the Court may make an order by consent, which does fix the status of persons and things, and all parties will be bound by such decision; but in this case the circumstances are different. The agreement is not made in the presence of all parties, and it deals adversely with the interest of absent parties, creditors in Selangor. It is in fact a meeting of certain persons wherein a contract is made, whereby certain advantages are intended to be secured to the Chartered Bank, in payment of certain sums which it is ascertained are due, and which the Court afterwards finds are due in respect of the wages of certain coolies. The advantage to be gained by the Bank is the priority of their debt, and although that priority is not now insisted on, except as regards the coolies' wages, yet we have to look now not on the claim of the Court as modified by circumstances, but on the character of the transaction as it existed at the time of its taking place. This priority although not now insisted on, was, as I take it, a legal fraud on the rights of other parties, other creditors who existed at the time of such contract, whose consent was never got, and whose rights were invaded by it. Upon this ground I think that the case of *The Oriental Inland Steam Navigation Co.* v. *The Scinde Railway Co.* applies, and that the appellants cannot now, after notice, set up the so-called order of the Court of Selangor, which I hold to be a mere agreement not establishing in their favour any valid rights.

Pellereau, J. The appellants realised out of the Company's assets in Selangor a sum of $36,268.89 out of which they applied $18,510.18 to the reimbursement of certain sums which they allege to have paid to certain creditors in Selangor having a priority by virtue of an order of the Selangor Supreme Court of the 10th September, 1889, and $17,758.71 to part payment of a sum of $26,790.9 for which they obtained judgment both in Singapore and Selangor. They raise no contention with regard to the $17,758.71 for which they are ready to account and to rank *pari passu* with other creditors in this Court, but with regard to the sum of $18,510.18 they claim to retain $18,057.25 of it by virtue of the priority which they allege was given to them by the Selangor

Wood, & Pelleau. } J.J. 1890.

In re The Rawang Tin Mining Co., Ltd. & The Chartered Bank of India, Australia & China.

Judicial order of the 10th September, 1889. On the 2nd September, 1889, a petition was filed in this Court for the winding-up by the Court of the Rawang Co., and a winding-up order was made on the 23rd September, 1889, when the respondent was appointed Official Liquidator. By Sections 95 and 212 of the Companies' Ordinance, 1889, all dispositions of property of the Company made between the 2nd and 23rd September, 1889, are void, and it is argued for the respondent that the appellants could not obtain by virtue of the Selangor order of the 10th September, 1889, any right of priority, and that the whole of the sum of $18,510.18 must be accounted for to the respondent. There is no doubt that by the effect of the abovementioned sections, a trust is created for the benefit of the creditors of the Company generally, and there is no doubt in my mind that the trust extends to all the assets of the Company in the foreign State of Selangor, subject to the laws and judgments in the State concerning property existing within its territorial limits. This I hold to be clear from the decision in the case of *The Oriental Inland Steam Co.*, L. R., 9 Ch. App. 557. It is found as a fact by the judgment appealed from, that the appellants had notice of the winding-up petition and order before they were in a position to realise the assets of the Company in Selangor, and this fact cannot be gainsaid by the appellants, who have not obtained leave to appeal on questions of fact. The disposition of those assets in their own favour was therefore void, and they should account for the $18,510.18 unless it be shewn that by the law or the Judicial order in Selangor, they or the persons whom they have paid, have a right to priority over those assets to that amount. I may here assert that at the Bar the Counsel for the respondent has consented to the Bank being in this Court placed in the position of those persons, if it can shew in this Court that they had claims and rights to preference and that the Bank has paid them. It was contended for the respondent that the Selangor order of the 10th September did not emanate from a Court of law; that it does not bear the seal of the Court; that the document produced is not a Judicial order or Judgment; and that although the judgment appealed from has found as a fact that it is a judgment, the respondent is entitled to urge that this finding, which is based upon the construction of a writing, is erroneous. The respondents' right to raise this contention is clear on the ground stated, but when I consider the document itself, and the fact that under an order of that Court the property of the Company was seized and put up for sale, I agree with the Court below that the document discloses an order made by a Court having jurisdiction in Selangor. The existence of a seal is not necessary to constitute a Court. But now arises the question—What does that order purport to do? It was not given upon any contention of parties; it does not express the law of Selangor; it does not state that under it a right of priority exists in Selangor on behalf of labourers, managers, or others, over the property of their employers or debtors; it does not acknowledge a right existing by law in favour of the appellants, and as the

WOOD & PELLERAU. } J.J
1890.

In re THE RAWANG TIN MINING CO., LTD. & THE CHARTERED BANK OF INDIA, AUSTRALIA & CHINA.

petition in bankruptcy was withdrawn and the Court was ignorant of the winding-up order or petition for it in Singapore, it cannot be argued that its order was an implied recognition of a right to priority on behalf of any one under the law of Selangor. It simply states and gives effect to a private arrangement between the appellants and certain alleged creditors of the Rawang Co. concerning the disposition of the assets of that Company in Selangor, an arrangement which gave the appellants the liberty of appropriating to themselves the proceeds of those assets for the reimbursement of certain sums which they offered to pay, and for payment by preference of the sum of $26,790.09 due to them. Such a judicial order is not the statement of a law, or custom, or the recognition of a right to which the trust created by the Companies' Ordinance, 1889, can be made subject. It is in reality an arrangement made for the convenience of the parties thereto, and has no greater force than the private arrangement between them, which cannot under the circumstances validate the disposition of the Company's assets. Had it been shewn to my satisfaction that the judicial order declared the law of Selangor, or even that the assets of this Company could not have been placed within the control of this Court without the $18,510.18 having been paid in Selangor, it might have been unfair to ask the Bank to account for the assets here without being reimbursed the outlay which it had been put to; we might then have been in the predicament pointed out by Sir W. M. JAMES, L.J., in the case of *The Oriental Inland Steam Navigation Co.*, when he says:—

> "There may no doubt be some difficulty in the way of dealing with assets and creditors abroad. The Court abroad may sometimes be not disposed to assist this Court or take the same view of the law as the Courts of this country have taken, as to the proper mode of dealing with such companies, and also with such assets. If so, we must submit to these difficulties when they occur."

It may be that a necessity existed for the payments alleged to have been made by the Bank, such necessity may be suspected, but its existence has remained in the dark and I do not see sufficient evidence from which I can infer it as a fact; under these circumstances, the Bank, which had notice of the trust, cannot reap the benefit of a disposition of assets which is void by our law, when it is not shewn that the law of Selangor, where the assets were, can be held to be different from it. The Bank having chosen to pay its money to parties in Selangor under a judgment or order by consent of this nature must take the risk and cannot complain that it should account for the assets appropriated by it to their refund; and I consider that it should account for the $18,510.18 as well as for the $17,758.71. The judgment appealed from should therefore be upheld, with a slight variation which is consented to, that the words at the end, *viz*: "Under the Companies' Ordinance, 1889," be struck out.

Judgment affirmed with costs, Court certifying for two Counsel.

AHAMED MEAH & ANOR. *v.* NACODAH MERICAN.

PENANG.

PELLEREAU, J.

1890.

March 5.

The entry of a marriage in a Kali's book, in consideration of which marriage, a promise is made, which promise appears in the entry and is signed, and thereafter sought to be enforced, is a "marriage settlement" within the Stamp Ordinance, 1885, and must be stamped before it can be admitted in evidence.

A contract to build a "suitable house" is too vague and uncertain, and cannot be specifically enforced by this Court nor can damages be awarded.

Suit for specific performance of an agreement made in consideration of marriage or damages for breach of agreement—and, by amendment, damages for falsely representing that in consideration of the plaintiff marrying his [the defendant's] daughter, he the defendant would build and give the plaintiff a "suitable house," which marriage the plaintiff contracted in faith of such representation. The plaintiff alleged certain acts of part performance which the defendant denied. The defendant pleaded the Statute of Frauds. The agreement relied on was entered in the book of the Kali or Mahomedan priest who solemnized the marriage between the plaintiff and the defendant's daughter. That entry was as follows:—

"Eve of Friday, the 16th day of Shaaban 1292 [corresponding to the 17th day of September, 1875.]

Ahamed Meah bin Akri Mia, of Porto Novo, married to Ahamed Kulsom, Beebee, fondly called Che Som bin Nacodah Merican. The bride has attained the age of puberty. The dowry of five hundred and one dollars to be paid at some future time by the bridegroom. No expenses. And *Kykuli*, that is to say, father-in-law's gift unto his son-in-law Ahamed Meah one hundred and one *diraham* [gold coin of Southern India] which make two hundred and eighty-three rupees. And also the gift of the father unto his daughter is two hundred and one *diraham* and gold jewelry, and he shall also build and give her a house which must be a suitable building. The *Kykuli* mentioned, has been received by Ahamed Meah himself in the presence of the assembly at the marriage ceremony. And the father's gift unto his child has also been received by his child. The father was the *wali* [the guardian who gives in marriage] and the father authorised the celebration of the marriage of his said daughter with the abovenamed party.

Witnesses of the marriage are those who set their hands below this. *Finis.*

Signature of Ahamed Meah, in Tamil.
Do. Nacodah Merican, do.
Do. Dalbadasah, do.
Do. Hajee Mahomed Amin, in Malay.
Do. Mahomed Ismail, do.
Do. Golam Mahomed, in Tamil."

Ross, [*Gawthorne* with him] for the defendant contended, that the entry was an agreement or marriage settlement and required to be stamped under the Stamp Ordinance, 1885—they also contended the ambiguity in the agreement was a patent one, and the agreement to build a "suitable house" was too vague and uncertain to be enforced. *Franks* v. *Martin*, 1 Eden 309; *Brace* v. *Wehnert*, 25 Beav. 348; *Taylor* v. *Portington*, 7 De G. M. & G. 328; *Agnew on the Statute of Frauds*, 122, 232-34, 269; *Cooper* v. *Hood*, 26 Beav. 293; *Pearce* v. *Watts*, 20 L. R. Eq. 492; and *Maddison* v. *Alderson*, 8 L. R. App. Cas. 484; and no damages could be awarded where the contract was one that could not be enforced—*Crompton* v. *Vane Ry. Co.*, 7 L. R. Ch. Div. 567; *Foster*

PELLEREAU, J. 1890.

AHAMED MEAH & ANOR. v. NACODAH MERICAN.

v. *Wheeler*, 36 L. R. Ch. Div. 697-8, on Appeal 38 L. R. Ch. Div. 133; *Elmore* v. *Perree*, 57 L. T. [N.S.] 333; *Lavery* v. *Pursell*, 39 L. R. Ch. Div. 508—In *Mahomed Salleh & Anor.* v. *Nacodah Merican* [antè p. 463], there was part performance, and the parties by their acts had rendered certain that which was uncertain.

Adams, for plaintiffs, said if the entry required to be stamped he was prepared to pay it—that the contract was no more uncertain than one to pay a "fair rent" or "at the best rent"—*Gregory* v. *Mighell*, 18 Ves. 328; *Chattoch* v. *Mullar*, 8 L. R. Ch. Div. 177; *Soanes* v. *Edge*, Johns. 69, and *Mayor of Cork* v. *Southgate*, 38 L. J. Ch. Div. [N.S.] 141—by a reference to the Registrar, it could be ascertained from the position of the parties, their habits, and customs, what would be suitable to the plaintiffs, as in *Gregory* v. *Mighell*, suprà.

Pellereau, J. [Having disposed of the facts, and decided that there was no satisfactory proof of part performance, proceeded—] The entry in the Kali's book is clearly a marriage settlement, and as such, is liable to Stamp duty. The question of law which I have to decide in this case, hardly arises under the Statute of Frauds as there is a writing of some kind here—the question really is whether apart from the Statute, there is such a contract here, certain in its terms, which the Court can enforce? There must be certainty as to the subject of the contract. If it is uncertain as to the nature of the house to be built, if uncertain as to value, it would be difficult for the Court to enforce it. The house is said to be a "suitable house." Suitable to whom? To the bridegroom or the father of the bride? The Court is left in doubt as to what way it is to be suitable. It is left in doubt as to the kind of house and as to its value. It is difficult to ascertain the minds of the parties. It is impossible to hold, on this contract, there was an agreement or concensus as to the subject-matter of the contract. I therefore hold the promise is void for uncertainty, and cannot be deemed to be specifically performed. I can also give no damages for the same reason. [He then dealt with the evidence, and held there was no fraudulent representation and proceeded—] I must therefore find for the defendant on all the issues raised—but as the defendant made the promise seriously and solemnly, and now takes advantage of the law, I think the justice of the case will be met by my giving him only the costs incidental to the issue of part performance, and as to the other issues each party should bear his own costs.

Judgment for defendant with ¼ costs. [*a.*]

TAN CHIN HOON *v.* TAN BOON TAY & ORS.

SINGAPORE.

GOLDNEY, J. 1890.

March 6.

Bequests of leasehold property "to T. C. H. and to his male child or children," and in case of his dying without issue, gift over to his brother. At the date of the Will T. C. H. had no child.

Held [by *Goldney*, J. and by Court of Appeal] that the rule in *Wild's Case*, 6 Coke's Rep. 17 was not applicable, and T. C. H. took only a life estate with remainder to his sons born [at date of action] or to be born, as joint tenants, and living at time of his death.

[*a.*] The plaintiffs appealed, but subsequently dropped the appeal.—J.W.N.K.

The weight of authority preponderates in favour of the proposition that the rule in *Wild's Case* is not applicable to personal property.

The nature of this suit, facts giving rise thereto and arguments, sufficiently appear in the judgments.

Bonser, [*Attorney-General*] *Davidson* with him, for plaintiff.

Napier, [*Sisson* with him] for defendants.

Cur. Adv. Vult.

March 10th. *Goldney*, J. In this action the Court is asked for a declaration as to the true construction of so much of the Will of Tan Koon Swee, deceased, as relates to four leasehold lands in Singapore bequeathed in the said Will to the testator's son, "Tan Chin Hoon, and to his male child or children." It has been contended on the part of the plaintiff that I am bound by the rule in *Wild's Case*, 6 Coke, 17, to hold that the plaintiff Tan Chin Hoon took an estate tail, the rule being that where there is a gift to one and his children, and there are as in this case no children at the date of the Will, it vests an estate tail in the parent. On the part of the defendants it was contended that the rule in *Wild's Case* is not applicable to personalty, and that even if this rule did apply that there is enough on the face of the Will to shew that the intention of the testator was that the son, Tan Chin Hoon, should be tenant for life with remainder to his children. I do not consider that the construction of the bequest in this Will is governed by the rule in *Wild's Case*; as far as I can judge, it has always been held by the Courts that this rule is not directly applicable to the construction of testamentary disposition of personal estate. There were no children in existence at the time of the bequest; the question is whether the words "to his male child or children," which I think are properly words of "purchase," should, for the purpose of furthering the intention of the testator, be considered as words of "limitation." The general rule of construction is that you must give to words their ordinary meaning, unless that meaning leads to absurdity or repugnancy, or contradicts the rest of the instrument. I have arrived at the conclusion that the giving to the words "male child or children" their primary signification does not contradict the rest of the instrument, and is not repugnant to the intention of the testator as indicated by the other parts of his Will. The conclusion at which I have arrived is in consonance with the judgment of this Court in the case of *Tan Tek Soon and others* v. *Tan Chin Seng and others*, No. 179/85. [*a.*] That was a case arising out of the same Will as in this case, but upon a bequest to another son. The terms of the two bequests although not quite identical, are so similar in their wording that I should almost feel bound by that decision, even if I did not agree with it. I however, do agree with it, and think that to apply any other construction would be to defeat the testator's wishes. I therefore declare that according to the true construction of the trusts of the Will of Tan Koon Swee, so far as the same relates to the premises mentioned in the

[*a.*] Not reported.

O'MALLEY, C. J. WOOD & PELLEREAU. } J.J. 1890.

TAN CHIN HOON v. TAN BOON TAT & ORS.

pleadings, the plaintiff, Tan Chin Hoon, took an estate for life in the said premises with remainder to his male children, born or to be born, as joint tenants. Costs out of the estate.

June 17th. The plaintiff appealed, and the Appeal was now heard before *O'Malley*, C.J., *Wood* and *Pellereau*, J.J.

Bonser, [*Attorney-General*] and *Bailey*, for appellants.

Napier, [*Sisson* with him] for respondents.

O'Malley, C. J. In this case I am of opinion that the words "I give, devise, and bequeath unto my son, Tan Chin Hoon, and to his male child or children the property specified" are to be construed in this Will as giving a life interest to Tan Chin Hoon with remainder to such male child or children as he might have living at the time of his death.

The general rule of construction of these words would appear from the authorities to be that in themselves *primâ facie* they would give an interest to Tan Chin Hoon and any male children whom he might have at the time of testator's death as a class jointly. That rule is laid down and followed in *DeWitt* v. *DeWitt*, 11 Simons, 41; *Re Crockett*, 2 Ph. 553: *Newill* v. *Newill*, 7 L. R. Ch. Ap. 253, and *Fisher* v. *Webster*, 14 L. R. Eq. 283. But it appears to be part of the rules that the *primâ facie* construction may be regarded as subject to modifications, on other provisions in the Will indicating intention inconsistent with that construction. Now, here there are provisions which seem to me sufficient in this case to negative its *primâ facie* construction. 1st: The gift over to the brother is to be in the event of Tan Chin Hoon's dying without issue. How could that have any meaning if in the event of Tan Chin Hoon having no children at the time of testator's death, he took an absolute interest, as he must do, under the abovementioned construction? It is evident, I think, that any children alive at Tan Chin Hoon's death are sufficient to prevent the gift over; therefore any male children alive at Tan Chin Hoon's death are sufficient to keep the property from passing on from Tan Chin Hoon. And his male children are in fact to have an interest in the property, but clearly such children might be all children born after the testator's death; it must be intended therefore that such children shall have an interest under the Will, and the only way of affecting that is to give the construction on which I rely here.

With reference to the contention of the Attorney-General I may say that I do not think that the case of *Fisher* v. *Webster* decides that the words "without issue" in the gift over, do not prevent the legacy being joint. The Vice-Chancellor does not refer to this as it was not material to the purpose of his judgment, the only question there being, whether the gift over, after the death of the legatee without issue, failed as being too remote.

Wood & Pellereau, J.J., concurred.

Appeal dismissed with costs.

CRANE *v.* YEOH HONG GHEE.

SINGAPORE.

GOLDNEY, J.
1890.

March 10.

The period of limitation for an action for rent founded on a covenant in a lease is twelve years under Act 14 of 1859, Section 1, Clause 11, and not three years under Clause 8.

Clause 8 of Section 1 applies only to actions for rent where there is no lease under seal.

The nature of this case, and the question that arose in it, sufficiently appear in the judgment.

W. *Nanson*, for plaintiff.

Donaldson, for defendant.

Goldney, J. This was an action to recover 12 years' arrears of rent amounting to $150. The only point in dispute is whether the plaintiff's right to recover arrears of rent is, or is not, limited to a period of 3 years by Indian Act 14 of 1859, an Act to provide for the Limitation of Suits. This action is brought upon the covenants of leases, and is founded on a specialty within the meaning of the 11th Sub-section of Section 1 of the Act. By this sub-section the period of limitation is 12 years. On the part of the defendant it is contended, that the case in governed by Sub-section 8 of Section 1, which "to all suits for the rents of any buildings or lands" gives 3 years as the period of limitation. At the time of the passing of the Indian Act 14 of 1859, the English Acts on this subject were 3 & 4 Wm. IV. c. 27 and 3 & 4 Wm. IV. c. 42. By the 42nd section of the 1st Act an action to recover "arrears of rent" was limited to 6 years, and by the 3rd section of the last Act "all actions of debt for rent upon an indenture of demise" were limited to 20 years. Under the English Acts it has always been held that 3 & 4 Wm. IV. c. 42, Section 3, applies to actions upon bonds or covenants for the payment of rent or interest in respect of money charged upon land, and that such actions may be brought, notwithstanding the 42nd section of 3 & 4 Wm. IV. c. 27, which applies to remedies against land only. After some consideration, I have come to the conclusion, that the principle of the English Act applies to the Indian Act, and that Sub-section 11 is not limited by Sub-section 8, and that an action upon a covenant for the payment of rent comes within Sub-section 11, and not within Sub-section 8. I find therefore for the plaintiff a verdict for the $150.

SHEDUMBRUM CHETTY *v.* KENG CHEOW & CO.

SINGAPORE.

GOLDNEY, J.
1890.

March 19.

It is no defence in law to an action on a Promissory-note, that when the amount became due the defendant paid a part thereof to account, and the plaintiff agreed to accept a new note for the balance, which note the defendant was always ready and offered to give.

Action on a Promissory-note to recover $2,000 and interest. Defence that the note sued on was originally a note for $3,000; that when the note became due it was agreed between the defendants and the plaintiff that the defendants should pay $1,000 to account of the said note, and that one of them should make and give to the plaintiff within a fortnight thereafter a new Promissory-note for the balance of $2,000 payable within four months, and the plaintiff agreed to take the said new note in satisfaction of

GOLDNEY, J. 1890.

SHEDUM-BRUM CHETTY v. KENG CHEOW & Co.

the note now sued on; that the defendants in pursuance of this arrangement had paid the plaintiff the $1,000, and the one defendant has always been ready and willing to make and give, and now offered to make and give, to the plaintiff, the new Promissory-note for $2,000, but the plaintiff after receiving the $1,000 aforesaid, had refused to accept the new note and had brought this action on the original note within the said fortnight. The plaintiff demurred to this defence.

Shearwood, for the demurrer contended, that an accord and satisfaction to be a defence must be executed and satisfied. The plea did not shew that such had been done here—the mere being ready and willing to do it, was not sufficient. *Hardman* v. *Bellhouse*, 9 M. & W. 596; *Gabriel* v. *Dresser*, 15 C. B. 622; *Allies* v. *Probyn*, 2 C. M. & R. 408. Payment of a smaller sum was no satisfaction of a larger—*Cumber* v. *Wane*, 1 Sm. L. C. 288. In *Sibree* v. *Tripp*, 15 M. & W. 33, it was held the giving of a negotiable instrument was a satisfaction of an equal or larger sum due, but that was because the instrument was negotiable and something different from the original debt, which was not negotiable.—In the present case the note sued on was negotiable. In *Foakes* v. *Beer*, 9 L. R. App. Ca. 605, the House of Lords reviewed in detail the whole law bearing on this subject, and decided that there must be some new consideration for the new agreement, some *independent* benefit to the plaintiff, actual or contingent. There was no new consideration for the arrangement here set up—the $1,000 paid was a payment for a liability already incurred, a part of the debt due, and was no *independent* consideration. The defence in effect, said the plaintiff, although he held a note on which he could recover the $2,000 agreed to take a new note, and to bar his remedy for four months—the giving up of a Promissory-note in which three persons were liable, for one on which one person was to be liable—*Pinnel's Case*, 5 Rep. 117, did not apply, though it was there said the giving of a stick of sealing-wax would be a good consideration—the Court, it was true, would not enquire into the value of the consideration as there could be no saying what value the plaintiff had set on it—but the thing offered in place of the old must be new and different in character, and must moreover have been accepted by the plaintiff, and not merely tendered by the defendants.

Napier, for the defence contended, the giving of a negotiable security for an old debt was a sufficient consideration. *Sibree* v. *Tripp* [supra]; *Sard* v. *Rhodes*, 1 M. & W. 153; *Goddard* v. *O'Brien*, 9 L. R. Q. B. Div. 37; and *Bidder* v. *Brydges*, 37 L. R. Ch. Div. 406. There had been a "novation"—the substituting of one debt and liability for another. *Scarf* v. *Jardine*, 7 L. R. App. Ca. 345, 351; the acceptance of a single liability in substitution of several joint ones was sufficient—*Goode* v. *Cheeseman*, 2 B. & Ad. 328, and *Lyth* v. *Ault*, 7 Exch. 669. An accord with mutual promises to perform at a future time was binding. 1 Sm. L. C. 298; at least as an equitable defence—*Jonassohn* v. *Ransome*, 3 C. B. [N. S.] 779.

Cur. Adv. Vult.

GOLDNEY, J. 1890.

SHEDUM-BRUM CHETTY v. KENG CHEOW & Co.

March 29th. *Goldney*, J. The question before the Court is whether the statement of defence is in law any defence to the action. On an action on a Promissory-note the defendant has pleaded part payment and an agreement that he should within two weeks of such payment give to the plaintiff a new Promissory-note for the balance. The note for the balance has not been given, and the action was commenced before the expiration of the alleged period of two weeks. It seems to me to be a settled principle that a mere agreement to substitute another thing in lieu of the original obligation is void, unless carried into execution and accepted as satisfaction. No action can be maintained on the new agreement, nor can the agreement be pleaded in bar to the original demands. *Lyne* v. *Bruce*, 2 H. Bl. 327; *James* v. *David*, 5 T. R. 141. A mere readiness and willingness to give the Promissory-note for the balance cannot be said to be a carrying into execution of the agreement which is to extinguish the original debt. The effect of "novation" is, that the original debt is extinguished in the same manner as by actual payment. A new obligation however by which the creditor extends the time of payment, is not, in the Civil Law considered a "novation." In actions of debt a plea of tender must not only allege that the defendant has always been and is still ready and willing to pay the debt and that he tendered the requisite money, but must also be accompanied by a "profert in curiam" of the money tendered. In this case the defendants' pleading is not accompanied by a "profert in curiam" of the alleged note for the balance. I do not consider that the statement of defence is, in law, an answer to the action.

Demurrer allowed with costs.

REGINA *v.* CHIN AH CHI.

SINGAPORE.

O'MALLEY, C. J. PELLERAU & GOLDNEY, J.J. 1890.

March 20.

A prisoner was charged before a Magistrate with using threats in order to induce persons to become members of a Secret Society. The Magistrate ordered the Court to be cleared and proceeded with the case in private..

Held, the proceedings were irregular and the conviction bad; and under Section 33 of the Appeals Ordinance 12 of 1879, the proper form of procedure in this Court was to quash it.

The prisoner was tried before E. W. Birch, Esquire, Magistrate, at Malacca, with having used threats to certain persons in order to induce them to become members of a Secret Society. The Magistrate, at the request of the Police who represented that "as a matter of public policy" it was advisable to have the proceedings taken in private, ordered the Court to be cleared, and after this was done, proceeded with the trial and convicted the prisoner. The prisoner appealed and the appeal was heard before *Wood*, J. on the 28th September, 1889, who considered that what took place had occasioned a failure of justice, within Section 33 abovementioned, and quashed the conviction; but at the request of the Crown reserved under Section 38 of the Appeals Ordinance 12 of 1879 the appeal for the consideration of the Court of Appeal.

O'MALLEY, C. J. PELLEREAU & GOLDNEY. J.J. 1890.

REGINA v. CHIN AH CHI.

Bonser [*Attorney-General*] for the appellant contended, that the exclusion of the public on the ground of public policy did not vitiate the proceedings. The exclusion was necessary to the ends of justice.

Groom, for the respondent.

O'Malley, C.J. The conviction must be quashed. The rule in public Courts is publicity, and if the proceedings were conducted in private, good grounds must be shewn for the exclusion of the public. There might have been good grounds, but what was before the Court did not constitute such. The proceedings were therefore irregular and the conviction bad. The proper form of procedure under Section 33 was to quash it.

Pellereau, and *Goldney*, J.J., concurred.

Conviction quashed. [*a.*]

YEO KIAN GUAN *v.* SEAH LIANG SEAH.

SINGAPORE. GOLDNEY, J. 1890. April 16.

Where a charge of fraud was alleged against a deceased person, forty-five years after the transaction sought to be impeached, though the plaintiff was then unborn and the deceased person stood in a semi-fiduciary position to him,

Held, there must be evidence of the fraud before the transaction could be set aside, and suspicion merely was not sufficient.

The mere fact of a person being named in a Will as an Executor, does not prevent him purchasing the testator's property, if he has never taken upon himself the duties of Executor or Trustee, unless he makes use of his position in order to commit a fraud.

The facts and questions in this case, sufficiently appear from the judgment. The case was heard on the 9th and 10th April, and on this day.

Bonser, [*Attorney-General*] *Everard* with him, for plaintiff, cited *Fox* v. *Makereth*, 1 W. & T. L. C. in Eq. [4th Ed.] 150, 162; *Wederburn* v. *Wederburn*, 4 My. & Cr. 41; 1 Wm. on Exors. 381; 2 Wm. on Exors. 1891; *Worly* v. *Worly*, 18 Beav. 58; *Postlethwaite* v. *Rickman*, 36 W. R. 808; *Birch* v. *Allen*, 8 L. R. Ch. Div. 314, and Lewin on Trusts [6th Ed.] 428.

Davidson, [W. *Nanson* with him] for defendant cited *Lowen* v. *Fulton*, 19 Sim. 104, 115; *Stacey* v. *Elph*, 1 My. & K. 195; *Orr* v. *Newton*, 2 Cox, 274; *Clarke* v. *Clarke*, 9 L. R. App. Cases 733, 737, 743; Lewin on Trusts, 432; Godefroi on Trusts, 316; *Gregory* v. *Gregory*, Coop. 201, and *Baker* v. *Read*, 18 Beav. 398.

Cur. Adv. Vult.

21st April. *Goldney*, J. This is an action brought by the plaintiff as administrator of Yeo Kian Guan against the defendant as executor of Seah Eu Chin to recover from the defendant a large quantity of property which he alleges Seah Eu Chin held as trustee for Yeo Kian Guan and not as owner. The plaintiff's case is based upon the fact that Yeo Kim Swee, the father of Yeo Kian Guan by his Will appointed Seah Eu Chin, Executor and Trustee for his son.

[*a.*] See *Regina* v. *Dorasamy Pillay*, antè p. 350, and also *Hajee Shaik Abdul Cader* v. *Aisha & Ors. In re* Kynnersley, antè p. 151.

The property which the plaintiff claims, consists of: 1.—Property bought by Eu Chin from Kim Swee before his death.—2.—A plantation and houses. 3.—A house and ground in Old Bridge Road. 4.—Houses and land in North Boat Quay, South Bridge Road, Upper Circular Road, and Carpenter Street.

Items 2, 3 and 4 are alleged to have been the testator's property at the time of his death and to have been subsequently acquired by Eu Chin. The difficulty I have to contend with in this case is that the transactions which I am asked to set aside took place some 45 years ago before the plaintiff and defendant were born, or if they were born, they could not have been more than 2 or 3 years old. I can only act on evidence, I cannot decide this case upon what may be called suspicion.

The plaintiff or his authors have allowed 45 years to go by, without a suggestion that the defendant's father had acted in any way prejudicial to plaintiff's interests, and if there is now a difficulty in proving his case it is his own fault. The defendant's father died in September, 1883, at which time the plaintiff must have been 26 years of age at least. No satisfactory reason was given on behalf of the plaintiff why this action was not commenced before Kim Swee's death. The plaintiff himself was not examined as witness.

To deal first with the land purchased by Eu Chin from Kim Swee before his death, there is no evidence that this transaction was tainted with fraud, or as far as I can see, that there was any fiduciary relation between the parties at that time. On the other hand the defendant has been able to produce from his father's papers a bill of costs from his Lawyer which shews that at that time Kim Swee and Eu Chin were mutually engaged in large land transactions, and that Kim Swee and Eu Chin were acting under legal advice when Kim Swee's interest in certain properties was assigned to Eu Chin.

I have come to the conclusion, that the purchase of the property by Eu Chin from Kim Swee before his death was a *bonâ fide* transaction and cannot now be disturbed.

The 2nd item, a plantation and 2 houses, the defendant stated that he could find no trace among his father's papers of this item having even been in his father's possession; on the part of the plaintiff it was admitted that they could not establish their case as to the plantation. The same may be said of lease No. 759 of the remainder of the property, all with the exception of lot 67, 1 house and ground in Old Bridge Road, was held by Eu Chin under Government grants. Lot 67 was conveyed to him by Yap Soo Leng the testator's executor. What the circumstances were under which Eu Chin received these grants from Government there is no evidence to shew, but it does appear these lots had been the property of Kim Swee and that the new grants to Eu Chin were not made until after Kim Swee's death.

As to lot 67 the house and ground where Eu Chin lived and carried on his business was purchased by him from the testator's executor Yap Soo Leng. With regard to these two items the only question for me to decide is one of fact, viz., whether or not Eu

GOLDNEY, J. 1890.

YEO KIAN GUAN v. SEAH LIANG SEAH.

Chin took upon himself the duties of executor or trustee, if he did I think the law is quite clear that he could not buy the house from himself or from his co-executor and as to the other property granted to him after the testator's death he would have to give an account as to how it ceased to be part of the testator's estates and became his property.

I have however come to the conclusion, that there is not evidence before me which would justify me in finding that Eu Chin ever acted as executor or took upon himself the duties of a trustee. Probate was granted to the other executor with liberty to Eu Chin to come in and prove. The inference I am inclined to draw taking the documents as a whole, especially when I observe that the petition for probate was prepared by the same Lawyer who was acting a few weeks for Eu Chin in the settlement of matters between him and Kim Swee, is that Eu Chin abstained from proving the Will, or acting as trustee under legal advice, which considering the business relations in which he stood with Kim Swee was the ordinary and prudent advice which, under the circumstances, a Lawyer would give to his client, especially also as he apparently wished to buy the house where he lived and carried on his business. All the evidence of Eu Chin having acted as executor or trustee I can call nothing more than gossip. To my mind the plaintiff's case as it stood on the Will alone was rather weakened than strengthened by the evidence. The mere fact of his being named in the Will as an executor would not prevent him purchasing the testator's land if he never took upon himself the duties of executor or trustee.

I do not think it necessary to deal with detail points which arose during the trial. I think the plaintiff has failed to make out his case. The verdict must be for the defendant.

VANJOOR *v.* KALIAPAH CHETTY.

PENANG.

PELLERAU, J. 1890.

April 29.

Where two Magistrates, sitting as a Court of two Magistrates under Ordinance 13 of 1872, Section 1, as amended by Ordinance 17 of 1876, Section 3, disagree, they have no right to discharge the accused: their proper course is to refrain from giving their verdict and to let the case go before other two Magistrates for trial *de novo*.

The abovenamed Vanjoor charged the abovenamed Kaliapah Chetty with cheating, under Section 420 of the Penal Code. The case originally was down in the list of J. W. Norton Kyshe, Esquire, Acting Second Magistrate, but by him was ordered to be tried before a Court of two Magistrates. The case was thereafter accordingly heard by W. Egerton, Esquire and R. C. Jacobson, Esquire, sitting as a Court of two Magistrates under Ordinance 13 of 1872, Section 1 *et. seq.* as amended by Ordinance 17 of 1876, Section 3. It was [*inter aliâ*] contended before them by Counsel for the accused that the case was one for a civil tribunal. On the conclusion of the evidence, the two Magistrates intimated that they were agreed that the evidence if believed disclosed an offence, and the case was not merely a civil one; but on the point whether the evidence should be believed they disagreed. Mr. Egerton

being of opinion that the evidence should be believed and the accused convicted, and Mr. Jacobson being of opinion that the contradictions in the evidence rendered it unworthy of belief, and the charge should be dismissed. Having so intimated their respective views, a discussion arose as to what should under the circumstances be the result. Counsel for the prosecution contending, that the accused should be committed for trial at the Assizes or the case be referred to two other Magistrates to hear and determine. Counsel for the defence contending, that as the Court was divided as to the guilt of the accused, he was entitled to the benefit of the doubt and should be discharged. The two Magistrates considered that according to the ruling of this Court at the Assizes in *Regina* v. *Lee Kan & Ors.* [antè p. 560], they, as a Court of two Magistrates, had no power to commit the accused to the Assizes; they also declined to allow the case to go before two other Magistrates on the ground that the case was determined and could not be carried away further; they therefore ordered the accused to be discharged. They also intimated that for the same reasons, no fresh summons would be granted against him. The prosecutor appealed, and the appeal now came on for hearing.

G. S. H. *Gottlieb*, for the appellant contended, that the Magistrates had not determined the charge, and were wrong in thinking the case was determined and so could not be re-heard before two other Magistrates. They were also wrong in declining to permit a fresh summons to be issued.

D. *Logan*, [*Solicitor-General*] for the Magistrates, admitted he could not support their order.

Pellereau J. said he was of opinion that the Magistrates were wrong to have discharged the accused. His learned brother *Goldney* and himself in a recent case [*a.*] had come to the conclusion that when two Magistrates sitting as a Court of two Magistrates differed in opinion they had no power to commit the accused to the Assizes. The reasoning of GOLDNEY, J. was, that the Criminal Procedure Ordinance 6 of 1873, Section 2, contemplated only a committal by a single Magistrate or Justice of the Peace, and that two Magistrates sitting under Ordinance 13 of 1872 as amended by Ordinance 17 of 1876, had no such power given to them, and however absurd it might be that what could be done by one Magistrate could not be done by two, that, in his opinion, was the effect of the legislation on the subject. The reasoning that had led himself [PELLEREAU, J.] to the same conclusion was, that the accused when before a Court of two Magistrates was on his trial—he was put on his defence, and after he had so done, by cross-examining the prosecutor and his witnesses, and making his statement and calling his own witnesses—all without having had an option or even a caution—to treat the trial as a preliminary enquiry and commit him to the Assizes, would not be fair to him and might possibly subject him to disadvantages which should not be the case. He still continued of that opinion and thought the Magistrates were right in the present case in refusing to commit

[*a.*] *Regina* v. *Lee Kan & Ors.*, antè p. 560.

PELLEREAU, J. 1890.

VANJOOR v. KALIAPAH CHETTY.

the accused to the Assizes. What then were they to do when they differed? Clearly to refrain from giving their verdict, and to discharge themselves from so doing [as this Court does with a Jury that cannot agree, for the two Magistrates are both Judge and Jury in the case before them] and allow the case to go before some other two Magistrates to be heard *de novo* and determined. The charge in this case was clearly not decided, the case was not determined and the order of the Magistrates must be set aside and the accused tried by a Court of other two Magistrates.

Order accordingly.

In the goods of DUMSHEAH.

PENANG.

PELLEREAU, J. 1890.

May 5.

The Court has power notwithstanding Section 493 of the Civil Procedure Ordinance 1878, to dispense with security for the due administration of an estate; and in a case of special circumstances will exercise the power, and exempt the administrator from furnishing security.

The petitioner Basawah was the father of the abovenamed deceased. In 1874 the petitioner in consideration of natural love and affection, conveyed certain lands in Penang Road [which he was possessed of in fee] to himself for life, and after his death to his wife Letchmee for life with remainder to his sons Bapoo and the abovenamed Dumsheah, in fee. The said Letchmee, Bapoo, and Dumsheah thereafter died intestate leaving the petitioner their only next-of-kin. Bapoo predeceased the said Dumsheah, and Dumsheah the said Letchmee. Both Bapoo and Dumsheah died infants of the age of thirteen years and twelve years respectively; unmarried. The petitioner by these events was entitled to the said land for life under the aforesaid conveyance, and absolutely as sole next-of-kin of Dumsheah, the survivor of the joint tenants in remainder, in fee, as aforesaid. He had lately contracted with a third party for the sale of the land to him, but Counsel had advised that he could not make a good title without taking out letters of administration to the estate of the said Dumsheah. The petitioner accordingly applied for letters and the same were granted him by *Pellereau*, J. on 28th April, 1890.

Ross, [*Scott* with him] for the petitioner now moved that such letters might be issued to the petitioner without his being required to give the usual or any security. He read an affidavit by the petitioner setting forth the above facts, and further stating that the deceased left no debts, and his funeral expenses had long since been paid by him, and he alone was now absolutely entitled to the estate of the deceased. He referred to Section 493 of the Civil Procedure Ordinance, 1878, and to *The goods of* Sandilands, *deceased* [September, 1889, unreported] where *Wood*, J. had dispensed with security as the administrator was only the attorney of the next-of-kin and had merely to remit the money to Scotland.

Pellereau, J. doubted whether the Court had power to dispense with the security, and whether Section 493 was not

PEL-LEREAU, J. 1890.

In the goods of DUMSHEAH.

imperative. He however directed the Registrar to search for and produce the papers and Registrar's minutes in the case cited, as well as any other precedent on the point. He said in the interval he would consult *Wood*, J. on the subject.

3rd June, 1890. *Ross*, now renewed his application and the Registrar produced the Cause papers and Registrar's minutes in *The Goods of* Sandilands, from which it appeared that security had in that case been dispensed with.

Pellereau, J. [after further consulting *Wood*, J.] said that both his learned brother and himself had come to the conclusion that the Court had the power to dispense with security in special cases. That Section 493 obviously required security where the administrator had to account to others, other than himself, either as being creditors or next-of-kin. In the present case the property had originally been purchased by the petitioner himself and by him had been conveyed to his wife and children who had all died, and he was now according to law absolutely entitled to the whole estate. There were also no creditors and nobody to whom he was to account. There was no necessity for security for an accounting to himself. Under the special circumstances of the case, Basawah would therefore be exempted from furnishing security.

Order accordingly.

NAGORE *v.* NAGORE GUNNY.
In re SAVAVATHY CHETTY.

PENANG.

PEL-LEREAU, J. 1890.

May 20.

A cargo boat or tongkang is a "vessel" within Section 5 of the Bills of Sale Ordinance 12 of 1886, and therefore a Bill of Sale by way of mortgage thereof, is not within its provisions.

Gapp v. *Bond*, 19 L. R. Q. B. 200, followed.

The plaintiff having recovered judgment against the defendant, seized two tongkangs or cargo boats belonging to the defendant, and which were registered in his name under the Harbour Ordinance 8 of 1872. The claimant, Savavathy Chetty, held a Bill of Sale by way of mortgage over these tongkangs, such bill of sale being made in 1888, and in the form of bills of sale under the Bills of Sale Ordinance 12 of 1886. This bill of sale was registered in 1888, under the Bills of Sale Ordinance 12 of 1886, but was not re-registered—the consideration for it also was for a pre-existing debt. The claimant having put in a claim to the boats seized, the Sheriff took out an Interpleader Summons which now came on for hearing.

G. S. H. *Gottlieb*, for the Execution-creditor [plaintiff] contended, that the bill of sale was void [*inter alia*] because it was made for a pre-existing debt, Section 8, Ordinance 12 of 1886; and also because it had not been re-registered, Section 14.

Van Someren, for the claimant contended, that the bill of sale was not within the Bills of Sale Ordinance 12 of 1886, as the subject-matter thereof, these tongkangs or cargo boats, were not "personal chattels" within the meaning of the Ordinance, but

PELLEREAU, J. 1890.

NAGORE v. NAGORE GUNNY. *In re* SAVAVATHY CHETTY.

were "ships or vessels" expressly exempted by Section 5. He referred to *Meyappah Chetty* v. *Hussan Hussain* [May, 1874, *Ford*, J. not reported]. *The Union Bank* v. *Lenanton*, 3 L. R. C. P. Div. 243 and *Gapp* v. *Bond*, 19 L. R. Q. B. Div. 200.

Gottlieb, in reply [had time granted him to consider this point, and on the next day the case came on] contended, that *Gapp* v. *Bond* had no application to this Colony, as by the General Clauses Ordinance 1 of 1888, Section 3, Clause 27, a "ship" was defined—and the definition excluded the idea of a tongkang though it was not always exclusively propelled by oars. A "ship" was there defined as being connected with "navigation" —and "navigation" is defined in Webster's Dictionary as "the art of conducting a ship at sea by geometrical science or astronomical observations." A tongkang or cargo boat was not so navigated. *Gapp* v. *Bond* only decided that a "dumb barge" was a "vessel"—it also decided that a "Thames Wherry" was not a "vessel." It was no authority that a "tongkang" was one.

Pellereau, J. said that whether or not a tongkang was a "ship" within Section 5 of the Bills of Sale Ordinance 12 of 1886, was immaterial, as it was clearly a "vessel" within that section. *Gapp* v. *Bond* shewed there was a difference between the two words, and to his mind was decisive of the point that a tongkang was not within the provisions of the Bills of Sale Ordinance. The bill of sale was therefore good, and judgment must be entered up for the claimant with costs.

Judgment for claimant, with costs.

MEYER *v.* COLDENBURG & ANOR.

SINGAPORE.

O'MALLEY, C. J. 1890.

June 3.

A clause in an agreement requiring that disputes thereunder should be referred to arbitration, does not prevent any of the parties thereto suing in this Court thereon. In order to oust the jurisdiction of this Court there must be words expressly excluding such jurisdiction.

Section 11 of the Common Law Procedure Act, 1854, was adopted in this Colony by Section 3 of the Civil Procedure Ordinance 4 of 1878, and is still in force here—but the provisions of that section must be complied with before a defendant can claim a right to go to arbitration under an agreement as aforesaid.

Suit for partnership accounts of a business carried on by the parties under the name of the Johore Distillery Company, for dissolution of the partnership and a receiver. Defence that by the parnership agreement all disputes thereunder were to be referred to arbitration, and that therefore this Court could not entertain this suit.

Khory, for defendants contended, that the clause ousted the jurisdiction of this Court, and the action should be dismissed. He referred to *Law* v. *Garrell*, 8 Ch. Div. L. R. 26; *Gillett* v. *Thornton*, 19 L. R. Eq. 599; *Plews* v. *Baker*, 16 L. R. Eq. 564; *Willesford* v. *Watson*, 14 L. R. Eq. 579; *Randegger* v. *Holmes*, 1 C. P. L. R. 679, and The Common Law Procedure Act, 1854, Section 11.

O'MALLEY, C.J. 1890.

MEYER v. COLDENBURG & ANOR.

Napier, for the plaintiff contended, that no such agreement would oust the jurisdiction, unless there were express words to that effect. By Section 11 of the Common Law Procedure Act, 1854, the right to go to arbitration could be claimed if its provisions were complied with, but that section had been repealed in England, and did not apply to this Colony.

O'Malley, C.J. The general principle of law being as stated by Mr. Napier, it is for the defendant to shew that there is some special provision to take the case out of the general rule. The provisions of Section 11 of the Common Law Procedure Act were adopted by Section 3 of the Civil Procedure Ordinance and remain in force here until repealed. The repeal in England does not affect us. That being so, the section lays down that the application shall be made in a particular manner within a particular time, viz., after appearance, but before plea and answer, and only in this manner can the parties avail themselves of it. The defendants did so apply the provision, but the order made on that application was subsequently set aside at the defendants' request on the ground that there was a misunderstanding as to its terms. The defendants renewed their application, but have not succeeded in getting the order, and it appears to me that the provisions of the section will not avail them further, and the action must proceed.

Defence over-ruled.

REGINA *v.* CHONG AH PYE & ANOR.

SINGAPORE.

O'MALLEY, C.J. 1890.

June 4.

A "*Weisang* lottery" is a "lottery" within the meaning of the Common Gaming House Ordinance 5 of 1888.

The evidence of the Informer is admissible in a charge under the above Ordinance, and he is not an "accomplice" within the meaning of the rule of law that requires the evidence of an accomplice to be corroborated.

Evidence that the prisoners sold lottery tickets is not evidence of their "*assisting* in the management of a public lottery," and in a charge for so *assisting*, evidence of such sale merely ought to be rejected.

The mere fact that quantities of lottery tickets are found in the prisoners' house or in their possession, is not sufficient evidence that they were "assisting or managing a public lottery." The presumption raised by Section 14 from the mere fact of finding of the tickets in the prisoners' possession, or house occupied by them, only applies to a charge under Section 5, Clause [*a*]

This presumption however, is an arbitrary presumption, and the smallest particle of evidence is sufficient to put the prosecution to prove their case.

On the conviction being quashed, the Crown was ordered to pay the appellants' costs of the appeal.

The effect of Clauses 2 and 8 of Section 34 of the Appeals Ordinance, 1879, is to make it the duty of this Court, on quashing a conviction, to consider whether on the facts, there is not a proper charge on which the accused might not be charged, and if there is, to direct that he be tried on such proper charge.

The appellants had been convicted by H. H. Hudson, Esquire, Acting Magistrate, for "being found assisting in the management of a public lottery called a "*Weisang* lottery," under the Common Gaming House Ordinance 5 of 1888, Section 5, Clause [*c.*] and fined $250 each. A "Weisang lottery" was a lottery in which the players stake upon candidates in a public competitive examination held in China. The result was determined by the

O'MALLEY, C. J. 1890.

REGINA v. CHONG AH PYE & ANOR.

competitive examination, but the prizes in the lottery depend upon the number of subscribers who select one or more names of the candidates. The defence called evidence to shew that the house in question was a lodging-house, and the room in which the tickets were found had been occupied by lodgers.

The following are the sections bearing on the case:—

3. ....

"Lottery" includes any game method or devise whereby money or money's worth is distributed or allotted in any manner depending upon or to be determined by chance or lot whether the same be held drawn exercised or managed within or without the Colony.

5. Whoever—

[*a*] being the owner or occupier or having the use temporarily or otherwise thereof keeps or uses a place as a common gaming house, or

.....

[*c*] has the care or management of or in any manner assists in the management of a place kept or used as a common gaming house or assists in carrying on a public lottery.....shall be punishable with a fine not exceeding three thousand dollars or with imprisonment of either description for a period not exceeding twelve months.

8. [1]—Whoever, either personally or by an agent pays or deposits any money or money's worth to or with any person concerned in the business of a common gaming house as a stake or for in respect of any event or contingency connected with a public lottery or buys a lottery ticket shall be punishable with a fine not exceeding twenty-five dollars.

[2]—A person in whose possession a lottery ticket is found shall be presumed until the contrary be proved to have bought the same.....

14. If any instruments or appliances of gaming are found in any place entered under this Ordinance.....it shall be presumed until the contrary be proved that the place is a common gaming house and that the same is so kept or used by the occupier thereof.

Nanson, for appellants.

Bonser, [*Attorney-General*] for respondent.

Cur. Adv. Vult.

June 5th. *O'Malley*, C.J. The question at issue was whether a Weisang lottery is a game of chance, and precisely bearing upon this point is the case of *Tollett* v. *Thomas*, 6 L. R. Q. B. 521. Lord Chief Justice COCKBURN in that case said, wagering in horse-racing alone was not chance, but judgment; but if other elements of pure chance were brought in, it became punishable. In that case alone arose the question whether a "candidate race" is a game of chance, but the learned Judge there gave no decision on it. Whether a "candidate race" is an event which may be regarded as chance or not I do not decide. In this case, the choice of the name of a candidate was not chance, but it was beyond the control of the purchaser whether his nominee passed the examination on which the stake was laid—but there was here an additional fact, and that was that there was uncertainty as to the amount of the prizes which depended upon the number of subscribers who select one or more names that made the distribution of prizes a matter of chance, strictly within the definition of "chance" as it was laid down and adopted in the case cited. This lottery is clearly a "device by which money was distributable in a manner

depending on chance," and I think that a "Weisang lottery," as it is proved to have been carried on in this case, is a lottery within the Common Gaming House Ordinance, 1888.

The next point is as to the sufficiency of evidence, and I understand that the contention of the appellant is two-fold. First, that the evidence was legally insufficient, that is to say, it is evidence on which if there were no more, the case ought to have been withdrawn from the Jury so to speak, and he contends further, that under this Appeal Ordinance it is open to him to say, that upon a full review of the evidence, justice will not be done in this case unless the conviction is quashed. That I understand to be the second contention. Well, as to the legal point, it is contented, first, that the evidence of the informer [which is essential for the proof of a case with this charge] that the evidence of the informer ought to be rejected by reason of that informer's character; that he is an accomplice, and that the evidence is to be objected to as a matter of law. It appears to me that in the first place, that he is not an accomplice for the purpose of any such rule; his position is that he is competent to prove the offence; he is not taking part in the same offence, though he is undoubtedly in one sense an accomplice. But I do not think that he is an "accomplice" within the rule. And his evidence is no more to be rejected than that of a grantee—*Finch* v. *Finch*, 23 Ch. Div. L. R. 271. I think there is no doubt that the Court is here sitting as it were upon the appeal, and to do justice in the case from the evidence before it, sitting here as Jury,—and therefore it might be held that as a matter of law, the Magistrate is not absolutely bound to withdraw such evidence from the Jury unless it is corroborated. Yet it is a case in which the Court will act in itself for the purpose as if it was sitting as a Jury. Well, then it is said, that even if you admit the evidence of the informer, you should reject it on the ground that it is uncorroborated; that is—the evidence with regard to the purchase of the ticket by the informer, and the sale of the ticket to the informer,—ought to be rejected as irrelevant to the charge on which the defendant has been tried. Now, one has to look and see what that charge was. It is carelessly and irregularly framed, and as I think with reference to a Statute of this sort, it certainly ought not to be. The charge is, that the prisoner was found assisting in the management of a Weisang lottery. "He was found assisting in the management of a Weisang lottery" peculiar words I think, and the important words are the word *found* and the word *management*. Now, that is not a charge strictly speaking in the terms of the Ordinance. The Ordinance provides two charges under the section under which this charge purports to be laid, that is Section 5, para. *c*. He might have been charged with assisting in the management of a place, kept or used for the purpose of a public lottery; or he might have been charged with a different offence, as with assisting in the carrying of a public lottery. He is not charged with either of these, he is charged with something or other, not either precisely one or the other, and we have to determine under which of these charges we have to decide. You have the word *found* and the word *management*.

O'MALLEY, C. J. 1890.

REGINA v. CHONG AH PYE & ANOR.

I think *found* involves the idea of a place and the word *management* is suitable for the first of these charges and not for the second, and that the charge supposed to be believed in, is assisting in the management of a place kept for the purpose of a public lottery. If that is so, it appears to me that the evidence is not relevant to this charge. There is nothing in the evidence to shew that the sale of that lottery ticket took place on the premises which are in question now, nor is there anything to shew that the tickets that were sold, were tickets belonging to this lottery, with reference to the keeping of which the man was charged, and to which, the papers that were found in the rooms upstairs and downstairs, related.

From the evidence of the informer there is no place to indicate where the Weisang lottery is held. It is very likely that all these lotteries are the same; and that being so, it appears to me that it is not relevant to this charge. It might be sufficient to support a charge of selling lottery tickets, but that is quite distinct from assisting in the management of a place kept or used for the purpose of a public lottery. The one is punishable with a fine of $25, whereas this charge is punishable with a fine of $3,000 or twelve months' imprisonment. I think that selling tickets might have been material to establish another charge, I do not think it is material to establish this charge. I do not think it affords reasonable presumption that the man was managing a house used for the purpose of a lottery, and I do not think it is relevant; therefore I think it should be rejected. Therefore if you reject this, it remains that in this man's premises there were found these two or three packets of lottery papers, books, and tickets. Well, the prosecution must have some evidence to support the inference that you are asked to draw from that; you have merely these papers found upon the premises. Now, can you upon that evidence get over the gap? Can you go from mere fact that these papers are found in quantities on the premises and in his possession,—that is presumption of fact—can you get from that, the inference, or the conclusion, that he is engaged in the managing of a house for the purpose of carrying on a public lottery. Now, it seems to me you ought to have further evidence behind that. Therefore, as far as that charge is being tried, it seems to me there is no evidence to support the charge, and the conviction should be quashed. Then, I understand the argument for the prosecution is, that under Sub-section 6 of Section 34 of the Appeals Ordinance 12 of 1879, if the Court should be satisfied that the prisoner ought to have been convicted upon the evidence on some other charge, the duty of the Court would be to find to that effect. Reference was made to Section 14 of the Gaming Ordinance, and it was said, that Section 14 will carry you over the difficulty. The Ordinance is one which has provided for a good many presumptions in certain cases, and it is said, here is presumption which will do what all these presumptions appear intended to do. That is to say, if you have not got the proof, you have at least the presumption to fall back upon. You have instruments of lottery found on these premises

occupied by the defendant, and then under Section 14 it is to be presumed, until the contrary is proved, that these premises are kept by the occupier for the purpose of a public lottery, and therefore although he may not be convicted under Section 5, Clause [*c*] he may be under Clause [*a*] You cannot prove your case on the one charge, because you have no evidence; but you may prove it under another, if you have reasonable presumption. Well, I am prepared to say, that if the defendant had not been called to give evidence, the result might have been different. The Ordinance provides that the defendant may be allowed to be called and give evidence, and in this case he has been called, his evidence has been supported by a number of people. Well, how are you to deal with the evidence provided by the defendant under these circumstances? What sort of evidence must be held sufficient to rebut the purely arbitrary presumption of the law; it is not a presumption of fact, it is absolutely arbitrary presumption. Well, what amount of evidence is sufficient to rebut the different charges? The smallest particle is enough to put the prosecution to prove their case. I think there was ample evidence here, that this presumption was exhausted. I think the evidence of the defendant and his witness is entitled, and ought to receive, full credit, and on that ground, the conviction of the Court below must be quashed—but I shall reserve the question of the effect of Section 34 of the Appeals Ordinance.

Nanson, asked for costs of the appeal.

Bonser, [*Attorney-General*] said it never had been done in this Court. He did not know why, but such costs were never given.

O'Malley, C.J. said, he saw no reason why costs should be refused. The appellants therefore would get all their costs of the appeal.

Conviction quashed with costs.

June 20th. *O'Malley*, C.J. I have carefully considered the evidence in this case, and as to the result, I think there is not evidence to support the conviction as it stands and that it must be annulled. But under Section 34 of the Appeals Ordinance I think I am bound thereupon to consider a further question. Under Sub-section 8 if I considered that the facts of the case were such that no valid charge could be preferred against the person accused in respect of the facts proved, my duty would be to order the accused to be discharged. But under Sub-section 2 if I am of opinion that there is a proper charge which could be preferred on the facts proved, I am to direct the accused to be tried again on such charge. I think the effect of these two sub-sections is to invest the Court with a discretion analogous to that given to a Magistrate, who, after hearing evidence for the prosecution and defence, has to consider whether there is sufficient ground for committing an accused person to take his trial before the Supreme Court, and if so, on what charge? Without in any way pre-judging the result, which will depend upon the evidence to be given on the trial, I am bound to say, that I think that there are grounds for preferring a charge of offering tickets for sale, and to direct that the defendant be tried on that charge.

SCULLY *v.* SCULLY.

SINGAPORE.

O'MALLEY, C. J. 1890.

June 9.

This Court possesses no divorce jurisdiction, notwithstanding Sections 10 and 13 of the Courts Ordinance 3 of 1878. [*a.*]

This was a petition for divorce by a husband against a wife. The plaintiff now moved that citation upon a co-respondent might be dispensed with, and this raised the question of the jurisdiction of this Court in divorce matters.

Sections 10 and 13 of the Courts Ordinance, 1878, are as follows :—

10. "The Supreme Court shall have such jurisdiction and authority as Her Majesty's High Court of Justice in England, and the several Judges thereof, respectively have and may lawfully exercise in England, in all Civil and Criminal actions and suits other than Admiralty actions and suits; and the said Court shall also have and exercise jurisdiction in all matters concerning the revenue and in the control of all inferior Courts and jurisdictions, subject in all the above cases to the laws of the Colony.

13. The Supreme Court shall have and exercise the jurisdiction vested under the Royal Letters Patent of the 10th of August, 1855, in the Court of Judicature of Prince of Wales' Island, Singapore and Malacca, in Matrimonial cases, so far as the several religions, manners, and customs of the inhabitants of the Colony will admit."

Shearwood, for the plaintiff moved in accordance with the Rules of 1886 of the Divorce Division of the High Court of Justice in England, and contended that by Section 10 of the Courts Ordinance 3 of 1878, this Court had jurisdiction in divorce cases. By that section this Court was to exercise jurisdiction in all civil suits as the Courts at home with the one exception of Admiralty suits. The Courts Ordinance was subsequent to the Judicature Acts 1873 and 1875 in England. By Section 16 of the former Act the High Court at home had divorce jurisdiction, and this Court therefore had the like jurisdiction under Section 10. Section 13 of the Courts Ordinance was no obstacle. The jurisdiction by that section was the matrimonial jurisdiction under the Charter of 1855—that Charter was before the Divorce and Probate Acts of 1857, so the jurisdiction given by the Charter was the old jurisdiction of the Spiritual Courts which had however been abolished so far back as 1857. It could not be intended to introduce this obsolete jurisdiction here. If there was any contradiction between the two sections, then Section 10 which was a remedial section, should be construed liberally—*Hardcastle on Statutes*, 144. It could never have been intended that people resident here should not be able to get a divorce, and must seek elsewhere for it.

Cur. Adv. Vult.

June 20th. *O'Malley*, C.J. Upon careful consideration of the law governing in this Colony, and of the Statutory and Charter provisions defining the jurisdiction of the Court, I have

[*a.*] *Vide* Judgment of *Pellereau*, J. delivered in April, 1887, in *Tan Seng Qui* v. *Palmer*, antè p. 257.—J.W.N.K.

come to the conclusion, that this Court has no jurisdiction to make any order in proceedings for divorce. The jurisdiction of this Court is defined by Section 10 of the Courts Ordinance 3 of 1878.

"The Supreme Court shall have such jurisdiction and authority as Her Majesty's High Court of Justice in England and the several Judges thereof, respectively have and may lawfully exercise in England, in all Civil and Criminal actions and suits other than Admiralty actions and suits; and the said Court shall also have and exercise jurisdiction in all matters concerning the revenue and in the control of all inferior Courts and jurisdictions subject in all the above cases to the laws of the Colony."

Now, what is the meaning of these words "subject in all the above cases to the laws of the Colony"? What were the laws of the Colony in 1878? To ascertain this, I rely on the elaborate judgment of Sir BENSON MAXWELL in the case of *Regina* v. *Willans*, 3 Kyshe, 16. The law of England as it stood at the date of the Charter of 1826 was introduced by that Charter—See 3 *Kyshe*, p. 37. Then came the Charter of 1855. Whether that re-introduced English law up to that date, and made the Common and Statute law of England as at that date, the law of this Colony, was a point on which Sir B. MAXWELL came to no conclusion, and it is one which it is not necessary to decide now. But the effect was that in 1878 the law of this Colony was the law of England as it had been in 1826, or the law of England as it had been in 1855 modified in either case by local legislation, and other special legislation for the Colony, subsequent in one case to 1826, and the other to 1855. The effect of Section 10 of Ordinance 3 of 1878 is that the Court here has such jurisdiction as the High Court of Justice in England has, and may lawfully exercise in actions and suits, subject to the law of England in 1826 or in 1855 as modified by local and other special legislation, applicable to the Colony subsequent to one or the other of these dates. The jurisdiction of the High Court of Justice in England, did, in 1878, include the jurisdiction of the Divorce Court, and therefore Section 10 of Ordinance 3 of 1878 gave to this Court such jurisdiction and authority as the Divorce Court in England had, and might lawfully exercise in 1878, but, subject to the laws of this Colony, *i e.*, subject to what having been the law of England in 1826 or 1855 had been modified by local and other special legislation in or for this Colony between one or other of those dates and 1878. But neither in 1826 nor in 1855 was a right of divorce known to the English law, nor between either of those dates and 1878 was it introduced into the Colony by local or special legislation, so that in 1878 it formed no part of the laws of the Colony. If then the Court exercised divorce jurisdiction as in England, it would be administering rights and remedies not recognised by the laws of the Colony, and would not be exercising the jurisdiction conferred upon it "subject to the laws of the Colony;" such is my view of the construction of Section 10 without reference to Section 13. But I think that view is confirmed by the terms of Section 13. Section 13 expressly provides that the Court shall have the jurisdiction in matrimonial cases which was given by the

O'MALLEY, C. J. 1890.

SCULLY v. SCULLY.

Charter of 1855, and turning to that Charter we find that that is the jurisdiction of the Ecclesiastical Court in England in 1855 subject to certain limitation with reference to local religions and customs. It explicitly makes that provision, for the matrimonial jurisdiction of the Court, which upon my construction, is impliedly contained in the language of Section 10. With regard to Probate Jurisdiction a different course is followed and for an obvious reason. The Probate Act, unlike the Divorce Act, created no new law, it merely transferred the administration of existing law from one tribunal to another. The law it administered was the law of England in 1826 and 1855, and the law also of this Colony in 1878. The Probate Jurisdiction of the High Court is comprised in what is given in general terms by Section 10 of Ordinance 3 of 1878 to this Court, and is given in explicit terms by Section 14.

Motion refused.

FOX *v.* TAN HENG WEE.

SINGAPORE.

O'MALLEY, C.J. WOOD & PELLEREAU. } J.J. 1890.

June 11.

An immigrant whose passage-money has been paid to the shipowner by another person, is not an immigrant "whose passage-money has not been paid" within Section 14 of the Chinese Immigration Ordinance 4 of 1880, and a person cannot under such circumstances, be convicted under that section for inducing such an immigrant to go elsewhere than the depôt in which the Protector has placed him.

The prisoner, Tan Heng Wee, was prosecuted by the Protector of Chinese for an offence against Section 14 of the Chinese Immigration Ordinance 4 of 1880, for inducing eighteen Chinese immigrants whose passage-money had not been paid, to go to a place other than a depôt established under the Ordinance. The case was first heard before H. Hudson, Esquire, Acting Magistrate, when the defence set up was, that the passage-money though not paid to the shipowner by the immigrants themselves had nevertheless been paid for them by the prisoner to the shipowner, and so the case did not fall within the section. The Magistrate took this view, but at the request of the Protectorate Officer, found the prisoner guilty, and stated a case for the opinion of the Supreme Court on the point. The appeal, or stated case, subsequently came on for hearing before *Wood*, Acting C.J. who was of opinion that the case was not within the section, but at the request of the Attorney-General, reserved the point for the Court of Appeal. The point now came on for argument before this Court. Sections 11 and 14 of the Ordinance are as follows:—

11. "Every immigrant whose passage-money shall not have been paid before or on his disembarkation shall, after such examination as aforesaid be detained under the care of the Protector of Chinese in one of the depôts authorised under the Ordinance, until arrangements have been made for the payment of his passage-money.....

14. Any person or persons who shall induce or attempt to induce any immigrant whose passage-money shall not have been paid to go to any place other than a depôt established under this Ordinance; or who shall entice or

attempt to entice away from any depôt any immigrant sent there by an Officer of the Protectorate shall be liable to a penalty not exceeding $20 for each immigrant."

O'MALLEY, C. J. WOOD & PEL-LEREAU. } J.J. 1890.

FOX v. TAN HENG WEE.

Bonser, [*Attorney-General*] for the Crown, and Protectorate, contended that the object of the Ordinance was to prevent tampering with the coolies or immigrants on arrival, and before the Protectorate had taken them over. The question at issue was whether by Sections 10 to 14 both inclusive, an immigrant had to pay his own passage-money before he might go free, or anybody could pay it for him, and so have a hold on him. The object of the Ordinance was not to protect shipowners from losing their money, but to prevent coolies from getting into difficulties and being trapped. Section 14 must be construed according to this evident intention of the Ordinance, and must be read as if the words "by himself" were in it, between the words "paid" and "to go," so that payment of the passage-money by any other person should not release the immigrant and prevent the Protectorate protecting him. If this were not done the spirit of the law to prevent trapping and enslaving of these coolies would be lost. This Ordinance was for their protection and was meant to prevent anybody, the shipowner or anybody else having a claim on them. In all these cases the coolies were brought down from China by brokers who always paid the shipowner the passage for the men—so that if the decision of the Magistrate was correct, it would be impossible to carry out the Ordinance.

Napier, for the prisoner contended, that the sections should be construed strictly. *Proctor* v. *Mainwaring*, 3 B. & Ald. 145; *Maxwell on Statutes* [2nd Ed.] p. 320-21. There was no offence proved, and the conviction should be quashed.

The Court [*O'Malley*, C.J., *Wood* and *Pellereau*, J.J.] unanimously held that the section was in restraint of the liberty of the subject—though for the protection of Chinese immigrants—and ought to be construed strictly. The language of the section "whose passage-money shall not have been paid" was in no way ambiguous and effect must be given to it. The evidence in this case shewed the passage-money had been paid, and no offence under the section was therefore disclosed.

Conviction quashed.

REGINA *v.* PANTALANI.

SINGAPORE.

The Attorney-General of this Colony like the Attorney-General of England, has the right of reply, even when no witnesses are called for the defence.

Query. Whether the right can be claimed by the Solicitor-General or private Counsel prosecuting for the Crown.

O'MALLEY, C J. WOOD & PEL-LEREAU. } J.J. 1890.

June 18.

The prisoner was charged with culpable homicide not amounting to murder, and for a rash act, and was tried at the November Assizes before *Wood*, Acting C.J. On the close of the case for the prosecution, Counsel for defence addressed the Jury and closed his case calling no witnesse The Attorney-General

O'MALLEY, C.J. WOOD & PELLEREAU, J.J. 1890.

REGINA v. PANTALANI.

who was prosecuting in person, rose to reply for the Crown when Counsel for the defence objected to his so doing on the ground that he had called no evidence, and the Attorney-General of England alone was entitled to reply under such circumstances. The learned Judge reserved the point. The Attorney-General replied, and the Jury found the prisoner guilty on the second charge. The point reserved now came on for argument.

Napier, for the prisoner contended, that the right of reply under the circumstances belonged to the Attorney-General of England alone. The Attorney-General of the County Palatine of Lancaster had no such right—*Regina* v. *Christie*, 1 Fos. & Fin. 75—and the Attorney-General of this Colony was in no better position than he. The point was one of practice merely, but there were *dicta* of Judges at home to the effect that the Attorney-General of England had to appear in person to enjoy the right. *Regina* v. *Beckwith*, 7 Cox C. C. 505, per BYLES, J., *Regina* v. *Christie*, suprà, per MARTIN, B; *Regina* v. *Taylor*, 1 Fos. & Fin. 535, per BYLES, J; *Regina* v. *Burns*, 16 Cox C. C. 195 per DAY & WILLS, J.J.—See also 1 *Taylor on Evid.* § 390, p. 664 [8th Ed.].

Bonser, [*Attorney-General*] contended, that it was the prerogative of his office to possess the right of reply.

The Court [*O'Malley*, C.J., *Wood* and *Pellereau*, J.J.] held, the right of reply was a prerogative of the Crown from of old and was exerciseable by the Attorney-General—whether it could be claimed by the Solicitor-General or by private Counsel prosecuting for the Crown they did not at present intend to decide.

THUM CHEE *v.* HO AH FAH.

PENANG. WOOD, J. 1890. June 24.

On a rule being made absolute under Section 20 of the Appeals Ordinance 12 of 1879, for a Magistrate to state a case, the Court awarded costs *against the Magistrate*, there being no circumstances for departing from the ordinary rule that "costs follow the event."

When a case has been stated under Section 18, the only parties to the appeal are the appellant and respondent; the committing Magistrate has therefore no *locus standi* to appear and support his conviction [*a*.]

A Magistrate has no power on conviction of an employer for an assault on his servant to order the contract for service to be cancelled.

The Court being satisfied that an excessive sentence imposed by a Magistrate had caused a failure of justice, reduced the sentence, though the sentence was not larger than legally awardable to the offence.

The appellant Thum Chee had been convicted by W. Egerton, Esquire, Magistrate, Province Wellesley, for assaulting the respondent Ho Ah Fah on the 25th and 27th May, 1890, and was sentenced to rigorous imprisonment for a term of two months and to a fine of $75, and the contract for service by the respondent to the appellant was ordered to be cancelled. Besides the evidence of the prosecutor as to an assault on 25th, other evidence was admitted to shew he had other wounds on his person which he did not allege the accused had inflicted on him, and evidence was

[*a*.] See *Punghulu Allang* v. *Him*, Volume 3 of these Reports, 144. But see also *Regina* v. *Wee Sim Tian & Ors.*, antè, page 238.

also adduced of an assault by the accused on another servant in his employ named Lim Ban, who in consequence of the assault by the accused on him on the 27th May had gone to the kitchen, taken a knife and cut his own throat, whereupon the Police entered and took away both prosecutor and Lim Ban from the house of the accused. Counsel on behalf of Thum Chee served the Magistrate with notice of appeal, but the Magistrate refused to state a case holding that the application was "frivolous"—Section 18, Clause III. Ordinance 12 of 1879.

Anthony, for Thum Chee now moved under Section 19 of the Appeals Ordinance 12 of 1879 for a rule calling on the Magistrate to shew cause why he should not state a case for the consideration of this Court.

The Magistrate appeared in person and shewed cause in the first instance, and contended that the objection to the evidence went merely in mitigation of sentence, and that as the accused [the master] had ill-treated his servant [the prosecutor], the prosecutor was not bound further to serve him, and the contract was accordingly cancelled.

Anthony, contended that evidence as to the assault on Lim Ban was inadmissible and operated on the mind of the Magistrate prejudicially to the accused and led to the excessive sentence imposed—also the Magistrate had no power to cancel the contract.

Wood, J. held that neither objection was "frivolous" and made the rule absolute.

Anthony then asked for costs *against the Magistrate* under Section 20 of the Ordinance.

The Magistrate submitted the Court would not order him to pay the costs as the accused had not stated his objections in his notice of appeal.

Wood, J. said, the accused was within his strict legal rights, and he saw no reason for departing from the rule that costs follow the event.

Rule absolute with costs against the Magistrate.

Anthony, hereupon waived his right to costs.

July 1st. The case now came on by way of appeal.

Anthony, for appellant contended, there had been a failure of justice because there was no legal evidence to justify so severe a sentence [Section 33]. Much evidence had been adduced which was not legal evidence. The conviction was for assaults on the 25th and 27th May—the evidence was only as to the 25th. The prosecutor spoke of rattan cuts on his legs, arms, and back inflicted on 25th. The Apothecary spoke to these and several other wounds on other parts of his body. The interpreter spoke of two marks on forehead, a blue-eye and a mark on the breast. The Magistrate in convicting for two assaults instead of one shewed his mind was influenced by the impressions and wounds on the man's body and not by the proof. He must also have been influenced by the alleged assault on the other man Lim Ban on the 27th. The other wounds on the prosecutor might have been

WOOD, J. 1890.

THUM CHEE v. HO AH FAH.

the result of assaults by other persons—they were not the wounds spoken by prosecutor or caused by the accused. The sentence should be reduced. The Magistrate had no power to cancel the contract and this portion of his order was clearly bad.

The Magistrate appeared to support his conviction.

Anthony objected that on an appeal the Magistrate was not a party and had no *locus standi*. The only parties to an appeal were the appellant and respondent under Sections 18, 21, 25, and 29 of the Ordinance. *Punghulu Allang* v. *Him*, 3 Kyshe, 144.

Wood, J. This is now an appeal, and the Magistrate clearly has no *locus standi* to appear and support his judgment. I have dealt with this matter before in the case cited.

Anthony, hereupon waived his objection.

The Magistrate in support of the conviction contended, the dates in the conviction was an error, and might be corrected by striking out the 27th. The Apothecary spoke in general terms of the marks on the body. A good deal of pressure had to be brought to bear on prosecutor as he was afraid to make any complaint. There was good ground therefore for presuming that the wounds on his person were all inflicted by the accused. Neither these wounds nor the assault on Lim Ban influenced the Magistrate, to increase the sentence. Mr. W. E. Maxwell, as Magistrate, once sentenced an European to rigorous imprisonment for an assault.

Wood, J. There is no proof, but the contrary that the wounds, other than those spoken to by prosecutor, were caused by the appellant. Taking the evidence and in particular that of the prosecutor that he was struck only on the arms, legs, and back, the Magistrate was clearly wrong in concluding without further enquiry that the blows on other parts of the hand and body were inflicted by the accused. The punishment was excessive, and I cannot but come to the conclusion, that there has been a failure of justice. For the assault spoken to by the prosecutor, I think a fine alone would have met the justice of the case, but as the appellant has undergone fifteen days' imprisonment already, I shall remit the extra month and-a-half,—allow the fine to stand—and reverse the order of the Magistrate for the cancellation of the contract which clearly he had no power to make. The conviction will also be amended by striking out "27th."

Order accordingly.

MAHOMED MEERA NACHIAR & ANOR *v.* INCHE KHATIJAH.

PENANG.

WOOD, J. 1890.

June 25.

A testator who died in 1863 having given a life interest in certain lands to his widow, declared that after her death the said land should "go" to his daughter M. to be by her possessed, occupied, and enjoyed, without however any power of alienating the same, "and after her death to go to her issue, who should occupy, possess, and enjoy the same" without however any power of alienation, and in case if she or her issue should die without leaving issue then the land was to go over to the plaintiffs. M. survived the testator, but died intestate without issue. Her administrator thereafter sold the land in fee to the defendant. The plaintiffs thereafter brought this suit to have it declared that M. had only a life interest under the aforesaid Will and her

administrator could convey nothing thereof to the defendant—to have the conveyance cancelled—and the lands declared to belong to the plaintiffs under the clause of the gift-over on failure of issue.

Held, that on the true construction of the whole clause, M. took an estate tail *eo instanti* the testator died; that under Act XX. of 1837 the lands and estate tail devolved on M. as personalty and as there could be no estate tail in personalty, M. took an absolute interest and the conveyance of the fee to the defendant by the administratrix of M. was good.

Held further, that it was immaterial that M. died without issue, and without having barred the entail, and the gift-over was inoperative.

Roe d Dodson v. *Grew*, 2 Wils. 322, followed.

Kitchee Pakirmah v. *Syed Akil* [Penang Case—unreported] explained and adhered to.

This was a suit to have a construction placed to the Will of a testator who died in 1863, and to have it declared that certain lands therein devised, passed to the plaintiffs and to have a conveyance thereof from the administratrix of one Machee [to whom the lands had been devised in manner hereinafter mentioned] to the defendant, delivered up to be cancelled. The clause of the Will in question is set out at length in the judgment. The facts material to this report were as follows. Aisha, the testator's widow and first tenant for life, went into possession of the lands under the said Will immediately on the testator's death and afterwards died intestate. She had however in her lifetime by Deed Poll, registered No. 5,352, dated 3rd April, 1878, as the executrix of the testator, conveyed by way of gift, the land on the east side of Penang Road, devised by the testator to the said Machee, to her *for life*. Machee died in 1879, intestate and without issue, and the said Aisha as her mother, obtained administration to her estate. As such administratrix she, in 1880, sold and conveyed the lands on the east side of Penang Road, devised to Machee, to one Nagore Peechay *in fee*, who in 1881, sold and conveyed it to the defendant *in fee*. The defendant from that time was in possession of the land. The plaintiff charged that Machee had only an estate *for life* under the aforesaid Will, and as she died without issue, her administratrix could convey nothing, but the lands passed to them under the clause of the gift-over in failure of issue.

Van Someren, for plaintiffs contended, that Machee took only an estate for life, and having died without issue the gift-over took effect, and the plaintiffs were entitled to the land, and the conveyances in question should be cancelled as they were clouds on the plaintiffs' title.

Ross, for defendant contended, that Machee took an estate in fee and relied on *Kitchee Pakirmah and Anor* v. *Syed Akil*, 16th August, 1888 [unreported]; he also contended the gift-over did not pass the lands to the plaintiffs as the word "them" therein did not refer to the devisees named, but to "their respective issues" which was the last antecedent.

Cur. Adv. Vult.

July 16th. *Wood*, J. In this case the plaintiffs are Mahomed Meera Nachiar and the representative of Aminah, devisees under the Will hereinafter in part set forth and the defendant is a pur-

WOOD, J. 1890.

MAHOMED MEERA NACHIAR & ANOR. v. INCHE KHATIJAH.

chaser of land sold by Aisha, the representative of Machee also a devisee under the Will—and the question was whether Machee was entitled to the lands conveyed for life, or absolutely, in which latter case the conveyance is good. The testator Cader Mydin made his Will dated, 11th July, 1863, and died shortly afterwards. By this Will the testator after divers devises and bequests, devises as follows:—

"And as to the rest, residue, and remainder of my estate, consisting of three pieces of lands with brick buildings in this Island, gold and silver ornaments, household furnitures, and ready money, I Will and direct that after my decease the same shall be under the control, custody, and management of my wife in this Island, named Aisha, who is to collect and receive the income, rents, issues and profits arising therefrom, for the support and maintenance of herself, my two daughters named Aminah Mah and Machee and my grand-daughter named Mahomed Meera Nachiar, and also to put the said buildings into proper repairs and paying all Government taxes, but without reserving any right, power, or authority to her, to sell, dispose, mortgage, or in any way alienate the said three pieces of lands and premises; and *after her death* then the said three pieces of lands and premises *to go to* my two daughters, and my grand-daughter of this Island as follows: the land with buildings situate on the west side of Penang Road aforesaid, purchased from Hajee Hamad, *to be given* to my daughter the said Aminah Mah; the land and buildings situate on the east side of the said road, purchased from Pakeersaw Lebby *to be given* to my daughter the said Machee, and the land and buildings situate at Tulloh Ayer Rajah in Burmah Road aforesaid, purchased from Mrs. Anna Wright, *to be given* to my grand-daughter the said Mahomed Meera Nachiar, to be by them respectively possess, occupy, and enjoy—[without reserving any right, power, or authority to them or either of them to sell, dispose, mortgage, or alienate the same] *and after their death to go to their respective issues* who shall respectively occupy, possess, and enjoy the same; not reserving to them or either of them, any right, power, or authority to sell, dispose, mortgage or alienate the same, *and in case if any of them or their respective issues shall die without leaving any issue, the share of legacy of the said deceased, shall go to the survivors of them.*"

As to the estate of the mother Aisha, no question arose and she was admitted to have an estate for life in the lands in question. These lands now in question, are the lands devised to Machee, viz., land on the east side of Penang Road purchased from Pakeersaw Lebby. For the defendant it was contended, that these lands passed to Machee as tenant in tail or in fee simple, it did not matter which, and became hers by purchase from Aisha, the administratrix of Machee. In construing the clause in question, the first point raised was that the language by which the estate for life is given to Aisha, the wife of the testator, is materially different from the language in which subsequent estates are given to the daughters and the grand-daughter—being much more specific and full in the former case than in the latter—but I consider that the devise to the mother being of free-holds and personalty with specific directions for the management and control of such mixed property, and its disposition so as to provide for the support and maintenance of herself and the younger branches of the family, the two daughters and grand-daughter—such different language throws no light upon the subsequent bequests to the daughters and grand-daughter. Thus, the construction of the clause is narrowed to the construction of the following words:

"And after her [Aisha the mother's] death, then the said three pieces of land and premises to go to my two daughters and my grand-daughter as follows"—[then follows the bequest to Aminah Mah in terms similar to what follows, and continues] "The land and building situate on the east side of the said road [Penang Road] purchased from Pakeersaw Lebby *to be given* to my daughter the said Machee." [Then follows the bequest to Mahomed Nachiar in similar terms, and continues] "To be by them respectively possess, occupy, and enjoy" [here follows words in restraint of alienation and continues] "*And after their death to go to their respective issues who shall respectively* occupy, possess, and enjoy the same" [here follows words in restraint of alienation] "*and in case if any of them or their respective issues shall die without leaving any issue* the share of legacy of the said deceased *shall go to the survivors of them.*" It was urged in argument that as the lands are "*to be given*" to the daughters and grand-daughter, some effect must be given to these words; but as the land is "to go" to the daughters and grand-daughter—the words "to be given" may be looked on as immaterial, and since lands, on the death of a person beneficially interested therein are so far as transmission is concerned, of the nature of chattels real and go to the executor or administrator and not to the heir or devisee, the words "*to be given*" may well refer to the assent of the personal representative, or to the acknowledged custom in this Colony of the representative to convey by formal deed for purposes of registration. It was also urged that the word "issues" in the words "and after their death to go to their respective issues" must be meant to mean "children," and so I think it should—inasmuch as the issue of such issue are afterwards mentioned—a point too plain to need any reference to the authority of cases—see however 2 *Jarman on Wills*, 4th Ed. p. 106. Again, it was said that it was questionable whether the word "them" in the concluding phrase of the clause "and in case if *any of them or their respective issue* shall die *without* leaving any issue, the share of legacy of the said deceased *shall go to the survivors of them*"—refers to the issues, viz., children of the three legatees, or to the legatees themselves. It is true that the "respective issues" of the three legatees is the last antecedent, but it appears to me to be clear from the collocation of words that the testator has always used "them" and "their" as indicating the legatees and no one else; and as in the preceding phrase, after giving the several properties to the three legatees, the testator goes on to say "and after their death to go to their respective issues," the subsequent words "in case any of them, or their respective issues shall die without leaving issue" have direct reference to the preceding phrase; the latter being, so to speak, the complement of the first—while the words "shall die without leaving issue" in the phrase "and in case if any of them, or their respective issues shall die without leaving issue" seem to me to be inapplicable and redundant, on the supposition that "them" means "respective issues" [children]—the sentence then reading or being supposed to read "and in case if the respective issue or their respective issue shall die without leaving issue, &c." Thus, as

WOOD, J. 1890.

MAHOMED MEERA NACHIAR & ANOR. v. INCHE KHATIJAH.

it appears to me, we have to deal only with a devise to "Aisha for life" and "after her death to Machee, and after her [Machee's] death, to her [Machee's] issue [children], and in case she or her issue [children] shall die without leaving any issue," then over—and I am of opinion that by this devise the testator must be held to have intended to create an estate tail in favour of Machee. I come to this conclusion upon the authority of the old case of *Roe d Dodson* v. *Grew*, 2 Wils. 322, which case and the subsequent cases which have followed and mainly supported it, are treated of at length in 2 *Jarman on Wills*, 4th Ed. pp. 418-24. The testator in this case intended no doubt to give the three legatees Aminah, Machee and Mahomed Meera Nachiar estates for life in their respective properties—but the intention also was that the estate should not go over as long as there was issue of that tenant for life—and such intention is best carried out by holding that the testator conferred or intended to confer an estate in tail general. He intended to control the general operation of the distribution of the estate of each of the devisees at her death, not necessarily through the force of any law of primogeniture as in England, but much as if the children and the children's issue were females and so took as co-parceners—but the intention seems to be plain that the children and their issue were to take until a general failure of issue, when and when only the estate of each legatee must go over to the others. Whether he could legally do this or not is not to the purpose. Our first effort is to find out the intention of the testator—and it is a subsequent question what the result of the bequest really is. The question whether the estate conferred on the devisees, was an estate in fee or in tail, is under the circumstances of the case immaterial, but as a previous judgment of mine has been cited in argument, and as I am told that other cases depend upon my construction of the Will in question, I am tempted to say a few words in explanation of that decision. Land in this Colony, is not on the same footing as land in England. By Indian Act XX. of 1837, it is enacted that—

> "From the First day of October, 1837, all immoveable property situate within the jurisdiction of the Court of Judicature of Prince of Wales' Island, Singapore and Malacca, shall, as far as regards the *transmission* of such property on the death and intestacy of any person having a beneficial interest in the same, or *by the last Will* of any such person, be taken to be and to have been of the nature of chattels real and not of free-hold."

The law relating to Wills, may be said to be the same as in England. The Indian Act XXV. of 1838, being practically a rescript of the English Wills Act, 7 Wm. IV., and 1 Vict. c. 26, and I may here remark that Section 28 of the Indian Act which is an exact rescript of Section 29 of the English Act, and which has reference to the words "die without leaving issue" has no application to the case of Mahomed Meera Nachiar, &c. The words "die without issue" having reference not to any "person" but to a class of persons, viz., the children—or rather issue, meaning children of Machee—and comes neither within the language nor the meaning of that section.

In the case of *Kitchee Pakirmah and Abdul Cader* v. *Syed Akil* decided by me in 1888, the devise was as follows: "I give and devise to my daughter Kitchee Pakirmah and my two sons Ahamad and Abdul Cader the free use and enjoyment of all my household furniture, plate, linen, and also the dwelling-house at Tulloh Jelotong.....for and during their natural life, and after their decease to their lawful issues and their respective descendants after them, to remain, occupy, and enjoy the same without however....." here follows a clause restrictive of alienation. On this provision, I seem to have held that the three devisees took estates in fee as tenants in common, or rather as tenants in tail of land which was of the nature of chattels real, and so the estate tail became an absolute interest in fee. That they were tenants in common and not joint tenants, follows from the fact of their being tenants in tail, for there can be no joint tenancy of tenants in tail by "necessity of reason," since they cannot have common heirs of their bodies—*Co. Lit. 184a.* But were they tenants in tail? The devise is to A. B. and C. for and "during their natural life, and after their decease to their lawful issues, and their respective descendants after them." Here, although there is no devise over in the event of any failure of issue, yet the reasoning in *Roe* v. *Grew* is the same. The testator's desire is, that A. B. and C. should take estates for life, and as he desires also that the land should go to their issue, and their respective decendants "*after them*," there is no other way by which this successive enjoyment of the estate, by the objects of the testator's bounty, could be effected, except by succession as heirs in tail—2 *Jarman on Wills*, 412, and the cases there cited. In such a devise, "issue" is clearly a word of limitation, and aptly referable to an estate tail. The estate tail thus created are estates tail in "immoveable property," which, "so far as regards the transmission of such property by the last Will of the testator, shall be taken to be of the nature of chattels real." Here, as I take it, the land is "transmitted" by the testator to his legatees —for I cannot well call them "devisees"—subject to the assent of the executor, and being on such transmission "of the nature of chattels real." The gift of an estate tail is a gift of the absolute interest in the land given, which I assume to be an estate in fee, since tenancy in fee simple is not actually abolished, and as such may be enjoyed or dealt with until the death of the next person beneficially interested in it when it again becomes of the nature of chattels real.

Reverting to the case now before us, the case of *Mahomed Meera Nachiar and Poonoomah* v. *Inche Khatijah*, I am of opinion that although Machee died without issue, the limitation over to the plaintiffs did not take effect—that since this Will speaks from the date of the death of the testator, the estate conveyed or "transmitted" to her by the last Will of Cader Mydeen, was *eo momento* at the testator's death, an absolute interest in land, which was of the nature of a chattel real; and passed, as such, on her death, to her representative Aisha, who duly conveyed it

WOOD, J. 1890.

MAHOMED MEERA NACHIAR & ANOR. v. INCHE KHATIJAH.

to the defendant as a purchaser for value, and there will consequently be judgment for the defendant.

It is needless to say that these two decisions are in view of the provisions of the Indian Act XX. of 1837, under which the several devises are to be construed, and not under the new law, Section 33 of the Conveyancing and Law of Property Ordinance 1886—Ordinance 6 of 1886.

Judgment for defendant, with costs.

VEERAPPAH CHETTY *v.* KOH SOON LIAT & ANOR.

SINGAPORE. PELLEREAU, J. 1890. June 27.

The Sheriff has no authority to receive from a defendant the amount claimed in an action, and costs, *before* execution is issued therefor.

A defendant therefore who pays the amount claimed and costs, to the Sheriff, on service of the writ of summons and without the plaintiff's consent, will be liable to pay it a second time to the plaintiff should the Sheriff misappropriate the amount.

The Rules made in 1866 for the guidance of the Sheriff are still in force. [*a.*]

Action to recover $64 due on a Promissory-note. The defendants admitted the making of the note and that on date of the commencement of this action, the money was due by them; but they alleged by way of defence that a few days after they had been served with the writ of summons herein, the first defendant had paid the amount and costs to the Sheriff. The Sheriff was subsequently prosecuted for criminal breach of trust and convicted, and the defendants submitted they were no longer liable. These facts were admitted by the parties.

Nanson, for plaintiff contended, that the Sheriff had no authority to receive the debt and costs which could only be paid to the plaintiff, or his Solicitor as the writ of summons informed him.

Joaquim, for the defendants contended, that the Sheriff being an officer of the Court payment to him was equivalent to payment into Court.

Pellereau, J. There is no proof that the plaintiff considered the Sheriff as his agent, or that he had ever in any way constituted him his agent. Section 46 of the Courts Ordinance, 1878, relating to the Sheriff and his duties, contained nothing which empowered the Sheriff in executing a writ of summons to receive the amount sued for in satisfaction. Section 210 of the Civil Procedure Ordinance, 1878, allowed a defendant at any time after service of the writ, and before, or at the time of delivering his defence, to pay money into Court in satisfaction, but in such a case payment was to be made to "the proper officer," and it did not appear that the Sheriff was the proper officer. Rules had been made in 1866 by Sir BENSON MAXWELL for the guidance of Sheriffs in executing the duties of their office, and these rules he believed were still in force, but he was of opinion that under them the Sheriff could only receive money for an *execution* creditor. In this case the plaintiff had not obtained a judgment, and the money was not recovered under an execution. It was no doubt a hard case, but the Sheriff was not the agent of the plaintiff, and the defendant could not discharge himself by payment to a person who was not the plaintiff's agent. Judgment for the plaintiff with costs.

[*a.*] See *Rules & Orders of Court*, infrà—Rules dated November, 1866.

REGINA *v.* SAHID.

PENANG.

O'MALLEY, C.J. WOOD & PELLEREAU. } J.J

1890.

July 9.

A Police Officer cannot legally arrest a person for breach of a mere bye-law, such as over-loading a passenger boat contrary to Rule 36 [for passenger boats] made under Section 53 of the Harbour Ordinance 8 of 1872.

A conviction for the offence of allowing a person in lawful custody to escape under Section 221 of the Penal Code cannot be sustained when that person is not legally in custody or is punishable with a mere fine.

This was a question reserved by *O'Malley*, C.J., who stated the following case for the opinion of this Court:

"At the Assizes held at Penang on the 1st of April, 1890, one Sahid, a Police Constable, was tried before me upon the charge 'that he Sahid being a public servant, to wit: a Constable in the Police of the Colony of the Straits Settlements, and being as such public servant bound to keep in confinement one Tan Ah Bow, charged with over-loading his boat, did voluntarily allow the said Tan Ah Bow to escape from such confinement and that he the said Sahid thereby committed an offence punishable under Section 221 of the Penal Code.' The facts were as follows: One Kulop, a boat tindal at Pangkore, saw Tan Ah Bow carrying an over-load of passengers on his passenger boat and thus transgressing the provisions of Rule 36 of rules for passenger boats [published on page 203 of *Government Gazette* for 1879] made under the authority of Section 53 of the Ordinance 8 of 1872, and thereupon arrested him and gave him into the custody of the Police at the neighbouring Police Station, and told them to enter a charge against him for that offence. The prisoner was one of the Police in whose custody Tan Ah Bow was so placed and he voluntarily allowed him to escape.

Upon this state of facts my doubt is, whether I ought not to have directed the Jury to acquit on the ground that the custody in which Tan Ah Bow was, was not lawful custody, the only penalty for transgression of the rule against over-crowding being that provided by Section 54 of the above-mentioned Ordinance, viz., a penalty not exceeding $25."

The question reserved now came on for argument before the Court of Appeal, consisting of *O'Malley*, C.J., *Wood* and *Pellereau*, J.J.

D. *Logan*, [*Solicitor-General*] for the Crown said he could not contend that the boatman Tan Ah Bow was lawfully in custody—but in addition to this as his offence was only punishable with a fine, Section 221 under which the prisoner here was convicted, did not apply.

The prisoner was not represented, nor did he appear.

O'Malley, C.J. The conviction must be quashed. We think it right to add that the Police should be informed as to their rights of arrest, and that they are not entitled to arrest people for trivial breaches of such bye-laws.

Conviction quashed.

REGINA *v.* DIN & ORS.

PENANG.

O'MALLEY, C.J. WOOD & PELLEREAU. } J.J.

1890.

July 9.

When appliances of gaming are found in a house, though a private house lawfully entered under the Gaming Ordinance 5 of 1888, the Magistrate and this Court *must* presume under Section 14, until the contrary is shewn, that the house is a Common Gaming House—

Per O'Malley, C.J. Very little evidence is sufficient to rebut this presumption.

Per Pellereau, J. As it is the law that that presumption shall be made, clear and full evidence is required to rebut the presumption—but what is such evidence depends on the circumstances of each case.

ref R v Chan Ty c. 1 ... 5-18 and
and R v Tan Siew Wah & ... 9 K ...

O'MALLEY, C.J. WOOD & PELLEREAU. } J.J. 1890.

REGINA v. DIN & ORS.

The mere fact that the prisoners found gaming were Malays, and one of them is a young *unmarried* girl, and the manners, habits, and customs of Malays is not to allow such a girl to be associated with the *public*, does not of itself rebut the presumption.

Query. What is meant by a "class of the public" in Section 3 of the Ordinance? [*a*.]

The prisoners, six in number, all Malays, had been convicted by J. W. Norton Kyshe, Esquire, for being found playing in a common gaming house at Tanjong Tokong, in Penang, contrary to Section 7, Clause 1 of the Common Gaming House Ordinance, 1888, and severally fined $1 each. The evidence was that a Corporal and some Constables having entered a private house No. 238, by the roadside at Tanjong Tokong, about 11.30 at night, under a warrant issued under the aforesaid Gaming Ordinance, found the six prisoners and twelve or thirteen others playing on a mat in the verandah upstairs with English cards for money. On the mat were found a couple of lamps, 59½ cents, and some tamarind seeds said to be used for counters, and on the persons of the prisoners, 40 cents in all. On the approach of the Police the players dispersed—the prisoners were the only ones arrested; the others made their escape. None of the prisoners tendered themselves as witnesses, nor did they seek to explain how they and the others were there, or how they came to be playing. They denied the story told by the prosecution and called evidence to shew they were in different houses and had there been arrested, that they were all relatives of each other, and one of them was a virgin, a daughter of one of them. The appellants appealed against the conviction, and the appeal come on for hearing on 10th February last, before *Pellereau*, J. when the same was reserved for consideration of the Court of Appeal. It now came on for argument before the Court of Appeal, consisting of *O'Malley*, C.J., *Wood* and *Pellereau*, J.J.

G. S. H. *Gottlieb*, for appellants contended, that there was no evidence this was a common gaming house. By Section 3, Clause 1, gaming house was defined as a place to which "the public or a class of the public" had access for the purpose of gaming. The house here was a private house and the prisoners relatives.

[*Pellereau*, J. It was a private house, but that night it might have been opened to the public?]

There was no evidence the people there were the "public" or a "class of the public." Then they must be there for the purpose of "gaming." Games are lawful and unlawful—unless the games were unlawful games, there was no "gaming"—*Brandt on Gaming*, 111, 112.

[*Pellereau*, J. At common law as appears from *Burn's Justice of the Peace*, all common gaming houses were a nuisance and indictable by that law. Games lawful and unlawful were made so by Statutes not applicable here.]

[*Wood*, J. Does not "gaming" mean merely gaming for money?]

It is submitted it is not—the game must be unlawful—but if indictable at common law, still under this Ordinance a common

[*a*.] See *Regina* v. *Chan Ah Tye & Ors.*, antè p. 518.

gaming house has a peculiar meaning of its own, a place to which the "public or a class" thereof has access.

[*O'Malley*, C.J. The Ordinance says the expression "common gaming house" shall "include," not "is."]

But the effect is the same.

[*Wood*, J. You had an opportunity of calling those who escaped to explain how they came there and to shew they were not the public.]

We deny any others were there, how could we call them? We deny we were playing, how could we explain how we came to play? The presumption under Section 7 of those running away having played is a presumption against them not against us. Then their alleged escape raises no presumption against us under Section 14, as the house was not entered by a Justice of the Peace. The people if playing were merely having a quiet evening together, and less than a dollar on the whole is the amount found on them and on the mat. It was not a common gaming house within the Ordinance.

Ross, for Crown submitted, gaming meant gaming for money. *Dyson* v. *Mason*, 22 L. R. Q. B. Div. 351. The Statutes making games lawful and unlawful did not extend to this Colony. *Regina* v. *Tan Sin Hap & Anor.*, 3, Kyshe, 94. Although Ordinance 9 of 1876 spoke of "unlawful" gaming, Ordinance 13 of 1879 spoke of "public" gaming, and this present Ordinance 5 of 1888 defines a common gaming house in three different ways in Section 3, Clause 1—but that definition did not exclude but includes the common law definition of such a house and what that is, is shewn in *Jenks* v. *Turpin*, 13 L. R. Q. B. Div. 505. There was evidence that there were 18 or 19 persons in all playing—six were arrested the others escaped. The prisoners don't explain how those others came to the house—by invite or otherwise—but it is for them to do so as the fact of the invitation, if any, was one peculiarly within their knowledge. The prosecution could not prove they were not. Had they done so, the case would have been within *Regina* v. *Chan Ah Tye & Ors.* [antè p. 518]. These six prisoners and others were found playing and they ran at approach of Police, and in absence of proof they were invited, the inference is they were a class of the public and had access to the house for gaming. Then Section 14 is a slip as regards the escape of persons and the entry by a Justice of the Peace. The word "if" has been misplaced.

[*O'Malley*, C.J. The language of the section makes sense, and we must construe it as we find it.]

Then gaming appliances were found, the mat, cards, counters and money—and under Section 14 they raise the presumption the house is a common gaming house.

[*O'Malley*, C J. The Ordinance is full of alarming and extraordinary presumptions. Because appliances of this kind are found therefore it is to be presumed to be a common gaming house—therefore that the public have access to it, and therefore within the definition of Section 3. A strange and most arbitrary presumption.]

O'MALLEY, C.J. WOOD & PELLERAU. J.J. 1890.

REGINA v. DIN & ORS.

It is presumption the law declares *shall* be made, but nothing was easier than for the prisoners to have rebutted it—they could have tendered themselves to give evidence under Section 18, Clause 3, if the others were not the public, but they don't attempt to do so.

[*O'Malley*, C.J. What is meant by "a class of the public"?]

A section—any portion of—the public.

[*Wood*, J. It is for you to prove the charge. When a fact is consistent with guilt or innocence, a Magistrate can't convict —those others might or might not have been the "public" or a class of it.]

Whether they were or not was best known to the prisoners, it is within their peculiar knowledge, and they alone could prove or disprove it. Unless it was for them to do so, no conviction could be had under this Ordinance.

Gottlieb, in reply. The presumption raised by the facts or by Section 14 can be rebutted. Whether it is a common gaming house or not depends on whether the public or a class thereof has access to it. Very little is required to rebut it. Here the people were all Malays—their habits and customs are well-known—they don't allow their unmarried daughters to appear in or mix with the public. One of the persons said to be gambling here, one of the prisoners, was a virgin— from the customs and habits therefore, this fact alone repels the idea the "public" had admittance into that house that night. The prisoners are shewn to be all relatives and friends—the others could not be called as we don't know who they are and deny they were there. At most the evidence shews the family were having a quiet game as a mere pastime, and to call this a common gaming house is to misapply the term.

Cur. Adv. Vult.

July 11. *O'Malley*, C.J. In this case the appellants were convicted of being found playing in a common gaming house contrary to Section 7, Clause 1 of the Ordinance 5 of 1888. The appeal is on the ground that there was no sufficient evidence to support the conviction, and that the conviction was against the weight of evidence. I am of opinion that the conviction must be affirmed. The appellants were found gaming for money in a house which was entered into by the Police under the Ordinance and certain gaming appliances were found. Under Section 14, it is enacted that "if any instruments or appliances of gaming are found in any place entered under this Ordinance .....it shall be presumed until the contrary be proved that the place is a common gaming house and that the same is so kept or used by the occupier thereof." By that section therefore such a house under the circumstances *must* be presumed to be a common gaming house until the contrary is shewn. I cannot find from the evidence in this case that the contrary was proved. I cannot therefore say the Magistrate was wrong. I may say for

myself that a very small amount of evidence to the contrary would satisfy me—but I cannot accept the mere fact about the girl and the habits and customs of these people—which is the only fact by which the presumption is here sought to be rebutted—as sufficient.

Wood, J. I am of the same opinion, and on the following grounds. It is conceded by the appellants that the house was properly entered by the police under this Ordinance. Having entered, they found gaming appliances from which alone under Section 14, it *must* be presumed until the contrary is shewn that the house is a common gaming house, that is a common gaming house within Section 3 of the Ordinance. We are not called upon to decide what is meant by a "class of the public." Then is the contrary shewn? I do not think that the mere fact of the girl being among the people, and the well-known habits and customs of the people, is sufficient to shew the contrary. Evidence might have been given by the prisoners or other persons there explaining how they came to be playing—but no such evidence is adduced. The Magistrate under the circumstances was entitled to presume the house to be a common gaming house and to convict; and we cannot say he was wrong.

Pellereau, J. I concur. I wish to state specifically what my finding and ruling are—*Firstly*, "gaming" I hold to be gaming for gain or lucre, and this I found on *Dyson* v. *Mason* [suprà], and also on the old common law definition of what is a common gaming house, which is still law in this Colony. *Secondly*, I find from evidence it was not shewn that this house was not a common gaming house—that it was not open to a class of the public. People were found in the house to the number of about nineteen—it was doubtful whether they were or were not a class of the public. The appellants could have explained the matter and so removed the doubt; they could have shewn these people were not there as a class of the *public*, and so rebutted the presumption under Section 14. They did not do so. The facts of the case leave this point doubtful, but the facts proved raise the presumption under Section 14—this presumption was therefore not rebutted. I cannot go so far as the learned Chief Justice as to say that a little evidence would be sufficient to rebut the presumption. I would require clear and full evidence to satisfy my mind by contrary evidence that the house was not open to the public—but what would be sufficient for that purpose would depend upon the circumstances of each case. The presumption is one the law declares, *shall* be made under certain circumstances, but it allows that presumption to be rebutted by evidence *aliunde*. We therefore *must* so presume and see if the presumption is rebutted. In this case I however agree with my learned brothers that the presumption has not been rebutted and therefore the conviction must stand.

Conviction affirmed.

[illegible]

ANAMALAI CHETTY *v.* KADER TAMBY.

PENANG.

O'MALLEY, C.J.
WOOD & PELLEREAU. } J.J.
1890.

July 9.

A Bill of Sale of personal property to secure the re-payment of a loan with interest "*within* three months from the date thereof," is *not* contrary to the form in the Schedule to the Bills of Sale Ordinance 12 of 1886; and is payable within a "stipulated time" within the meaning of the italicized words in that form.

Such a Bill of Sale need not contain an express power of sale—such a power being implied from Section 10, Sub-sections 1 and 2 of the Ordinance.

Ex-parte Official Receiver *Re* Morritt, 18 L. R. Q. B. Div. 222 [*per* Lord *Esher*, M.R., and *Lopes*, L.J.], followed.

Case stated under the Appeals Ordinance 12 of 1879, Section 16, by J. K. Birch and R. C. Jacobson, Esquires, two Magistrates of Police, Penang, for opinion of the Supreme Court, as follows:

"The said Kader Tamby was charged before us on the 11th April, 1890, at the Police Court, in Penang, that within the last six months he did fraudulently remove a cart and a pair of bullocks when the same were under mortgage to one Anamalai Chetty, and thus committed an offence punishable under Section 424 of the Penal Code.

It has been proved in evidence that the defendant had fraudulently disposed of the cart and bullocks in order to avoid seizure by the mortgagee and recovery of the money.

Mr. F. Baynes for the defendant argued against the validity of the bill of sale on the following grounds.

[1]—That the clause referring to the time of re-payment did not mention any stipulated time of re-payment, and was therefore not according to the Schedule of the Bills of Sale Ordinance.

[2]—That this clause being to the effect that the money should be re-paid *within* a certain time had the result of making the bill of sale one on demand, and therefore according to the decision of the English Courts, illegal.

We convicted the defendant of fraudulent removal of property and fined him $150.

On these facts the opinion of the Supreme Court is requested as to the point of law in regard to the validity of the bill of sale."

The question was argued on 3rd June, 1890, before *Pellereau*, J. by

Baynes, for the appellant.

Ross, for the respondent.

Pellereau, J. My impression is against you Mr. Baynes, but if you wish the question reserved for the consideration of the Court of Appeal, I shall do so, and so give you the benefit of the opinion of my brother Judges.

Baynes, asked that it might be reserved.

Order accordingly.

The question came on for argument and decision on the 9th and 10th July, in the Court of Appeal, which consisted of *O'Malley*, C.J., *Wood* and *Pellereau*, J.J., leave being given to the appellant to urge the further point here taken.

Baynes, for appellant. This bill of sale is payable "within three months from the date thereof." The form given in the Schedule to the Bills of Sale Ordinance 12 of 1879, states that the money is to be payable on the day of "or whatever may be the *stipulated* times or time for payment." I contend making the money payable at any time "within" three months is not a payment within a "stipulated" time—Section 8, Clause 2,

requires the bill of sale to be in the form given in the Schedule or otherwise it is void. The question here is whether the clause for re-payment in this case is a compliance with the form in the Schedule. Of course, the form need not be literally followed and it is sufficient if it substantially does so. *Davis* v. *Burton*, 11 L. R. Q. B. Div. 537, laid down certain principles for construction of the Ordinance, and it was there held that a bill of sale in which the interest had been capitalised and was payable by instalments was void as it provided that in default of payment of any one instalment the whole amount remaining unpaid was to become due. *Fry*, L.J. in that case said the Act requires the bill of sale to be certain in its terms, and that the maxim *id certum est certum reddi potest* was not applicable. I contend that to make the bill of sale payable in the way it is in this case is to render its terms uncertain—it enables the grantor to pay up at any time or any day within the term. It is very different from making it payable "three months after date." Another uncertainty is that it is not stated to be lunar or calendar months.

[*Wood*, J. "Month" means calendar month in all commercial and business documents and transactions.]

In *Parsons* v. *Bland*, 38 W. R. 388, it was held that a bill of sale was void because the address and description of the attesting witness was not given in the bill of sale itself. The form says in the attestation clause, in italics, "add witnesses name, address, and description"—and as the bill of sale in that case had omitted to do so, it was held not in accordance with the form and so void. That omission could not possibly affect the legal effect of the bill of sale. If the bill of sale in this case had been in accordance with the form, the money would have been payable on the day of , or at some *stipulated* times or time; but here the words in italics in the form even have not been followed—*Cotton*, L.J. in the case last cited says, the words in italics are part of the form. The meaning of these words "stipulated times or time" was explained in *Melville* v. *Stringer*, 13 L. R. Q. B. Div. 392, and a bill of sale "on demand" was there held not to be payable in a "stipulated time," as it was not a payment within a *fixed* time, so that other parties dealing with the grantor might know when the money is payable to the grantee. In this bill of sale there is nothing to shew third parties when the grantor will repay the loan—he might do so next day, or the day last but one of the three months. The principle is that third parties must be able to know for certain so as to be able to deal with the grantor. Then in *Hetherington* v. *Groom*, *ibid.* 789, it was again held that a bill of sale payable "on demand" was not one payable within a stipulated time as it was payable at the "mere choice and volition of the grantee." Here I say, it is payable at the "mere choice and volition" of the *grantor*, and so is equally bad. The only meaning that can be given to the words "stipulated time" in the form is a fixed date. Then in *Selby* v. *Higgs*, 15 L. R. Q. B. Div. 689, it was held that a bill of sale payable "within seven days after demand in writing" was also bad; it was not payable in a stipulated time and was the

O'MALLEY, C.J. WOOD & PELLEREAU. J.J. 1890.

ANAMALAI CHETTY v. KADER TAMBY.

same as "on demand." In *Ex-parte* Clever, *Re* Rawlins, 18 L. R. Q. B. Div. 489, it was held that that part of the form which spoke of equal payments did not render a bill of sale void which made the document payable in unequal payments, and the reason for this was that the words in italics "or whatever else may be the stipulated times or time" shewed an alternative mode of payment was allowed, provided it was a "stipulated" time. In that case the unequal payments were to be on *fixed* dates—the equality or unequality of the payments on those dates would not be substantially unlike that provided by the form. The result of these decisions is that the powers of the mortgagee were intended to be considerably restricted—the form was to be substantially followed—inserting an uncertain time for payment was not to be permitted. It may be said that these words "within three months" do not affect the legal effect or make the legal effect of the bill of sale different from that of the form—but no more was that the case of the omission of the witness' address in *Parsons* v. *Bland*. In *Thomas* v. *Kelly*, 13 App. Ca. L. R. 506, the definition laid down by *Bowen*, L.J. in *Ex-parte* Stamford, 17 L. R. Q. B. Div. 259, to the effect that a bill of sale was not according to the form, only if its legal effect was different from that form, was qualified; and it was held a bill of sale might be void as not being in accordance with the form though not differing in its legal effect, but in matter of pure form. It is a characteristic of this bill of sale that the money is payable at an uncertain time, but it is purely a matter of form.

[*Pellereau*, J. What would be the effect if the bill of sale was to be payable at the "end of three months"? According to your argument that would be bad.]

Yes, the words in italics shew that some latitude is allowed for the time of payment, but it must be a fixed time—the word "stipulated" is the governing word in the whole clause and shews certainty is what is required. The next point is that this bill of sale is also bad as it contains no express power of sale. In the form—further words in italics—liberty is given to insert what covenants the parties like for the defeasance or maintenance of the security. A power of sale ought under those words to be expressly given. In *Ex-parte* Stamford [suprà] it was decided that a bill of sale as "beneficial owner" was bad, as those words imported into the bill of sale the provisions of the Conveyancing Act, 1881. That Conveyancing Act is similar to our Ordinance 6 of 1886 by Section 3 of which, "property" is declared to be "moveable" or "immoveable"—and "mortgage" is declared as a mortgage "of either moveables or immoveables"—a power of sale is given by Section 22. So that the bill of sale here, giving no power of sale, the grantee must fall back on his power of sale under that Ordinance. If he does, he comes within the case of *Ex-parte* Stamford and the bill of sale is void—if he does not, he has no power to seize and take possession at all.

[*Pellereau*, J. Look at Section 4 of the Bills of Sale Ordinance. If this bill of sale has no power of sale, it is not within the Ordinance—and if it is not within the Ordinance, your first point

must fall to the ground as the bill of sale need not then be according to the form in the Schedule.]

It is immaterial on which point I succeed. Then Section 10 of the Bills of Sale Ordinance assumes some power of sale and regulates it.

[*Pellereau*, J. What do you say to Section 10, Clauses 2 & 4?]

Clause 4 gives no power to seize, and there can be no sale till seizure. In *Ex-parte* Official Receiver *Re* Morritt, 18 L. R. Q. B. Div. 222, the Court was divided on this question of power of sale, the majority holding that the power of sale conferred by the Conveyancing Act, 1881, was not incorporated into the bill of sale, nor into the Bills of Sale Ordinance. In *Watkins* v. *Evans*, ibid. 386, it was held the power of sale *was* so incorporated and therefore the bill of sale in that case which contained no power of sale was good—the power of sale being held to be that conferred by the Conveyancing Act, 1881, subject to the restrictions of Section 20 in that Act, and Section 13 of the Bills of Sale Ordinance. In *Calvert* v. *Thomas*, 19 L. R. Q. B. Div. 204, the Judges said that the Judges who decided *Watkins* v. *Evans*, had misapprehended the decision of the majority in Official Receiver *Re* Morritt and that they had held exactly the opposite to that which they were supposed to have held. I contend therefore, if the Judges in *Watkins* v. *Evans* had not been under this misapprehension they would not have held the bill of sale in that case, which contained no power of sale, good, they would have considered it was bad. A bill of sale to be good must be one that operates under the Bill of Sale Act.

Ross, for the respondent. The first point taken here is that the bill of sale is uncertain in its terms as to payment. The Schedule sets out the form and in the form are several words in italics—all these italicised words in the body of the form, are directory—those in the attestation clause are obligatory. First, we have the italics in the form as to the consideration—"whatever else the consideration may be," shewing that it need not necessarily be a money consideration, and though the form speaks of "Dollars," not italicised, yet this may be varied. Then the words "stipulated times or time" shew there is an option left to the parties, and a bill of sale will be good though there is only one payment—*Watkins* v. *Evans*, [supra]—but if good, then the words "equal payments" in form, though not italicised were not obligatory,—that part of the form might or might not be followed. The meaning of the words "within three months from the date hereof," mean payable three months after date so far as the *grantee* is concerned, and it is immaterial whether it is lunar or calendar months. I submit however, it means calendar, as all legal documents are so construed. The words give the *grantor* a right for the whole three months with the option of paying earlier—but the *grantee* is bound to wait the full three months. Even if a date had been fixed there is nothing to prevent a mortgagor paying up before his time though he may have to pay interest for the full term. The stipulation here is in favour of the grantor. The key-note of all the decisions on this

O'MALLEY, C. J. WOOD & PELLEREAU. } J.J. 1890.

ANAMALAI CHETTY v. KADER TAMBY.

question of form is that the bill of sale must not be prejudicial to the *grantor*, it must not give powers to the grantee in excess of those conferred by the form. The *grantor* is the person intended to be protected—and *also third* parties. As to third parties, they would know from the language of this bill of sale that the grantee would have to wait for three months. That the grantor was intended to be protected is shewn by the fact that the rate of interest must clearly be stated so that he need not be under the necessity to calculate to find out what it is—also from the fact that the bill of sale has to be explained to him.

[*O'Malley*, C.J. The English section says "in accordance with form"—our section says "in the form."]

It is so, but that makes no difference in the meaning to be given to the expressions. *Webb* v. *Fairmauer*, 3 M. & W. 473, is an authority for saying that "in three months" is binding on the creditor for the full three months—and there is no difference between "within" and "in."

[*O'Malley*, C.J. You say "within three months" is a fixed time as far as one limit is concerned, but it is open to one of the parties to vary the time within that limit?]

Yes, but that party is only the grantor. In *Re* Williams, *Ex-parte* Pearree, 25 L. R. Ch. Div. 656, it was held that a bill of sale was void as it was payable "forthwith" and the grantee might step in at once or at any time—this same reason led to the bills of sale in *Melville* v. *Stringer* [suprà] and *Hetherington* v. *Groom* [suprà] being held bad—they were enforceable at the "mere choice and volition of the grantee." If a bill of sale was made payable say "seven days after Christmas" that would be good. The time here as far as the grantee is concerned is a fixed time—three months. In *Ex-parte* Stamford [suprà] it is said the Court has nothing to do with the reasonableness or unreasonableness of the bill of sale—it is sufficient if it gives intimation of its terms to an ordinary mind—the Act does not say the bill of sale shall not be more nor less than the form. An outsider reading this bill of sale would not get a bit less information than if it had said the day of .

[*Pellereau*, J. It is not a prejudice to third parties for the grantor to pay up before the time, but the contrary.]

Just so. In *Ex-parte* Stamford, *Bowen*, L.J. defines the limits within which a bill of sale may differ from the form—it is good if it gives the same legal effect. It is true this definition was somewhat qualified in *Thomas* v. *Kelly* by Lord FITZGERALD, but the other Lords say nothing on it. In *Blaieberg* v. *Beckett*, 18 L. R. Q. B. Div. 96, a bill of sale was held bad as its legal effect was prejudicial to the grantor, but from the language of the Judges it is clear the grantor is one of the persons protected and favoured by the Ordinance. In *Ex-parte* Clever, *Re* Rawlins [suprà] it was held these italicised words "stipulated times or time" were directory, but not obligatory, and so subject to variation. In *Selby* v. *Higgs*, [suprà] although it was "within seven days" it was only so "after demand" and that demand depended on the "mere choice and volition of the grantee" as in *Hethering-*

ton v. *Groom*,—*Parsons* v. *Bland*, [suprà] turned on italicised words which were obligatory—so in *Blenkertim* v. *Robertson*, 24, L. R. Q. B. Div. 543.

[*Pellereau*, J. The italics in the body of the form is different you say, as at the end it speaks of inserting things "not contained in body hereof," and so implies it is not complete? It may be added to, though within certain limits?]

Yes—In *Cockerane* v. *Entwistle*, W. N. 1890, p. 103, a bill of sale was held bad as it included rights over chattels real, while the form in the schedule only operates over personalty. This case only follows the former ones, viz., that the legal effect of the document had been altered. The second point divides itself into two points. If it contains no power of sale it might be defective, but it is not void.

[*O'Malley*, C.J. If defective, is not that sufficient, as what then would be the rights of the holder against these goods so as to say that those rights have been interfered with by their fraudulent removal?]

No—there is a difference between a mortgage of lands and of personalty. In the former the mortgage would have to proceed by action for foreclosure. In the latter, the property passes to the grantee, and on default he can take possession and sell by force of his right of property. This right he has at common law—*Ex-parte* Official Receiver *Re* Morritt—*White* v. *Morris*, 21, L. J. C. P. [N. S.] 185, also shews such right. But in truth this bill of sale contains a power of sale, for such power is implied under Section 10, Sub-sections 1 and 2. In *Hetherington* v. *Groom*, FRY, L.J. assumes the section gives power of seizure and sale. In *The Caledonian Credit and Mortgage Corporation, Ld.* v. *Gorney*, 16 L. R. Q. B. Div. 24, it was held if express power of sale is given in the bill of sale, it does not make the bill of sale void as it does not alter the legal effect; that the joint effect of the Act and form was that the bill of sale thereunder *had* that power. In the new edition [13th] of *Prideaux on Conveyancing*, p. 728, express power of sale is left out though in the earlier editions it is to be found. In *Ex-parte* Official Receiver *Re* Morritt, the majority of the Judges held that the mortgagee had a power of sale at common law, but Lord ESHER and LOPES L.J. while they agreed in this, also held that Section 10 of the Bill of Sale Ordinance impliedly gives power of seizure and sale. *Cotton* L.J. alludes to the point, but says he expresses no opinion on it—but neither he nor the other Judges dissent from that view.

Baynes, in reply. The words payable "within three months" are not the same as "three months after date"—the former gives a legal consequence different from the latter. The object of the Legislation was that all the terms should be precisely stated—no doubt was to exist—yesterday I saw a bill of sale payable "within three years." The Ordinance surely never intended such a long period, but the principle applicable to that bill of sale is the same one to be applied here. All cases relied on by the other side are cases in which the legal effect was altered and being in favor of grantee was bad. Here the objection is not one of legal effect, but of

O'MALLEY, C.J. WOOD & PELLEREAU. } J.J. 1890.

ANAMALAI CHETTY v. KADER TAMBY.

mere form. There is a difference between "in" two months and "within" two months, and the case of *Webb* v. *Fairmaner* is not applicable. In *Watkins* v. *Evans*, the bill of sale was payable one month after date, but the exact date was inserted, and so it was a compliance with the form. As to the second point—Section 4 of the Bills of Sale Ordinance shews the Ordinance applies only to all cases in which a power of seizure and sale is given. If a bill of sale has no such power it is not within the Ordinance and is therefore void. If Section 10 intended to give a power it would have followed the words of Section 22 of the Conveyancing Act 1881—they don't do so, and reading Section 4 and 10 together it is clear Section 10 only refers to documents having a power of seizure and sale within Section 4. It assumes that the document has such a power in it. Lord *Esher* and *Lopes*, L. J. no doubt say Section 10 implies the power, but the majority of the Judges don't say so; the inference is they doubted it.—In *Sweet's Precedents of Conveyancing* [4th Ed. 1888] p. 692, a power of sale is expressly given. In *Ex-parte* Official Receiver *Re* Morritt the bill of sale gives an express power to seize, and the majority of the Judges say, having power to seize, the grantee had power of selling. Here there is no power to seize or sell. In *Watkins* v. *Evans*, the bill of sale without a power of seizure and sale was held good only because the Court was under a misapprehension as to the decision in *Ex-parte* Official Receiver *Re* Morritt—otherwise they would have held the bill of sale void. In *Melville* v. *Stringer*, and *Hetherington* v. *Groom*, it is laid down that the bill of sale must be clear, so that any one not a Lawyer reading it might understand what it means—so I contend here a man who is not a Lawyer on reading this bill of sale would not think there was a power of sale—he would be misled by it.

[*Pellereau*, J. How do you explain that the form in the Bills of Sale Ordinance does not contain a power of sale, when power of seizure and sale is the thing that affect third parties?]

The italics at the end shew power may be added for the maintenance of the security—that includes a power of sale. If these parties intended a power of sale, yet it does not appear, and so the true nature of the contract between them is not shewn in this bill of sale and it is void under Section 11, Clause 3.

Cur. Adv. Vult.

July 11th. *O'Malley*, C.J. The appellant has been convicted of fraudulent removal of property under Section 424 of the Penal Code, and the question is, whether the bill of sale put in by the prosecutor to shew his rights to the property is not void for not complying with the Bills of Sale Ordinance. Two objections have been taken to the bill of sale—First, that the clause for re-payment was not in accordance with the form in the Schedule to the Ordinance as it was not payable within a "stipulated" time. The clause was that the money was payable "within three months from the date hereof." As to this ground, I think the bill of sale is sufficiently and substantially according to the form, and this on the *criteria* laid down in *Ex-parte* Stamford *Re* Barker. I

think so notwithstanding the difference in this case, as to fixing of time by a fixed date, and the difference in that the money might be paid by the grantor within the limit. The second point was that the bill of sale is void as there was no power given in it to seize and sell. I think on the authority of the reasoning of Lord ESHER and LOPES, L.J. in *Ex-parte* Official Receiver *Re* Morritt, that no such power is needed. Such power is implied from the wording of Section 10 of the Bills of Sale Ordinance itself. The bill of sale is therefore good and the conviction must stand.

Wood, J. I am of the same opinion. On the first point, I think this bill of sale is substantially according to the form, on the authority of *Ex-parte* Stamford, and the clause for re-payment sufficiently definite. On the second point, I consider power of seizure and sale is implied under Section 10, Clause 2 of the Bills of Sale Ordinance, on the authority of *Ex-parte* Official Receiver *Re* Morritt, and *Watkins* v. *Evans*.

Pellereau, J. I concur.

Conviction affirmed.

ING AH MENG *v.* OPIUM FARMER.

The "Chinchew" or Nakodah of a ship on board which some illicit chandu is found in a box which is in no way shewn to be his, is *not* to be "deemed to have imported" the chandu within Section 7, Clause 2, simply because he is the responsible person on board, and the ownership of the box cannot be traced to any other person.

The appellant, Ing Ah Meng, had been convicted by J. K. Birch, Esquire, First Magistrate, Penang, with importing illicit chandu, and fined $200, under Section 7, Clause 1 of the Excise Ordinance 4 of 1870, as amended by Ordinance 4 of 1884. The evidence was to the effect that the appellant was the Chinchew or Nakodah of the steamer "Swee Leok" of 47 tons burden; that the Police and certain Revenue Officers had gone on board, and on searching found four tins of illicit chandu in a box which was locked. Not finding any one on board who owned the box—passengers having all disembarked—they took the clerk of the steamer into custody. While in custody this clerk laid an information that the Chinchew was the "responsible officer" on board, and he believed the box was either used by him or the cook. On this information a warrant was issued and the Chinchew, the present appellant, arrested. At the hearing before the Magistrate these facts were proved, the clerk however, stating he did not know to whom the box belonged. The Chinchew in his defence called witnesses who swore the box belonged to the cook, a Hylam man, who had since left the ship. The Magistrate disbelieved these witnesses, and thinking the Chinchew was the responsible man on board, held he must be "deemed to have imported" the chandu under Section 7, Clause 2 aforesaid. That section is as follows:—

7. "The importation of chandoo or opium dross into any Settlement is prohibited, and any person who shall import or attempt to import chandoo or opium dross into any Settlement shall be liable on conviction to a fine not exceeding.....and the chandoo or opium dross shall be forfeited.

WOOD, J. 1890. — ING AH MENG v. OPIUM FARMER.

Any person having on board any ship on its arrival within the limits of the Colony any chandoo or opium dross, except such as might properly be required for the use of the crew or passengers on the passage of such ship as sea-stores shall be deemed to have imported the same."

The appellant appealed against this conviction.

Anthony, for the appellant contended, there was no evidence to trace the chandu to his possession, and he could not therefore, be said to *have had* it. It was found on board, but he was no more to be deemed to have imported it from this mere fact than anybody else on board.

D. *Logan*, [*Solicitor-General*] admitted he could not support the conviction.

Wood, J. The conviction must be quashed. It is a case in which costs should be given.

Conviction quashed, with costs.

DONOHUE *v.* JOAQUIM.

SINGAPORE. — O'MALLEY, C. J. 1890. — August 12.

Where the process of this Court is abused, as for instance, by a plaintiff issuing a summons for a gross and scandalous claim, the Court will summarily without notice to the plaintiff, order it to be taken off the file and the service set aside.

This was an application by the defendant to be allowed to give short notice of motion to the plaintiff to shew cause why the writ of summons herein should not be struck out and service set aside; or if the Court considered that the summons should not remain on the file, that it might be struck not without notice to the plaintiff on the grounds that it was a gross abuse of the process of the Court and scandalous. The defendant was a Barrister and an Advocate of this Court. In 1885, the plaintiff, who was a Barrack Sergeant, consulted the defendant, and the result was an action [No. 55 of 1885] against the then Senior Commissariat Officer, Colonel Wild, for damages for assault and false imprisonment. Colonel Wild pleaded to that action that plaintiff was subject to military law and as such imprisoned for an offence and that this Court had no jurisdiction. The case was argued for two days before Sir THOMAS SIDGREAVES, the then Chief Justice, the defendant arguing the case as Counsel for the plaintiff. The Court, on the authority of *Dawkins* v. *Paulet*, 5 L. R. Q. B. 94, held that it had no jurisdiction [*a*.] and gave judgment for the defendant without going into the merits of the case. On 18th April last, the plaintiff was sued in the Court of Requests for $2 balance of his *boy's* or servant's wages; he issued subpœnas to the present defendant and to the Attorney-General, the Registrar of this Court and others. The defendant attended on the subpœna [para. 10 of claim hereinafter mentioned], but the plaintiff did not do so and judgment was given against him for the amount claimed. Yesterday, 11th August, the plaintiff began this action against the defendant and caused the writ of

[*a*.] See *Kamoo* v. *Bassett*, Vol. 1 of these Reports, p. 1.

summons to be served on the defendant on the same day. This writ of summons stated the title of the action as "John Donohue, in behalf of himself and three children, of Singapore, Inhabitants—plaintiffs—and J. P. Joaquim, Barrister or Advocate—Defendant." The endorsement of claim which was headed "Special Indorsement," was as follows:—

"The plaintiff's claim is $15,000, on account of the case $\frac{85}{83}$, *Donohue* v. *Wild*, the defendant being the plaintiff's Advocate in that case, where law admits no excuse whatever for the admitted offences, not only against the plaintiffs, but also against the Crown.

For culpable neglect, refusal of duty and cheating his clients in serving the other or defendant-side against his own clients.

1. By not making the charges so strong nor claiming the amount for damage and loss shewn by the plaintiffs' instructions, verbal and written. This would be acquiesced in if he, the defendant, had done his duty otherwise—it now forms part of the whole fraud.

2. By deceiving his client by promises that slight inaccuracies in the pleading, prepared by the defendant, were immaterial, and that his client could make a full statement when the time came for trial [which time never has come through the defendant's neglect and refusal of duty] by a promise that he, the defendant, would have that defendant, in case $\frac{85}{83}$, examined on oath on his utterly false pleading.

3. Allowing that defendant to prevent a settlement on trial, by an utterly false pleading, that the wrongs or grievances are not cognisable by Civil law, &c. Refusing to have that defendant sworn, or to examine him, and shutting out the witnesses produced to prove what the plaintiff alleges.

4. Cheating his clients out of $300 by taking $100 as a fee to obtain redress for his clients, in a case where law admits no excuse for the defendant, by refusing an offer, an arrangement by the defendant's-side, without the knowledge or consent of his clients; and in face of this offer of arrangement, and in face of that defendant confessing offences for which the law admits no excuse, he [the present defendant] allows that defendant afterwards to make use of an utterly false pleading, that the offences for which he had previously offered to make an arrangement, are not cognisable by Civil law; and to cheat and mock his clients under pretence that they could get benefit of military law, in consequence of which forgery and falsifying by that defendant, and culpable neglect and refusal of duty by the present defendant, about $200—more has been taken by force and in defiance of law from the plaintiff, to punish and intimidate him from seeking protection of law—or as it may be put, for being law abiding—in submitting to a series of grievous wrongs, and for seeking settlement at law, instead of killing the offenders on the spot.

5. Culpable neglect and refusal of duty, causing loss of about $500 more, by serving the other side, and enabling the defendant to conceal all previous wrong-doing, and causing further endless loss by allowing the defendant to make use of another false and fraudulent document, as pretence of acquittal of offences—which no power on earth can acquit them of—and in face of the defendant being allowed to prevent trial or settlement, and in face of there being no notes of investigation, or record of evidence, to shew even a colour of trial or legality.

6. That the value of the several sums of money maliciously wasted or arbitrarily taken, in defiance of law, by way of private punishments, to intimidate the plaintiff from seeking settlement at law, is immeasurably beyond the proper value of that money, in consequence of wrong being heaped on wrong, and in consequence of a persistent disobedience to the Will of God, expressed in law,—more grievous, in some respects, than that rebellion or disobedience on account of which hell has been made, and all mankind condemned.

7. Culpable neglect in allowing the defendant, on the other side, to be screened, when law admits no excuse; and in allowing his own clients to be so outrageously punished, for being law abiding and seeking redress at law, instead of taking law into his own hands.

O'MALLEY, C. J. 1890.

DONOHUE v. JOAQUIM.

8. Culpable neglect is not appealing against such perversion and reversal of justice.

9. Culpable neglect, in allowing the defendant to put the responsibility of his own disobedience to the laws of the Crown, on the Crown.

10. Maliciously resisting the plaintiff's rights in law, and disobeying the commands of the Crown, by refusing to attend Court to give evidence on 18th April, 1890, when duly subpœnaed.

11. Necessitating a Petition of Right, and a claim of $40,500 against the Crown, by culpable neglect, in allowing his clients to be deprived of Civil rights and liberty, and benefit of law—to be so often and outrageously punished for being law abiding and seeking settlement at law, Allowing the actual offenders to escape, by putting the blame on the Crown, and making common cause with others, in resisting the law, and blocking every other means of settlement? Consequently, unless the full amount of the claim is imposed, the Attorney-General, in his answer, may try to put the whole blame of this defendant; so that when a man is so outraged that he puts the name of God on the last wrong, be it ever so little in itself, great injustice would be done, if this defendant is let off lightly now; and Her Majesty's Attorney-General coming forward a short time after, trying to excuse the Government by saying all the blame rests on this defendant, after being let off lightly. It being self-evident, that if no excuse can be found for the first defendant, none can be found for this defendant, allowing the first to be screened, and his own client not only to be deprived of benefit of law, but so outrageously punished for being law abiding, and all the subsequent consequences as well.

12. Although he neglected to prevent, he could not force the Chief Justice and others to disobey directions of law, therefore each is responsible for their own separate offences, and the Crown for all."

Address for service. "Guardian's Quarters—Government House."

Joaquim, the defendant, in person now *ex-parte* called the attention of the Court to the writ of summons and made the application as above stated. He submitted that the Court had full power to set aside writs, &c., when they were an abuse of the process of this Court [*a*.] and scandalous. Section 184 of the Civil Procedure Ordinance, 1878, bore somewhat on the point.

O'Malley, C.J., without giving notice to the plaintiff, said the writ of summons was most scandalous, and he would not allow it to remain a moment longer on the file; and ordered it to be forthwith taken off and set the service aside.

Summons taken off file. Service set aside.

REGINA *v.* YEOH BOON LENG.

PENANG.

WOOD, J. 1890.

August 18.

Query. Can a *Chinaman* be convicted of *bigamy* in this Colony? [*b*.]

Where a Chinaman was prosecuted for bigamy under Section 494 of the Penal Code, and the prosecution were unable to prove that by Chinese law, custom, or religion, the second marriage was void by reason of its taking place in the lifetime of the first wife,

Held, he was entitled to be acquitted.

The *onus*, under the said Section 494 of proving that the second marriage is void as aforesaid, is on the prosecution, and not on the prisoner, to prove that the marriage is valid.

Books purporting to contain the Code or laws of a Foreign Country, before they can be admitted as evidence under Section 12 of the Indian Evidence Act II. of 1855, of such laws, must be shewn to be books not only compiled or written by permission of the

[*a*] See *Stein* v. *Valkenhuysen*, 27 L. J. Q. B. [N. S.] 237, 238, per *Crompton*, J.

[*b*.] See *In the goods of* Ing Ah Mit, antè p. 380.

Government of that country, but in its compiled form as tendered, to have been printed or published under the authority of that Government so as to appear to have in that condition and language the sanction of that Government and so to be accepted as reliable.

Books on foreign law, to be admissible under the other part of the said Section 12, must be shewn to be books "*commonly admitted*" in the Courts of that Foreign Country, "as *evidence* of the law of such country."

Where therefore it was proved by a witness [not an expert] that he was in the habit of attending the Courts of the Foreign Country, but was seldom present at the hearing of cases, and that certain books [produced] were used as reference of the laws by the Judges of that country who tried Civil and Criminal Cases—and that he had seen such books in the Courts of Justice there, and had seen them turned over and looked at by the Judges, but he had no knowledge whether they were admitted as evidence of the law in those Courts,

Held, the books were not admissible under Section 12 aforesaid.

No other books or writings on foreign laws, customs, or manners, other than those falling within Section 12 aforesaid, are admissible in evidence or can be read to a Jury.

In a case of importance, and where no harm will be done to a prisoner, the Court will adjourn a part heard criminal trial for a longer or shorter period to enable the prosecution to procure evidence to prove the charge laid against the accused.

The prisoner, who was a Chinese merchant, residing in Beach Street, Penang, and a British subject, was charged at the Criminal Assizes before *Wood*, J., and a Common Jury "for that he the said Yeoh Boon Leng did on or about the 29th day of May, 1890, at Penang, having a wife, to wit: Kam Saw Keat, still living, marry one Seh Ann, such last mentioned marriage being void by reason of its taking place during the lifetime of such wife, to wit: the said Kam Saw Keat, and that he had thereby committed an offence punishable under Section 494 of the Penal Code."

The case was heard on the 30th and 31st July, and on this day.

Adams, for the prosecution, in opening the case, told the Jury that though it was an accepted thing that a Chinaman could take unto himself more than one wife, as a matter of fact by the Chinese law, he could marry but one as his only and lawful wife. He was about to read from a book called "*The Middle Kingdom*," by Williams,

Van Someren, [*Gurney* with him] for the prisoner, objected to the book being read.

Wood, J. upheld the objection.

Adams continuing his opening, then said he undertook to prove that the marriage of the prisoner to Seh Ann with the same ceremonies as for a marriage with a first or lawful wife, during the lifetime of Kam Saw Keat the first and lawful wife, and without having previously procured a divorce from her, was void according to Chinese law, and the prisoner was therefore punishable under Section 494 of the Penal Code. He then proceeded to call Kam Saw Keat the first wife.

Van Someren objected, as she being a wife of the prisoner could not give any evidence *against* him in a criminal trial of this kind.

Wood, J. without expressing any opinion on the objection requested *Adams* to address himself first to proving that the marriage to Seh Ann was void by Chinese law.

WOOD, J. 1890.

REGINA v. YEOH BOON LENG.

Adams, hereupon produced several volumes of Chinese books and said he would call a witness, a person who had resided in China for many years and was well acquainted with the laws and customs of that country, who would be able to prove that these books [certain passages of which he had caused to be translated] contained the laws of China.

Wood, J. intimated that our law required that such evidence should be given by an *expert*, but he would before deciding, hear the witness *Adams* had.

Adams, hereupon called Mr. Lim Kok Cheng, one of the Chinese Interpreters of the Court, who after being duly sworn, stated that—

"He had resided in China for eighteen years. He was first employed in the Custom House at Foochow in the Hokien Province, but afterwards promoted to the Office of the Board of Trade. He was in the habit of attending the Courts there as often as twice a month, but was seldom present at the hearing of cases. The books produced contained the laws of the present [Tai Cheng] dynasty which extended all over China. He had similar books with him before. They were used as reference of the laws by Mandarins who tried both Civil and Criminal cases. He had seen those books in the Courts of Justice there [Yamen] and seen the books turned over and looked at by the Mandarins. They contained the Civil as well as the Criminal laws and were accepted as authority on Chinese laws in the Chinese Courts, but he had no knowledge whether they were admitted as evidence. The Chinese Consul in Singapore was a Mandarin and an Expert."

Wood, J. was of opinion that this evidence would not do, and that an expert was necessary to prove what was the law of China, and that the evidence was also not sufficient to bring the books within that portion of Section 12 of the Indian Evidence Act II. of 1855, which provided that "books proved to be commonly admitted in such [foreign] Courts as evidence of the law of such country, should be admissible" in this Court "as evidence of the law of such foreign country." He however suggested that if the books shewed that they had been published by the authority of the Chinese Government, they would be some evidence under the other part of the same section which provided that "books printed or published under the authority of the Government of a foreign country, and purporting to contain the Statutes, Code, or other written law of such country.....shall be admissible..... as evidence of the law of such foreign country."

Mr. Lim Kok Cheng then examined the books with this view, but could find nothing in them on the point.

Wood, J. however thereupon permitted the witness to be examined as to his knowledge of the *custom* of Chinese marriages, whereupon Mr. Lim Kok Cheng stated—

"He had never known a Chinaman marrying two wives in China. A person could marry one wife and take other women as concubines; but many Chinese Babas here, who were already married, had gone to China and got married there again to other women as no one tried to prevent them from doing so."

On being cross-examined, Mr. Lim Kok Cheng stated—

"He had never studied the Chinese law, and all he could speak to was from what he had heard as well as from his personal observations both in China and here; that there were several Chinese here who, having a wife here went to China and married again, and *vice versâ*. He knew two cases of Chinese resident here who had two wives married here; the name of one of them he mentioned, the other name he could not recollect. Several names of respectable Chinese were then mentioned to the witness, and he was asked whether he did not know from common report that they had more than one wife here. Some of these he said he did not know, some he knew had mistresses, and one of them [an uncle of his] had not. He was asked if he had never in the course of his official duties known that a Chinaman—a comparatively poor man—had two wives in Penang. He replied he had."

Whereupon Counsel produced the papers *In the goods of* Ing Ah Mit, deceased [*a*], and asked the witness if that was the case, to which he replied it was. The petition for administration by the second wife, and two affidavits by her in which she described herself and spoke of the first wife too, were then shewn the witness, and he was asked if they bore his signature as having been explained by him to the petitioner and deponent, and on his replying in the affirmative, he was asked how he explained in Chinese to the petitioner and the deponent the words "two widows," "second wife" and "other wife," upon which the witness stated he had spoken of them all as "Boh" [wife]. He was then asked whether he *himself* had not been married in China and had a wife there, and whether he had not since been married in Penang and had a wife here too. He admitted that it was so, and that both were his wives.

Adams, then called a further witness—Mr. Ernest Karl, a French gentleman, and late Assistant Protector of Chinese in Penang, who stated he had resided over nine years in China and had studied the Chinese law.

Van Someren objected to the witness being examined as an *expert*, merely because he had studied the Chinese law, and referred to *Bristow* v. *Sequeville*, 19 L. J. C. P. [N. S.] 289, in which *Alderson*, B., had said it was "not competent for a Frenchman who had studied the books relating to Chinese law, to prove what the law of China is."

Wood, J., said on the English authorities he could only admit a person as an *expert* on foreign law who had not only studied that law, but had also practiced or administered it.

Adams then examined Mr. Karl with a view to shewing that the Chinese books already referred to were printed or published by the authority of the Chinese Government and so admissible. Mr. Karl hereupon stated that—

"The books were volumes of the Penal Code of China passed by the Tai Cheng dynasty. He knew they were used in Chinese Courts of Justice as guides for the administration of law there and were also learned by students. He did not know if they were used "as evidence" in those Courts. There was nothing to shew that the books were published by authority of the Government of China, but they contained the whole Code. They purported to be

[*a*.] See *In the goods of* Ing Ah Mit, antè p. 380.

WOOD, J. 1890. — REGINA v. YEOH BOON LENG.

a reprint of the Code, printed at the "Goh Soo Tong Press or Chop." He knew they were published by the Academy of Mandarins, but there was nothing in the books to shew the fact. The preface stated that "the former publication of the Code had deteriorated and were few, and it was advisable to reprint it for the better knowledge by the people of the laws of the country, so the compiler had undertaken the work, &c."

Adams contended, that the Chinese books were admissible on this evidence under Section 12 of the Indian Evidence Act beforementioned.

Wood, J., held the evidence was not sufficient to bring them within the section—it did not shew they were printed or published by the "Government" of China, nor that they were "commonly admitted as evidence" in China.

Van Someren objected to Mr. Karl producing a French translation of the Chinese law and it was withdrawn.

Adams, then submitted that these books being excluded, he should be allowed time to procure the evidence of an *expert*, in view of the great importance of the case. The Chinese Consul in Singapore was a Mandarin and an expert, and if an adjournment was allowed the prosecution would endeavour to procure his attendance.

Van Someren, objected to an adjournment after the case had been given in charge of the Jury. The prosecution had had ample time to prepare their case, and if the Magistrate had acted as he should have done, he should not have committed the prisoner to the Assizes without one tittle of evidence before him that the second marriage was void. The prosecution proved nothing then—they wished to try and prove something now, but had not been able to do so, and they wished for further time to get up a case. It was most dangerous to the prisoner to allow the prosecution to do this. Although the Court had the power, presumably under the Criminal Procedure Ordinance 6 of 1873, to adjourn a part heard case over a longer or shorter period, yet it would not readily exercise that power, especially as the prosecution did not shew that they had any reasonable prospect of procuring the evidence, or obtaining the attendance of the desired witnesses. The prisoner was in the hands of the Jury and he claimed a verdict.

Wood, J. said he thought that the case was of considerable importance—it would not be a case for punishing the prisoner if he should be convicted, except nominally for declaring what the law was, and so no great harm would be done to him. He thought that in the interests of justice and to ascertain what the law was as affecting Chinese second marriages, he ought to grant an adjournment to enable the prosecution if they could, to prove their case. The case would be adjourned to Monday, the 18th August.

18th August. Adams, for the prosecution stated that the Chinese Consul, in Singapore, had not been able to come up and he was doubtful how he could have compelled his attendance by process of this Court. The Consul, however, had sent up certain Chinese law books [other than those already tendered and

rejected] and these he would now tender in evidence as having been printed or published by the authority of the Government of China. He then called Mr. Lau Su the other Chinese Interpreter of this Court, who had had an opportunity of examining the books and making translations therefrom. This witness first read the imprint on these books, and stated that it was to the effect that—

"Those books had been reprinted by the Court of Trials of the Oh Pah Province in the Winter of the 11th year of the reign of the Emperor TONG TEE" [1872]—He did not know what was meant by the "Court of Trials." He then read portions of the preface, which did not shew anything. In the body of the book were several memorials to various Emperors at various times, and among these was a memorial for *permission to print these books*, with two replies from the Viceroy *granting such permission*. These memorial and replies, being translated were as follows:—

MEMORIAL.

"*Lew*, Judge, and *Chang*, Local Treasurer, of the Oh Pah Province, jointly submit this despatch requesting an order to act accordingly.

We presume that the trial of criminals is the most important part of administration, and laws regulate the trials of criminals. Any official who governs people ought to study them with his best attention. Now, on account of the daily increase of criminal offences, and civil litigations of the Oh Pah Province, we the said officials are very desirous to over-haul all matters concerning the trials of cases. We had submitted a despatch as to getting funds for establishing the principal department for trials, and framing regulations for teaching and punishing the people. Hitherto, we have the delegates to try cases. Besides the two prefects at "Boo" foo and "Han" foo—[a "foo" is sub-divided into districts]—another prefect is to be additionally appointed to sit in the department to preside over trials, and other officers are after careful selection to be deputed to that department to render assistance.

Those officers in that department must study, learn by-heart, understand and reason on the law books—so much so as to gather their full meaning and understand them thoroughly. In that case, all decisions are sound, and quotations are right and all punishments are adequate. But the law books sent out from the Board of Punishments are not many, and those reprinted by the printer's shops are not trustworthy for there are mistakes in the characters and strokes of the characters in them.

Besides these law books referred to, there are books of bye-laws, and books of precedents of cases in Courts now in use, &c., all these are important instruments in the administration of punishments. There being so many classes, the fear is that if they are not completely brought out, references cannot be obtained completely.

We, the said officials intend to carefully correct and compare the books called "The Laws of Tai Cheng Dynasty collectively compiled," and add thereto the bye-laws of decisions, cases of the Assizes held in Autumns, and tables of distances of the Wee Keun banishment and San Lew transportation. Cases decided in Courts more or less by reference to laws for years, and decisions passed by the Board, from time to time, for general use, will also be compiled. They shall be carefully examined and minutely assorted after the fashion of "the Collective compilation"—[the book abovementioned] *i. e.*, every thing belongs to a certain class, and shall be added thereto accordingly. They shall be assorted and compiled into volumes and printers shall be hired to reprint them. As to the correction, comparation, and compilation, we shall select those officers learned in law and cases, and they together with the legal advisers of the Court of Trials—the "Yuen" Department and the "See" Department—shall attend to that work properly, and get it done to full satisfaction. When they are printed into Volumes, they shall be at once distributed to all "foos" [sub-divisions of a Province]—

WOOD, J. 1890. REGINA v. YEOH BOON LENG.

"chows" [sub-division of a "foo"], and districts. *They shall be depended on and referred to.* As to the expenses required, the said Treasurer shall see how to pay them out of the funds for salaries of the officials in all "foos," "chows," and districts. This is an easier way to get the expenses, and the benefit obtained will be great.

We, the said officials do this for the sake of improving administration, and whether it is right or not, we ought jointly to submit this to your Excellency *and apply for your reply consenting to its being done.*"

REPLY.

"Minute received from the Viceroy *Lee* on the day of month of the 10th year in the reign of the Emperor TONG TEE [1871]:

I find that laws are important instruments to Mandarins and Rulers of people. As the original Standard Laws are very exact and their meaning is acute and deep, one must study and re-study them before one can gather their meaning, understand them thoroughly, and form one's decisions thereby. Therefore in the "Mandarin Act" it is set down in a clause that they must read and study the laws which have been examined and corrected by their higher officials for teaching and punishing the people. If a Mandarin does not always study and re-study to understand the meaning of the laws, he will surely make mistakes in his quotation and decision when he tries a case, and therefore the punishment cannot be expected to be adequate.

Now, the said officials intend to correct, compare, and reprint the "Law Books collectively compiled" and add thereto the bye-laws of decisions, table of distances of Wu Keun punishment and San Lew transportation, and cases decided in Courts more or less by reference to laws for years, and distribute them to all "foos," "chows" and districts, and to deduct the necessary expenses from the funds for salaries of the officials of "foos," "chows" and districts proportionately.

As what is submitted to me, is for the sake of improving the administration, *be it done accordingly.*

I desire that you will at once personally order the delegates to minutely correct and compare them so as to ensure that there shall be no mistakes in the characters and strokes of the characters that strangely exist in the laws and cases—*so they can be reliable and depended on and can be referred to.* But the having of a good system of administration is better when accompanied with the possession of men who can administrate. The kindness of our dynasty extends over the whole empire, and the people are taught to be good by virtues. If the Rulers of people of all places can administrate in the best way and make the people know to keep themselves within the limits of the law, then it can be expected to arrive at the prosperity of ceasing to use punishments as in ancient times, and then the happiness of our peace will be enjoyed for ever.

I arrive at this conclusion. I and the said officials ought to exert ourselves to the utmost."

FURTHER REPLY.

"Another minute received from the Vice-Viceroy *Kwoh:*

The enactment of laws is to do what civilisation fails to effect; and to suppress fierce-heartedness, rebellion, unprincipled intrigues and wickedness that are committed.

Bye-laws may be increased or diminished as time demands it; and trials vary according to the circumstances of the cases, but the only thing wanted is, that the Standard Laws must not be departed from. Bye-laws are near to Standard Laws, and are therefore placed after the latter; but they are purposely not printed in the Standard Laws. Cases are in accordance with the Bye-laws and are therefore put together with the latter: then they are conveniently arranged. This is the reason why the Board of Punishments recently established the Law Office. The said officials want to collect the laws, and select officers to correct and compile them. When they are published in future for use, then those who are to administer according to law, shall have them for guidance and need not leave their power to the clerks and inferior officers, because they being

officials, cannot trust their own decision. Moreover, the ignorant subjects after their attention is drawn to the fact that they cannot escape through the meshes of the law, will try to reform themselves at an early date. Now, I see the administration and the virtue of the people will improve daily.

I desire that you will at once act as prayed for, subject to the minute of the Viceroy."

Adams contended, that this was ample evidence that these books were "printed or published under the authority of the Government" of China, within the meaning of Section 12.

Wood, J. held the books were not admissible. The evidence was amply sufficient to shew that permission had been given by the Chinese Government to compile and republish their laws, but failed to shew that these *particular books* were compiled under that permission; or if so compiled, that the Government had *accepted* them as correct. "Printed or published by the authority of Government," in Section 12, meant that the books in the form in which it was when tendered in evidence, should be the form and the identical law, and in the condition and language which was *sanctioned* by the foreign Government, and so to be relied on as correct. He therefore ruled against them.

Adams then contended, that as the Court had neither evidence of Chinese custom nor law before it, the defendant, as a British subject, came under the English law, and as he [*Adams*] was prepared to prove the two marriages, it was for the prisoner to shew he had the right to contract the second marriage and that it was not void. In *Mayne on the Penal Code*, p. 388-9, all the cases mentioned shewed the prisoners tried to prove the marriage was valid, shewing the *onus* was on them.

Van Someren contended, that it was clear from the wording of Section 494 of the Penal Code, that the *onus* was on the prosecution to prove that the second marriage was void. The prisoner only came within its provisions "if the second marriage is void by reason of its taking place during the lifetime of the first wife"—these words were designedly put in so as not to bring within the criminal law for bigamy a class of people to whom polygamy was a recognised institution by their laws and customs. In other words all the essentials of Section 494, one of which was that the second marriage should be a void marriage because of the first wife being alive, must be proved, before a prisoner could be convicted under the section.

Wood, J. held that it was clear from the section that the *onus* was on the prosecution to prove that the second marriage was void.

Adams, requested that all his points both as regarded the question of *onus* of proof and admissibility of the Chinese books might be reserved for the Court of Appeal.

Wood, J. declined to do so; and under the circumstances directed the Jury to return a verdict of "not guilty" which was accordingly done, and the prisoner was discharged.

Not guilty. Discharged.

THE ASSOLINE.

SINGAPORE. — O'MALLEY, C. J. 1890. — August 27.

There being no claimants to a sum of money found on board a derelict vessel at sea, the same was declared to belong to the Crown; but the costs of the application to have it so declared were ordered to be paid out of the fund.

This was a motion in Admiralty, arising from the following facts. The s. s. *Glenearn* in command of Captain Duke, in the month of February, 1884, was steaming through the Indian Ocean when she sighted a derelict vessel. A boat was lowered and sent away on board, and it was found by the boat's crew that there were only three corpses on board the ship, which was a native craft named the *Assoline*. The boat returned to the *Glenearn* and reported the matter, and her captain considering the *Assoline* dangerous to navigation, ordered the boat's crew to return and scuttle her. The crew returned, and before sending the craft to the bottom they looked round a little and discovered several sums of money amounting altogether to 664 rupees. Captain Duke, on his arrival in Singapore, handed over the money to the Master Attendant, and he received the sum of $64.31 by way of salvage. Due notification had been given of these facts, and the owner of the *Assoline* or money called for; but no claimants appeared.

Bonser, [*Attorney-General*] as Admiralty Advocate now moved *ex-parte* that the remainder of the money be declared the property of the Crown—and also asked that costs for the Crown should come out of the fund. He contended the costs would be under the Vice-Admiralty Rules, and that the person entitled to the fund must pay the expenses for getting it out of Court.

O'Malley, C.J. This is not a claim by the Colony, but by the Crown. Costs are reimbursements. I shall make the order asked for.

Order as prayed, with costs.

REGINA *v.* MABOT & ORS.

SINGAPORE. — O'MALLEY, C. J. — August 28.

It is not necessary on the hearing of an appeal from the decision of a Magistrate under the Appeals Ordinance 12 of 1879, that the appellant should be in Court or within the jurisdiction.

It is no objection to a conviction for an offence against the Arms and Ammunition Exportation Ordinance 18 of 1887, that an order of forfeiture of the arms, &c., is not at the same time made.

The exportation of arms, &c., which is prohibited by the Arms Exportation Ordinance abovementioned, is an exportation *direct* to some prohibited place, and not an exportation from this Colony to some unprohibited place, although accompanied with an intention afterwards to export such arms, &c., from such latter place to the prohibited port.

The language of any Proclamation issued under the Ordinance must be controlled by the provisions of the Ordinance.

The appellants were convicted by Messrs. E. W. Birch and S. Leslie Thornton, two Magistrates, at Malacca, for that they on or about the 28th February, 1890, did export arms and ammunition to Netherland India, contrary to Proclamation, and punishable

under Sections 4 and 7 of Ordinance 18 of 1887, and were sentenced, the Chinaman, to pay a fine of $1,500 or six months imprisonment, and the Malay and Achinese prisoners $500 each or three months imprisonment. The evidence shewed that a steamer named the *Cecil Smith* had been despatched by the Chinese prisoner, laden with a large quantity of arms and ammunition. The other prisoners were his friends and accomplices. She left Singapore ostensibly for Lingi, in the Native State of Sungei Ujong, viâ Malacca, but there was reason for believing that the arms and ammunition were eventually intended to be taken from Lingi by some other vessel and smuggled into Netherlands India. The Police at Malacca having received information of the fact, the vessel on arrival at Malacca, was boarded by them and the prisoners taken into custody and the arms and ammunition detained. The prisoners were then charged and subsequently convicted as above stated. They appealed against this conviction —the appeal was partly heard in Malacca, and was subsequently adjourned to Singapore and came on for further argument on 27th August, and on this day.

Bonser, [*Attorney-General*] *Bailey* with him, for the Crown, took a preliminary objection that the appeal could not be heard as the appellants were not in person in Court, but were out of the jurisdiction. They contended that no sentence of corporal punishment could be passed on a person in his absence. This Court might if it thought the punishment insufficient, increase it—Section 25, Ordinance 12 of 1879. Section 34 necessarily implied that the person who came to this Court appealing from a Magistrate's decision subjects himself to the jurisdiction of the Court, and even if he had paid his fine and discharged the obligation the law imposed on him, the Court could increase the penalty in such a case, as the man must be prepared to submit to whatever punishment the Court thought right to impose. Even if he was sentenced to imprisonment and had served his term, and then appealed, and the Court held that a greater offence had been committed than that which he had undergone imprisonment for, the Court was justified in sentencing him to a further term of imprisonment. They then contended that the word "export" in Ordinance 14 of 1887, meant the mere taking out of this Colony—and referred to *Webster's Dictionary*. The exporter's duty finished as soon as the goods left the country—the etymological meaning of the word was, "carry out of the country." The usage of language would be considered in law, and if the ultimate destination of the goods is a foreign country, then according to usage the goods would be said to be "exported" to that country. The Court must look at the ultimate destination, and that destination here was Acheen. It was not necessary to prove the arrival of the goods at Acheen. The Ordinance spoke of exportation "to" a place—"to" meant the ultimate destination in the intention of the party—so that the goods would get to the prohibited place by some means or other. International comity must also be considered, and it was a serious offence to

O'MALLEY, C. J. 1890.

REGINA v. MABOT & ORS.

interfere with that comity. If the appellants could not be said to have exported they certainly were guilty of *attempting* to export, and the conviction could be amended. Their further arguments sufficiently appear in the judgment.

Everard, [*Joaquim* with him] for the appellants, contended that it was not necessary to have the presence of the appellants. Section 14 of the Appeals Ordinance was pretty clear on the point and shewed that the contemplation of the law was, the appellant need not appear as a matter of necessity, in any case. In this case, the appellants had paid into Court their fines and given security for the costs of the appeal; and there was not an instance on record in which this Court had increased a penalty—there were instances of lessening a penalty, but none the other way. Then the conviction was bad, as no order for forfeiture of the arms, &c., was made as required by Section 8 of the Arms Exportation Ordinance, 1887. Then as to the word "export," they contended that it meant the arrival of the vessel at the place to which the goods were being sent. The vessel here was bound for Lingi—her manifest so declared, and there was nothing to shew that the goods were destined for Netherlands India. Then as to the "attempt." As regarded the Ordinance, exportation was an innocent act; it is only an offence if done in contravention of a Proclamation. The destination of these goods from Singapore was Lingi, and the Court had nothing to do with the final destination of these goods from Lingi—the Ordinance spoke of exportation from a place to a place, and before there could be a conviction for an "attempt" there must be an overt act done in carrying out the intention. Anything done with the goods at or beyond Lingi was a distinct and separate act—the export from Singapore being over on arrival at Malacca or Lingi. No person could on law be convicted on a mere presumption of intention. Their intention might have been the worst before their arrival at Lingi, but on arrival at Lingi their intention might have materially altered. All attempts at exporting beyond Lingi would be acts done beyond the jurisdiction of the Court. Their further arguments appear in the judgment.

Bonser, replied.

Cur. Adv. Vult.

September 1st. *O'Malley*, C. J. In this case the appellants were convicted by a Court of two Magistrates at Malacca of the offence of exporting arms to Netherlands India, contrary to the provisions of a Proclamation made by the Governor in Council under the authority of Ordinance 18 of 1887, an offence punishable under Sections 4, 6 and 7 of that Ordinance. It appears from the case that the charge as proved, and upon which the defendants were actually tried, was so insufficiently stated as to disclose no legal offence upon the face of it. The charge as it appears in the proceedings is as follows:—

"That you the said Mabot, Mahmin, Chan Ong Bi, and Tengku Gampong on or about the 28th February, 1890, did export arms and ammunitions, to wit: 7 barrels gunpowder, 2 cases rifles, 1 case percussion caps, and one case

ammunitions and thereby committed an offence punishable under Sections 4 and 7 of Ordinance 18 of 1887."

The only fact that this alleges against the defendants is that they did export arms and ammunition, which in itself is not an offence. No objection was taken upon this ground, and I am satisfied that in the course of the hearing, defendants were informed as to the nature of the offence for which they were being tried, therefore, I do not feel bound to take further notice of this defect beyond saying that it shews at least that the proceedings in this case were taken without proper care to see that they were regular. The conviction is for an offence committed on or about the 28th of February, when the defendants were proved to have been at Singapore, so that it is for an offence committed at Singapore, a circumstance which might suggest some questions as to the jurisdiction of the Malacca Magistrates to convict. The appellants were fined, some of them $500, and one of them $1,500, and the arms and ammunitions were declared to be forfeited. The defendants had the benefit of legal advice upon the trial, but they did not apply to the Magistrates to reserve any point of law for this Court in the manner provided by Section 16 of Ordinance 12 of 1879, and they paid their fines. Subsequently, they applied to the Magistrates under Section 18 of the same Ordinance to state a case on appeal which was accordingly done, and that case having been brought on before the Court at Malacca was adjourned here. It appears from the evidence, that on the 28th of February, the *Cecil Smith*, a British steamer trading between the port of Singapore and the port of Lingi in the adjoining Native State of Sungei Ujong, was lying in the harbour of Singapore. The vessel had cleared and was about to commence her voyage to Lingi to touch at Malacca on the way, when the defendants brought on board a quantity of arms and ammunitions which were placed partly in the hold and partly on deck, and which were entered upon the ship's manifest as sundry goods for Malacca. The steamer started soon after, and reached Malacca on the 1st of March. Meanwhile, the Police at Malacca had received information of what was going on, and as soon as the steamer came into the neighbourhood of that port, boarded her, searched her, seized the arms and ammunition that they found on board, and arrested the defendants and conveyed them before the Magistrate at Malacca, where the case was heard and determined. The appellants contend, that they were illegally convicted, and a variety of objections have been urged both on the law and on the evidence, and as regards the informality of the proceedings in the Magistrates' Court. Before dealing with these, I must notice a preliminary objection to the proceedings on appeal, which was raised by the Attorney-General, who appeared on behalf of the Crown, to support the conviction. The Attorney-General contended, that this Court could not deal with the present appeal, unless it was first made to appear that the appellants were within its jurisdiction, and he urged that as the Court has power not only to quash convictions, but also to confirm, alter, increase, or award sentences, which may be

O'MALLEY, C. J. 1890. — REGINA v. MABOT & ORS.

imprisonment, it cannot exercise its jurisdiction on appeal, in any way, unless the defendants are present. I do not find that it has ever been the practice to insist upon the personal presence of the appellants, nor do I see either in the terms in which the jurisdiction of this Court to hear these appeals is conferred, or in the terms in which the right of appeal to the parties aggrieved is granted, or in the terms in which the procedure of the Court, and the conditions to be observed, are prescribed, any such condition laid down. The rights of parties to appeal, and the duty of the Court to hear the appeal, are stated in explicit terms in Sections 18 and 24 of Ordinance 12 of 1879, and the procedure and conditions to be observed for the due exercise of that right are fully laid down in Sections 18 to 22 without reference to any such condition. I think that it is a rule, that where jurisdiction is once given to a Supreme Court by plain words it can only afterwards be limited by express provision or by clear implication, and that it is also a rule that where a right, such as this right of appeal, is granted, it should not be otherwise than liberally construed in favour of the party to be benefited. It would be contrary to both these rules to hold, upon the ground urged by the Attorney-General, that the presence of the defendants is essential to their right to have their appeal heard, and to the jurisdiction of this Court to hear it. But, further, as was pointed out for the appellants, this Appeal Ordinance 12 of 1879 contains language which seems to imply positively, that the presence of the defendants is not necessary. Section 14 which, though it relates to appeals from the Supreme Court, bears directly upon the question, says:

"The Court of Appeal, after reading the case and hearing the Law Officer of the Crown or Counsel for the prosecution, and the person accused or convicted, or his Counsel, if all or any of them appear, shall have authority to direct the Court below as to any question or questions raised by the proceedings, and may reverse, alter, amend, or affirm the judgment; and if the judgment, is reversed, may direct that the person convicted be tried again before the Supreme or any other Court having jurisdiction on the same charge, or any other charge for which he is liable to be tried, if the Court of Appeal think that the person ought by law to be tried again. The Court of Appeal shall certify its decision to the Court below, which Court shall make such orders as are conformable to the decision of the Court of Appeal."

And again, Section 25 which relates to Magistrate's Court, says:—

"The Court shall give judgment in the said appeal after hearing the parties or their Counsel if in attendance on the day of hearing, and may affirm, alter, or reverse the adjudication of the Magistrate or Court of two Magistrates as justice may seem to require. Provided always, that if it shall appear to be necessary for the due determination of the appeal, the Court may order the witnesses examined, or offered, or named for examination in the Court below in the cause on either side, to be further examined, and may remit the case to the Magistrate or Court of two Magistrates for amendment and for further evidence, either for appellant or respondent; and after such amendment is made or further evidence supplied, judgment shall be given by the Court."

Both passages clearly shew in my opinion that the presence of the defendants was not intended to be a condition of hearing

their appeal. A reference to the provisions of the Indian Procedure Code, on the same subject, points to the same conclusion. I hold therefore that the objection to the appellants' claim to have their appeal heard has not been sustained. Coming now to the appeal, and to the contentions raised on the part of the appellants, I have to notice first an objection that was taken to the conviction, on the ground that it is too vague in its terms, inasmuch, as it does not state what the Proclamation is which the defendants are said to have contravened. The conviction says simply that the defendants about the 28th February, 1890, did in contravention of a Proclamation, export arms and ammunitions, to wit: 7 barrels of gunpowder, &c., and thereby committed an offence punishable under Sections 4 and 7 of Ordinance 18 of 1887. This is an objection which might have been urged with more or less effect in England, or where criminal procedure is regulated by English law, but having regard to the terms of Section 33 of Ordinance 12 of 1879, and being satisfied that the irregularity, such as it is, does not occasion a failure of justice, I now hold that it does not invalidate the conviction. It was also objected, that the declaration of the forfeiture of arms, should have formed part of the conviction, but nothing substantial in support of that objection was urged, and I think that the objection itself was frivolous. It was then contended, that the evidence did not support the conviction, and it was urged on that point that assuming that it is an offence simply to put arms on board a vessel with the intention that these arms should ultimately find their way to a prohibited place, there was no evidence sufficient to establish that intention in this case. Upon this point, I do not think it is necessary to give any absolute decision, but if it were, I think, I should be reluctant to act upon the circumstantial facts here present. They create suspicion of an intention, but that is not the same thing as the clear and cogent proof of an offence that warrants a conviction, and where one is dealing with intentions there is need to be particularly cautious, lest suspicious circumstances should be mistaken for proof of guilt. But my decision here is irrespective of any absolute conclusion on the point; I come now to the main question, namely: What is an exportation of arms to Netherlands India contrary to the provisions of the Proclamation and Ordinance? And for the purpose of dealing with this question, I will assume the fact to be that these defendants, when they put these arms on board the *Cecil Smith* to send them to Lingi, intended, in so doing, to have them landed or transhipped at the Port of Lingi, and thence transmitted in another vessel to Netherlands India as their ultimate destination. I assume also as a fact, what is admitted upon the case, that the *Cecil Smith* was bound for Malacca and Lingi and no further, and that any goods on board destined for any other place would have had to be landed or transhipped at one or other of these ports and placed in another vessel for export thence. Now, it is contended for the respondents, that any sending or carrying away to sea, which is accompanied by an intention

O'MALLEY, C. J. 1890. —— REGINA v. MABOT & ORS.

in the mind of the sender that goods so carried away shall find their way ultimately to Netherlands India, is an exportation to Netherlands India within the meaning of the Ordinance. And on the part of the appellants it is argued, that exportation to Netherlands India means exportation in a ship bound to Netherlands India; exportation with at least some overt act, at the time of exportation, fixing the destination of the goods, at the time of exportation to Netherlands India, and that exportation to any other place not prohibited, though it may be with the intention of having the goods transmitted from that place to Netherlands India, is not by reason of the mere intention an offence against the Ordinance. The Attorney-General contended first, that you must interpret the words "Export to" a place, used in the Ordinance, in their most popular sense, because that is the sense more agreeable to the general intention of the Ordinance and to the purpose to which it is directed, and that if you interpret them in that sense, then any sending away of arms from Singapore with the intention of their getting ultimately to Netherlands India, will be an exporting of the arms to Netherlands India within the meaning of the Ordinance quite irrespective of whether the ship that takes the goods from Singapore is bound to Netherlands India, or to London or to San Francisco, or any where else. We must look therefore to see what is the intention of the Ordinance, what purpose it had in view. The Ordinance itself is a re-enactment, with certain amendments of Ordinance 13 of 1867. It has no preamble, but presumably its object is the same as that of Ordinance 13 of 1867, which has a preamble, reciting that "it is expedient to provide powers for the prevention of the export from the Colony of arms, under certain circumstances." That, I take to be the intention of this Ordinance, "to provide the power for the prevention of the export from the Colony of arms, under certain circumstances." The Ordinance then enacts that the Governor in Council may by Proclamation prohibit the exportation of arms from the Colony either generally, or to any country, or place to be stated in the Proclamation. But the Proclamation which is issued under the Ordinance seems to have in view a purpose rather larger in its scope, because it recites in effect the expediency not of preventing the export of arms from this Colony to Netherlands India, but of preventing the import of arms into Netherlands India, and thus seems to contemplate the doing of something rather beyond what the Ordinance provides for, and beyond what its own enacting words, which are limited in their scope, by the intention of the Ordinance, provide, and also beyond what any law of this Colony is competent to do. That being so, I think we must be careful to construe the enacting words in strict accordance with the limited intention of the Legislature, and not to extend them to support the larger purpose which the Proclamation appears to have had in view. We have to interpret the words not according to the object of the Executive which framed the Proclamation, but according to the expressed intention of the Legislature which framed the Ordinance. The Attorney-General urged that the Court should take into account the purpose of international comity for

which the Ordinance must be supposed to make provision and, within limits, that is a fair subject for argument. No doubt, as a matter of international obligation, we are bound to see that our ports are not used as places for the doing of acts regarded by international law, as unfriendly acts and to see that such unfriendly acts are not done in our ports or within our jurisdiction—and the exporting of arms direct to a place where war is being waged, is probably an act of that character. But it is another question, whether the exporting of arms to neutral places is under any circumstance, an unfriendly act in contemplation of international comity. The obligation to prevent unfriendly acts within our jurisdiction may be clear, but the obligation to interfere with acts innocent in themselves, done within our jurisdiction, merely because there is an intention afterwards to turn them to unfriendly uses outside our jurisdiction is not so clear. Where the words used leave the matter open to doubt, the intention I should attribute to the Legislature would be, to deal only with such acts as are clearly unfriendly acts in contemplation of international law, and I think in that case I should hold what is prohibited here is export direct and not otherwise. An Ordinance might indeed be framed with the wider intention which the Attorney-General asks the Court to attribute to this Ordinance and where it said, "you shall not export to Netherlands India," it might declare that it meant "you shall not export anywhere with the intention that the export shall ultimately result in an import to Netherlands India," but if it did that, it would do it in view of some special relationship or friendship with the particular power, not from the general and ordinary considerations of international comity. I do not think I can go further than this, with the argument with reference to international comity; nor can I presume to speculate as to what may have been the detailed policy of this Ordinance. I observe merely, that in its form, it is nothing but an abbreviated edition of provisions which have been enacted with varieties of detail, but on the same general lines in all parts of the Empire, and that there is nothing in it to shew that it is intended to meet any special difficulty, or any special local circumstances. So far I can only conclude that it has in view merely the ordinary purpose of such Acts and Ordinances and is to be interpreted accordingly. I can well understand that there may be reasons for very special legislation in the peculiar circumstances of this Colony, and for giving the Executive very large powers, not only for preventing the doing of unfriendly acts by persons in the Colony, but for preventing, as it were by anticipation, acts which may result directly in the commission of unfriendly acts in the Native States under our protection, for whose international behaviour the Imperial Government may have a certain responsibility towards other Powers, and that to do that it may be very necessary and proper to punish intentions here, which are to become acts there. But then for that purpose, special and carefully worded enactments are needed, not mere transcripts of a common form of words used for simple exigencies. Looking therefore to the circumstance, to the objects in view and to the

O'MALLEY, C.J. 1890. — REGINA v. MABOT & ORS.

obligations that have to be fulfilled—and bringing them to bear on the words used in the Ordinance, I think it must be taken, that when the Ordinance says "you shall not export arms to Netherlands India," it intends to say, "you shall not do an act unfriendly according to international standards while you are in our jurisdiction: you shall not send arms from our ports direct to a place where war is being waged." In short, in this case "you shall not export arms in ships bound to Netherlands India." There is another point of view from which the construction of this provision of the Ordinance may be regarded. As a broad matter of principle, it ought not to be held that an Ordinance in creating and defining an offence, intends to make an act, innocent in itself, punishable merely because of the intention in the mind of the person who does it, unless it says so in plain and unmistakable words. To construe doubtful expressions in that sense would go counter to the rule that in doubtful matters and where an expression is in general terms, the words are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; because I think it is a rule of the common law that intentions shall not be punishable as crimes. *Blackstone*, says:—

"To make a complete crime cognisable by human laws, there must be both a will and an act. For though in *foro conscientiæ* a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet in general, and except in the rare case in which the party confesses such a design, no temporal tribunal has any means of discovering its existence, where it has not been carried out into an external action. It is besides impossible in any case to ascertain that conscience might not possibly have recovered its power in time to prevent the actual perpetration of the offence; for which reasons, in all temporal jurisdiction, an overt act or some open evidence of an intended crime is necessary in order to demonstrate the depravity of the will before the man is liable to punishment."

"A vicious will, without a vicious act is no civil crime," and therefore if an Ordinance intends to make an otherwise innocent act punishable, because of the intention only with which it is done, it must say so in plain terms, and unless it does, it must not be so construed. Undoubtedly an Ordinance may treat as an offence an otherwise perfectly innocent act, because merely of the intent with which it is done; and in dealing with certain classes of matters it is absolutely necessary to do so. It is done in excise and customs acts; it is done in bribery acts; it is done in the foreign enlistment act; and in a variety of other acts; but then where it is done it is always done by plain words and there is no instance that I know of, of intention being made punishable, without plain words indicating that the intent is to make the offence. On this ground I think that as the Ordinance makes it an offence "to export to Netherlands India," its terms are not to be construed as making it an offence "to export to any place with intent that the things exported shall afterwards be imported into Netherlands India," but merely as making it an offence to export in fact, in act and deed, to Netherlands India: that is to export with a destination

to Netherlands India fixed in and by the act of exportation, which is the same thing as to export in a ship bound to Netherlands India. I thing I should notice also certain subsidiary provisions in the Ordinance, which seem to support the view of the construction that I have adopted. Sub-sections 1 and 2 of Section 5 give a power to search vessels for arms in course of exportation to prohibited places. If the respondent's contention as to what such exportation comprises were correct, then we would expect to find the power given to search all vessels suspected of having arms on board, irrespective of their destination; whereas if the appellants' contention is right we would expect to see the power confined to cases of ships bound for prohibited places? As a fact the power is so limited. Again, Sub-section 3 makes arms in course of exportation to prohibited places liable to seizure. Why is the power of seizure limited to the case of arms found on board ships to prohibited places, unless it be that the Legislature intended that only arms so placed should be regarded as in course of exportation to prohibited places. The respondent based an argument as to the meaning of the word "export" upon the use of the corresponding term "import" in the Customs Consolidation Act [39 & 40 Vic. Chap. 36], and he said that because in Section 41, it says: "No goods shall be deemed to be imported from any particular place, unless they be imported direct from such place, and shall have been there laden on board the importing ship either as the first shipment of such goods or after the same shall have been actually loaded at such place," therefore it is to be held that in the absence of such a definition "importing" would include importing otherwise than direct; and that by parity of reasoning "export" includes export otherwise than direct. What it seems to me rather to shew is that it may be doubtful whether the word includes both meanings, in the connection in which it is used in that Statute, and in that way, it tells against the respondent, because if a Statute creates and defines an offence with words that are doubtful, they should be construed in their more limited sense; and "export" used as it is in this Ordinance could be interpreted only as export direct. I have, I think, now dealt with most of the arguments that were brought before the Court, and on the grounds I have stated I must hold that the facts proved against the defendants do not constitute an offence against the Ordinance; and on the like grounds, that no attempt to commit an offence against the Ordinance has been established, and the order will be accordingly that the conviction be quashed, that the fines be remitted, and that the forfeiture be set aside. I think, I should notice here that the boarding of the steamer, and the search and the seizure of the arms at Malacca were acts done apparently under some misconception of the meaning of the Ordinance which authorises such proceedings only in the case of a vessel bound for Netherlands India, which this vessel was not. So far for the main point to be decided upon the appeal. But now it has been urged that although the conviction may be quashed, yet if upon the facts before me, I consider that there is any other charge upon which the defendants can properly be tried, I am bound, by Sub-section 2 of Section 34 of Ordi-

O'MALLEY, C. J. 1890.

REGINA v. MABOT & ORS.

nance 12 of 1879, to send them back to be tried on that charge; and in the alternative that if I consider that the facts of the case shew that the defendants ought to have been convicted of an offence other than that of which they were convicted, I must by Sub-section 6 of the same section direct sentence to be entered up for the offence upon which they ought to have been convicted, or send back the proceedings to the Magistrate's Court with directions to that effect. Under the latter provision, I do not feel bound to act in this case. It applies only where the charge is inconveniently framed, and I do not think that that was the case in this instance; and it is therefore only with reference to the former provision that I have to determine what course to take. It is said, that I might consider that a proper charge could be prepared upon the facts proved, for a breach of the Gunpowder Ordinance 8 of 1868, and of the Regulations made thereunder. I think it is possible that some of the defendants may have committed a breach of the Ordinance in Singapore, but I do not think that the Summary Court at Malacca has any jurisdiction to try such an offence, and therefore I cannot send back the case to it with a direction that there is a proper charge for it to try; and I do not think that I have any clear jurisdiction to send the defendants to any other Court. Nor do I consider that the facts would warrant me in putting the defendants upon their trial in respect of anything that is proved to have taken place at Malacca. Then, it was said a charge might be preferred for an offence against the Peace Preservation Ordinance 6 of 1872, and of the Proclamation made thereunder. But as to this, the same objections apply as in the last case; there is no jurisdiction in the Malacca Court to try an offence committed in Singapore, and I do not see that the facts prove any offence, or any part of an offence, to have been committed in Malacca. In the present case I do not see my way to make any order directing the defendants to be tried again.

Conviction quashed.

ATTORNEY-GENERAL *v.* CHEW SIN YONG & ANOR.

PENANG.

WOOD, J. 1890.

Sept. 4.

A defence that a Crown Contract purporting to be under the Excise Ordinance 4 of 1870, Section 3, is not in the form prescribed by that section and that therefore the defendants had not become entitled under that section to the exclusive rights of a Farmer under that Ordinance, is a "substantial ground of defence" and "on the *merits*" within the meaning of the Crown Suits Ordinance 15 of 1876, Section 2, Clause 7.

Query. Is the form of contract prescribed by Section 3 of the Excise Ordinance 4 of 1870, [as amended by Ordinance 15 of 1871,] obligatory on the Crown, and what is the effect of a departure from such a form?

This was an action commenced by the Attorney-General on behalf of the Crown to recover $95,050 being rent of the Opium, Spirit, and Toddy Farms of Penang and the Territory of the Dindings for August last past. The action being for an "ascertained" amount, it was begun on 1st September, by Certificate, Information, and Summons in the manner prescribed

by Section 2, Clauses 1 & 3, of the Crown Suits Ordinance 15 of 1876. The defendants were the Opium, Spirit, and Toddy Farmers of Penang and the Dindings, and held under two contracts dated 22nd December, 1888, made between Her Majesty the Queen of the one part, and the defendants of the other part, by which "the exclusive right of making or preparing chandoo or opium dross, and of selling and of retailing chandoo or opium dross, and of selling opium in smaller quantities than one chest, and the exclusive right of selling by retail spirituous liquors and of distilling spirituous liquors; and the exclusive right of making or preparing and selling Toddy at the Settlement of Penang and the Territory of the Dindings" were declared to be vested in the defendants as such Opium, Spirit, and Toddy Farmers. The one contract was in reference to the Penang Farms, the other with reference to the Dindings Farms—but each contract was of all the three farms in these respective places. The contracts were *not* in the form prescribed by the Excise Ordinance 4 of 1870, Section 3, as amended by Ordinance 15 of 1871, in various respects —both as regards pure matter of form as well as to its legal effect—and were each signed by the Resident Councillor of Penang on behalf of Her Majesty. By Clause IV. of the before-mentioned Section 2 of the Crown Suits Ordinance 15 of 1876,

"The defendant on being served with such Writ of Summons shall not be at liberty to defend the suit unless he shall obtain leave from the Court to do so."

The further clauses of the section bearing on this report, are as follows:—

V. A defendant desiring to defend such suit shall, within such four days, file a Statement, verified on oath, in the form in the Schedule D., of the facts on which he bases his defence, and shall serve a copy of the same, on the Attorney-General; and if the Court, on reading the same, is satisfied that the defendant has a substantial ground of defence on the merits, an Order may be indorsed therein granting leave to the defendant to defend, within such time as the Court may direct; when the suit shall proceed, down to, and inclusive of, the hearing or trial, subject to the provisions of this Ordinance, in the same manner as is practised in suits for a similar purpose between subject and subject.

VI. Any such order may be set aside by the Court, on its being satisfied that the same was irregularly or improperly issued.

VII. Leave to defend such suit shall not be granted unless on the merits, shewing a substantial ground of defence, to be made out by the defendant on his application for leave to defend.

VIII. No defect of form or procedure shall be deemed a sufficient ground for defence, but such defect may be amended, by, or by leave of, the Court, whenever brought to notice, on such terms, as to costs and otherwise, as to the Court may seem right.

.....

Van Someren, on behalf of the defendants moved *ex-parte*, on an affidavit stating [*inter alia*] the rent sued for was secured to the Crown by the aforesaid two contracts, but that neither of them were in the form prescribed by the Excise Ordinance. He contended that by Section 3 of the Excise Ordinance 4 of 1870, no person in whom the exclusive rights aforesaid vested, was to

WOOD. J. 1890.

ATTORNEY-GENERAL v. CHEW SIN YONG & ANOR.

use such rights until *after* he shall have entered into a contract in writing in the form set forth in the Act—that form was substituted by Ordinance 15 of 1871. The present contracts were not in that form, and so the defendants had never become in law "entitled to use" the exclusive rights—the Crown in fact had not given the defendants that which they tendered for and which the Crown purported to give—there was, in law, a failure of consideration for the defendants' promise in these contracts. By the proviso in Section 3 of the Excise Ordinance, 1870, terms could be *added* to the contract form—but in the present contracts there were both additions and *variations*—objections both of pure form—and of the legal effect of the contracts being different from the form—and he instanced two or three of such differences. The defendants had had the use of the Farms and could be sued for "use and occupation," but the sum was not necessarily the amount sued for; it would have to be assessed by the Court, and being "unascertained" no leave to appear and defend need be applied for—Section 3, Clauses 1, 2 and 3 of the Crown Suits Ordinance 15 of 1876,—and the defendants would not be held bound to keep the Farms any longer. He intimated he had other objections as to form and substance of these contracts, but moving now only for leave to defend he submitted he had shewn enough grounds to obtain such leave.

D. *Logan*, [*Solicitor-General*] on whom a copy of the affidavit had been served, and who was watching the application on behalf of the Crown, asked permission of the Court to point out that by Clause 7, Section 2, of the Crown Suits Ordinance 15 of 1876, leave to defend should not be granted except "on the merits, shewing a substantial ground of defence." The objection taken by the defendants was merely technical, and not on the "merits."

Wood, J. said, that he was of opinion that the defence was substantial and on the merits [*a.*] and the only question was whether any terms should be imposed in granting leave to defend.

D. *Logan*, [*Solicitor-General*] then asked, that if leave was granted, it should only be on the defendants paying the $95,050 into Court.

Van Someren objected to this, contending he was asking no favour so as to justify the imposition of such a condition.

Wood, J. refused to impose such a term—but thinking the case of considerable importance, and should be hurried on to a hearing as soon as possible, he was of opinion that if the Court required the defendants to file their defence within a couple of days and take short notice of trial that would meet the justice of the case. Leave was accordingly granted on these terms.

Leave to defend on terms. [*b.*]

[*a.*] Section 2. *Chitty Arch: Q. B. Practice* [13th Ed.] p. 800; also *Wharton's Law Lexicon*-Title, "Merits."

[*b.*] The Attorney-General gave notice of appeal against this order, but subsequently dropped the appeal and discontinued the action.

REGINA *v.* SYED MAHOMED ALSAGOFF.

SINGAPORE.
O'MALLEY, C. J.
1890.
Sept. 9.

The mode of raising a plea of *autrefois acquit* or *autrefois convict*, under Section 69 of the Criminal Procedure Ordinance 6 of 1873, is by formal plea in bar, and if the Crown does not admit the facts stated in the plea, it must put in a formal reply and a Jury will be impanelled to try the issue of fact raised by the plea and reply.

On the trial of such an issue, neither the Depositions taken before the Magistrate on the former or the subsequent charge are admissible in evidence as of the facts in question in each trial.

If the Jury by their verdict, find the plea is not proved, the Court will not thereupon convict the prisoner of the offence charged and pass judgment on him,—but will give judgment *respondeat ouster*, and the prisoner will be tried for the offence charged, in the usual way. [*a.*]

The prisoner was charged in five counts—*1stly.*—With instigating on 11th May, 1890, one Marie Gorski, a woman with child, to cause her to miscarry, under Sections 511 and 312 of the Penal Code. *2ndly.*—With instigating on 24th May, 1890, the said Marie Gorski to cause herself to miscarry, under the same sections. *3rdly.*—With attempting on 11th May, 1890, to cause her to miscarry by giving her a noxious drug, under the same sections. *4thly.*—With instigating on 27th May, 1890, the said Marie Gorski to cause her to miscarry, under the same sections, and *5thly.*—With attempting on 27th May, 1890, to cause her to miscarry by giving her a noxious drug under the same sections.

The trial took place on this day, and on the 10th and 11th of September.

On being arraigned and called on to plead to these charges, *Davidson*, [*Nanson* with him] for the prisoner stated there was a preliminary point. The prisoner alleged that he was tried for the same offence and on the same facts at the last Assizes held in Singapore, and that the trial ought not now to proceed on these charges on this Indictment. He submitted that as there was no provision made in the Criminal Procedure Ordinance 6 of 1873, for disposing of this objection, he took the objection at this stage in accordance with what appeared to be the practice in India—*Queen* v. *Dwarkanath Dutt*, 7 W. R. Cr. R. 15, the Procedure Code of which country was not unlike ours and also silent on this point. The basis of this objection was Section 69 of the Criminal Procedure Ordinance 6 of 1873, which is as follows:—

"69. I.—A person who has once been tried for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again on the same facts for the same offence, nor for any other offence for which a different charge from the one made against him might have been made under Section 61 or for which he might have been convicted under Section 62.

II.—A person convicted or acquitted of any offence may be afterwards tried for any offence for which a separate charge might have been made against him on the former trial under Section 60, paragraph 1.

III.—A person acquitted or convicted of any offence in respect of any act causing consequences which, together with such act, constituted a different offence from that for which such person was acquitted or convicted, may be afterwards tried for such lastmentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was acquitted or convicted.

[*a.*] See *Mayne on the Penal Code*, p. 438-9.

O'MALLEY, C. J. 1890.

REGINA v. SYED MAHOMED ALSAGOFF.

IV.—A person acquitted or convicted of any offence in respect of any facts may, notwithstanding such acquittal or conviction be subsequently charged with and tried for any other offence which he may have committed in respect of the same facts if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged."

This did not however touch the question of procedure on such an objection. The question was whether a formal plea should be put in and go before a Jury—he submitted there was no necessity for such a plea.

Bonser, [*Attorney-General*] for the Crown contended, that the objection must be raised by a formal plea, and if the facts therein were admitted, the validity of the objection could be raised by a demurrer to the plea—but if the facts were disputed, a formal reply should be filed and the issue tried by a Jury. *Rex* v. *Turner*, R. & M. C. C. R. 239, had so laid down the principle and there was nothing in our Procedure Code providing otherwise. There must be materials on the record to shew why the prisoner should not be tried. In *The Queen* v. *Panna and others*, 7, N. W. P. H.C. Rep. 202, what was necessary to the validity of such a plea is laid down. He also referred to Section 42 of Ordinance 5 of 1870.

Davidson, in reply submitted, Section 42 of Ordinance 5 of 1870, did not say how this objection was to be disposed of. In *The Queen* v. *Panna & Ors.*, [suprà] it was evident there had been no plea at all, or it would not have been necessary to set out all that would be required in a plea of this kind. He contended the Court would take the plea as raised, on the objection being taken, and dispose of it without a Jury.

O'Malley, C.J., said he did not think any cases were obtainable on this point, and the English cases he considered were inapplicable as in them a distinction is taken between felonies and misdemeanours. Our law made no such distinction and it would be quite contrary to the spirit in which our procedure was framed. He thought there ought to be materials on the record to shew what had happened, and he was of opinion that the best course was to have a formal plea.

Davidson, then put in a formal plea which was as follows:—

"And the said Syed Mahomed Alsagoff cometh into Courth ere and having heard the said Instrument of Charge read, saith that Our said Lady the Queen ought not further to prosecute the said Instrument of Charge against him the said Syed Mahomed Alsagoff he having been heretofore in due manner of law acquitted of the premises in and by the said Instrument of Charge above specified and charged upon him; and for plea to the said Instrument of Charge he says that heretofore to wit: at the Assizes holden at Singapore on the 15th day of July, 1890, he the said Syed Mahomed Alsagoff was duly arraigned upon a certain Instrument of Charge which charged

[*First.*] That the said Syed Mahomed Alsagoff on or about the 11th day of May, 1890, at Singapore, voluntarily attempted to cause Marie Gorski, a woman with child to miscarry, and in such attempt did an act towards the commission of such offence, to wit: gave a drug to the said Marie Gorski such attempt not being caused in good faith for the purpose of saving the life of the said Marie Gorski and thereby committed an offence punishable under Sections 511 and 312 of the Penal Code.

[*Second.*] That the said Syed Mahomed Alsagoff on or about the 27th day of May, 1890, at Singapore aforesaid, voluntarily attempted to cause

Maria Gorski, a woman with child to miscarry and in such attempt did an act towards the commission of such offence by giving a drug to the said Marie Gorski such attempt not being caused in good faith for the purpose of saving the life of the said Marie Gorski and thereby committed an offence punishable under Sections 511 and 312 of the Penal Code.

[*Third.*] That the Syed Mahomed Alsagoff on or about the 11th day of May, 1890, at Singapore aforesaid instigated the said Marie Gorski a woman with child to commit an offence punishable with imprisonment to wit: to cause to miscarry, and thereby committed an offence punishable under Sections 116 and 312 of the Penal Code.

[*Fourth.*] That the said Syed Mahomed Alsagoff on or about the 27th day of May, 1890, at Singapore aforesaid, instigated the said Marie Gorski a woman with child to commit an offence punishable with imprisonment to wit: to cause herself to miscarry and thereby committed an offence punishable under Sections 116 and 312 of the Penal Code.

[*Fifth.*] That the said Syed Mahomed Alsagoff on or about the 11th day of May, 1890, at Singapore aforesaid attempted to cause to be taken by the said Marie Gorski an unwholesome drug to wit: Cantharides, knowing it to be likely that he would thereby cause hurt to the said Marie Gorski and in such attempt did an act towards the commission of the said offence to wit: gave the said drug to the said Marie Gorski and thereby committed an offence punishable under Sections 511 and 328 of the Penal Code.

[*Sixth.*] That the said Syed Mahomed Alsagoff on or about the 27th day of May, 1890, at Singapore aforesaid attempted to cause to be taken by the said Marie Gorski an unwholesome drug to wit: Ergot of eye, knowing it to be likely that he would thereby cause hurt to the said Marie Gorski and in such attempt did an act towards the commission of the said offence to wit: gave the said drug to the said Marie Gorski and thereby committed an offence punishable under Sections 511 and 328 of the Penal Code.

To which Charges in the said last mentioned Instrument of Charge he did then and there plead not guilty, and the Attorney-General who then prosecuted for Our said Lady the Queen said that he would not further prosecute the said Syed Mahomed Alsagoff for the offences by the first, second, third and fourth Counts in the said last mentioned Instrument of Charge supposed and laid to his charge, and thereupon a Jury then and there duly summoned, impanelled and sworn to try the said issue so joined between Our Sovereign Lady the Queen and the said Syed Mahomed Alsagoff upon their oaths did say that the said Syed Mahomed Alsagoff was not guilty of the offences by the fifth and sixth Counts of the said last mentioned Instrument of Charge supposed and laid to his charge, whereupon it was then and there considered by the said Court that the said Syed Mahomed Alsagoff should go thereof acquitted without day as appears by the record of the said proceedings now here remaining in Court, and the said Syed Mahomed Alsagoff avers that the said Syed Mahomed Alsagoff who is charged by the present Instrument of Charge are one and the same person and not divers and different persons; and that the said Marie Gorski mentioned in the first Instrument of Charge and the said Marie Gorski in this present Instrument of Charge mentioned are one and the same person and not divers or different persons, and the said Syed Mahomed Alsagoff further avers that the charges and offences in the said former Instrument of Charge mentioned and the charges and offences in the present Instrument of Charge mentioned are the same charges and offences and not divers and different charges and offences, and the said Syed Mahomed Alsagoff also avers that if the present Instrument of Charge contains charges or offences divers or different from the charges or offences in the former Instrument of Charge such divers or different charges and offences [if any] relate to the same single act or set of acts and to the same facts, as the charges and offences mentioned in the former Instrument of Charge and not to any divers or different act or set of acts or to any divers or different facts and that for such divers or different charges and offences [if any] he might have been tried and convicted at the trial of the former Instrument of Charge under Sections 61 and 62 of the Criminal Procedure Ordinance, 1873, and this he is ready to verify.

O'MALLEY, C. J. 1890

REGINA v. SYED MAHOMED ALSAGOFF.

Wherefor the said Syed Mahomed Alsagoff prays the judgment of the said Court here if he ought to be put further to answer the present Instrument of Charge and whether Our said Lady the Queen will or ought further to prosecute or impeach him the said Syed Mahomed Alsagoff on account of the premises in this present Instrument of Charge contained and that he may be dismissed the Court and go without day

And as to the charges and offences of which the said Syed Mahomed Alsagoff now stands charged he saith that he is not guilty thereof. and of this the said Syed Mahomed Alsagoff puts himself upon the Country."

Bonser, [*Attorney-General*] stated he could not admit all the facts stated in this plea and could not therefore demur—but it was difficult for a Jury to decide on this plea and on a somewhat obscure section such as Section 69 of the Criminal Procedure Ordinance.

O'Malley, C.J. You must either reply or demur. If you cannot demur then you must plead in reply in due form and a Jury will be impanelled to try the issue.

Bonser, [*Attorney-General*] then put in a formal reply as follows:—

"And hereupon John Winfield Bonser, Esquire, Her Majesty's Attorney-General, who prosecutes for Our said Lady the Queen in this behalf says, that by reason of anything in the said plea of the said Syed Mahomed Alsagoff, above pleaded in bar alleged Our said Lady the Queen ought not to be precluded from prosecuting the said charge against the said Syed Mahomed Alsagoff, because he says that the said Syed Mahomed Alsagoff was unlawfully acquitted of the said offences charged in the present Instrument of Charge in manner aforesaid as the said Syed Mahomed Alsagoff hath above in his said plea alleged, and he further says that the charges and offences in the said former Instrument of Charge mentioned are not the same charges and offences, but diverse and different charges and offences, and that such charges and offences do not relate to the same single act or set of acts as the same facts as the charges and offences mentioned in the former Instrument of Charge, and he desired that the said Syed Mahomed Alsagoff might have been tried or convicted at the trial of the former Instrument of Charge under Sections 61 and 62 of the Criminal Procedure Ordinance, 1873, or either of them, and that the said John Winfield Bonser prays this may be enquired of by the Country."

A Jury was then impanelled to decide on the issue raised by these pleadings.

Davidson, then opened the case to the Jury, pointing out that the charges now made were generally instigating Marie Gorski, a woman with child, to miscarry—and the offences were laid down as on 11th, 24th and 27th May—the charge of 24th May was new, but it charged the same offence—one of the charges on the previous trial was that the prisoner instigated Marie Gorski, a woman with child, to miscarry "on or about the 27th"—the prosecution might at the trial have amended that charge—or the accused might on that charge have been found guilty of the offence on the 24th. It was all one transaction, though it may have extended over several days. He asked the Jury to compare the former with the present indictment, and contended that all the charges in them were the same; and a person who had been tried and convicted or acquitted—or might have been at that trial convicted or acquitted, could not be tried again on the same

charge—Ordinance 6 of 1873, Section 69. The charges here were of the same kind— Section 61; and under that Ordinance might be tried all together—or on trial of one, the accused might have been convicted of the other—Section 62. He then called

Mr. C. E. *Velge*, the Registrar of the Court, who swore to the identity of the prisoner and the prosecutrix, and produced and read the Indictment and Record of the proceedings at the first trial, July 15th—and also the Indictment at the present. He was also asked to produce the depositions taken before the Magistrate for the first trial, as well as those on the present charges.

Bonser, [*Attorney-General*] objected, and referred to Section 62, and *Rex* v. *Parry*, 7 C. & P. 839.

Davidson, contended the Jury and Court could only decide under Section 69 whether the facts of the first and the present trial were the same, by these depositions, and that the charges formerly made were based upon a single act or set of acts within Section 61.

O'Malley, C.J. held that neither set of depositions were admissible.

Davidson, then called

Mr. W. *Nanson*, who stated he had acted as Junior Counsel at the former trial and he produced his notes of the evidence then given. This closed the evidence in support of the plea.

Bonser, [*Attorney-General*] then addressed the Jury, he contended the facts in the two cases were not the same. The former was for administering a noxious drug to wit: Cantharides, knowing it to be likely to cause hurt—Section 328. In the present case, the prisoner was charged with instigating Marie Gorski to cause her to miscarry—Section 312. A great many of the facts were the same, but the offences were not—they were of a different nature. In the present charge there was also the additional fact that Marie Gorski was a woman with child. Unless the prisoner was in jeopardy before, he could not be free from liability on the second Indictment. *Brunsden* v. *Humphrey*, 14 Q. B. Div. L. R. 141—Section 69 was to be read, as qualified by Clause 4 thereof. A set of facts form one transaction, and they may all appear in evidence, but they are not the same facts to prove the charge. There is a selection of facts on each charge—He called no evidence.

Nanson, replied. The charges were differently worded, but the dates, the woman, the prisoner, the materials, being exactly the same, the Jury were to say whether the offences charged were not in reality precisely the same. The charge for the 24th was an ingenious attempt to prove a fresh offence on a date between the two previous dates. A mistake in date could not have enabled the prisoner to escape at the last trial. It was monstrous if a man could be charged with a series of facts which disclose an offence from the first to the last day of a month, and afterwards tried for acts committed, in that series, on an intermediate day.

O'Malley, C. J. [summing up, said]

Gentlemen of the Jury:—It is now my duty to sum up this case to you, and in doing so to explain to you what the issue is

O'MALLEY, C.J. 1890. — REGINA v. SYED MAHOMED ALSAGOFF.

that you have to try, and what are the points in the case to which you ought to direct your attention with a view of arriving at a verdict on this plea. It is an unfortunate thing, perhaps, that a discussion which is mainly legal, or largely legal, is to be carried on and disposed of in the course of a trial of this kind; it would be a convenient thing if it were possible to separate discussion of legal question of this difficult character from the dealing in a case with a question of fact by a Jury. But it is not possible to be done, and therefore, in this way, I must deal with such legal points that arise while I am addressing you upon the case. The plea upon which you have to find your verdict here is called *autrefois acquit*. I think it was a little unfortunately referred to by the Attorney-General as a device for the protection of prisoners; I think it would be perhaps more properly described as a method by which a free people have determined to assert their right of immunity from persecution in a Court of law; their right not to be more than once prosecuted or punished for one offence. That really is what a plea of *autrefois acquit* is; it is a means by which a man who considers that he is being brought before a Court a second time substantially for an offence for which he was in peril on the previous occasion may call attention to the fact, to prove it, and demand his discharge. The very terms and the curious Norman French in which the word *autrefois acquit* is expressed reminds one of its character. The question you have to determine here is whether the defendant has been so exposed upon the charges, upon the facts, which are brought against him in this proceeding, whether he has been so imperilled upon the former proceeding, as to make it appear he ought not to be put upon his trial a second time. The questions raised by the plea, which we have to consider here together [because it is partly a matter for you and partly a matter for me, and partly a matter of fact, and partly a matter of law] the material questions to consider are two. You may take it that the evidence is established, and you may dismiss that from your mind at once; certain forms or matters are sufficiently established for you to dismiss them from your mind; as for instance whether the Court in which the prisoner was previously tried was a Court of Jurisdiction capable of dealing with the matter. Technically it would be necessary you should be satisfied that the defendant is the same man as in the former proceeding. About that there is no question. The two questions we have to deal with are these. The plea says in effect [so far as it is material], the facts upon which you are proceeding against him in the present case are the same facts as those upon which he was tried on the former occasion. That is one question of fact. The question for you is whether upon evidence that statement is made out. What it means and what you must be satisfied about is not that every particular act and every incident, and every little circumstance connected with the facts in this case are the same as those in the other case, but that substantially the facts upon which the prosecution are going on in this case are substantially the same facts which took place at the trial before. Then you must consider what you are to look to;

and you form your judgment upon this matter; it is a question of evidence, and you must take such as has been put before you in support of it. To some extent the matter is simple, because the evidence was not in any way impeached; it was not cross-examined to, and no evidence was called to rebut any statements that were made on behalf of the plea; therefore you must fairly take it that every statement you have in evidence is absolutely correct, and upon which you may act with perfect confidence. You have put in before you a record of the former trial; it was read by the Registrar of the Court who was called as a witness, and that shews you what were the charges preferred against the defendant on the former trial. The charges that were preferred against him on the former trial were in the first instance four counts. He was brought into the Court with these four counts, and he was called upon to plead, and he did plead to them. I will beg you to keep your attention strictly to these four counts for the present, and to take no notice of what happened in the Court on the last trial; consider for a moment the four counts upon which the prisoner was charged on the former trial. You must understand what are those counts charged in this count, because when you understand that, you will see how important they are as evidence, and what were the facts upon which the prosecution were going in the former case. When a person is accused of a crime as you know, he is brought up on some charge or other [no great precision is observed in formulating a charge in the first instance]; he is brought before a Magistrate who hears the evidence, sometimes hears evidence for the prosecution only, and if the defendant desires it, he hears the evidence for the defence also. The Magistrate hears all the evidence, all the facts bearing upon the matter that may be brought before him, and it is his duty to hear all the facts material to the matter. He hears them, takes them down, records them in the depositions, and then if he thinks there is a case, not a mere case of suspicion, but one that demands enquiry in shape of a trial in this Court, then he commits the prisoner for trial in the Supreme Court. Along with the commitment of the prisoner go depositions taken at the trial, and so far as the Magistrate is concerned, that is an end. Then there comes another officer, who acting in a *quasi* judicial manner discharges a *quasi* judicial duty, that officer takes the depositions, and takes the facts as stated before the Magistrate, and he considers what are the charges which these facts will warrant the prosecution in bringing forward against the prisoner. He formulates these charges in proper terms, and these are the charges upon which the prisoner is brought here for trial. That official's duty is most certainly to reject no material facts; if there are facts pointing to the offence, it is his duty to frame a charge for that offence; and equally clearly he has no right to frame a charge for any offence, unless he considers he has facts before him that will warrant him doing so. Therefore, you have the judicial opinion of a public officer whose duty it is to deal with the matter; and you could hardly have better evidence of what the facts were in substance, than the charges preferred here and which are made

O'MALLEY, C.J. 1890. —— REGINA v. SYED MAHOMED ALSAGOFF.

by the judicial officer. That is a process that shews you, I hope, the value and importance of what were the facts in the former case, the value of the evidence given here and the charges originally preferred against the prisoner when he was brought on trial. There is another thing. The charges are intended, it is so declared by the law, and it is reasonable to give notice to the person accused of the matter with which he is charged; it is not necessary for the official to go into details and into the small particulars, but it is essential that the charge preferred against the prisoner shall be in such a form as to give him notice, substantial notice, upon which he can act in preparing and conducting his defence. Therefore you see that the charge is the indication of what the prosecution has to give by way of notice to the defendant of the substance of the matter upon which he is to be charged. If that is so, I may point out that these charges are the best evidence of what the matter, of what the substantial facts were, upon which these charges, whatever they were, were preferred. The same thing is equally true with regard to the charges which are preferred in this case; they are evidence for you of what the facts are upon which it is intended to try this man. I do not know that you have much else upon which to go in coming to a conclusion as to whether or no the facts and subject-matter of the charges in the former case are the same in substance as the charges in this case—that is, the charge upon which the prisoner was originally brought to trial. I have nothing to do with the charge subsequently preferred against the prisoner, it has nothing to do whatever with the question of the charges originally preferred, and upon which the defendant was brought before the Court on the last occasion. It is for you to say whether the subject-matter of the charges in this case, is the same as in the former case; whether the facts upon which the prisoner is to be brought to trial in this case, are substantially the same in the particular meaning as those brought in the former trial. There you have the point to direct your attention. The charges in this case, what are they? Leaving out so much of the jargon as might tend to mystify, I only give in substance what the charges are. They are, first, that the defendant instigated one Marie Gorski to cause miscarriage to herself. In dealing with this matter it is convenient that you consider only charges relating to the 11th May. Secondly, that of an attempt to cause Marie Gorski to miscarry by giving her a drug. There are two statements of the charges that are made against him in this case, that on the 11th May he instigated Marie Gorski to cause herself to miscarry, and that on the 11th May, he attempted to cause Marie Gorski to miscarry by giving her a drug.

Bonser, [*Attorney-General*]. I think Your Lordship has omitted an essential part of the charge, viz., that the woman was with child.

His Lordship continuing said: The charge in the present case is, that he instigated Marie Gorski to cause miscarriage to herself; as to a woman being with child, it remains to be seen how a woman without child can cause herself to miscarry.

Remember, that these charges are intended to give the prisoner notice of the matter with which he is charged. What does that double statement mean? It was alleged that he gave Marie Gorski a drug on the 11th May, and by giving that drug, or as part of the transaction of which the drug was a part [his part] of the transaction, as a transaction itself, he instigated her to cause herself to miscarry. That is what two charges appearing together in this way mean: they mean that he is charged with giving a drug; that he is charged with having done an act of giving a drug, and they mean on the strength of giving a drug; and possibly upon the strength of words or deeds to form part of that transaction, the prisoner is charged either with giving the drug in the attempt himself to cause Marie Gorski to miscarry, or giving a drug to Marie Gorski, or by acts and deeds forming part of that same transaction, instigating Marie Gorski to cause herself to miscarry. I put that to you as a reasonable and proper construction to put upon the appearance of these two charges together in the present case. To put it very shortly, and in a convenient form for consideration, the charge is put to you as a fact, as the notice given to the defendant of the matter with which he is to be charged in this case, it is simply: "We charge you here with giving to Marie Gorski an unwholesome drug, and persuading her to take it with a view to her miscarriage" or rather "We charge you with giving a drug to Marie Gorski, in May and with trying to persuade her to take it with a view of causing her miscarriage." I hope that is simple, and I think it is substantially correct. If that is the case, the charge means—what? In former trial it was precisely and in every respect the same, the charges preferred against him in the former case were the same as the two charges against him here now, the charges concerning the 11th, 27th May; it is for you to decide whether there is indication that the subject-matter was different to the matter of the charge on which he is to be tried in this case, or whether it was the same, whether the judicial officer who prepared the charges in this case, and who prepared them in the other had the same facts before him or different ones; if you think that he had the same facts, then, as regards the first issue, and these counts which apply to the 11th May you will take that conclusion with you and render your verdict accordingly. Now, you have the charges, and it might be said that they are in too general terms, that we cannot say from these whether the charges are the same; in answer to this it should be understood that it is intended to disclose to the prisoner how the law regards the matter with which he is to be charged, and if the law considers that the charges are sufficient for that purpose, then they are also sufficient, for you as Jurymen, to reveal to you what the matter is with which the prisoner is charged. These charges shew you that the date is the same, the description the same, the prisoner alleged to have given the drug the same, the one act alleged, the giving of the drug, is the same and the intention in both cases is alleged to be the same. Now, that is the evidence for you, drawn from the consideration of the two charges and of the manner and process by which and for which

O'MALLEY, C.J. 1890. —— REGINA v. SYED MAHOMED ALSAGOFF.

the charges are preferred now. It is for you to say whether upon consideration of these two sets of charges, identical in every respect as to the facts are substantially the same as the facts with which he was previously presented. That is with regard to counts 1 and 3, these are the counts which charge the crime committed on the 11th May, I think that precisely the same considerations apply to the count alleged to be committed on the 27th May, and it is not necessary in dealing with counts 4 and 5 to go over the same ground again: the same considerations apply, you have the same means of judging, and the same process of reasoning can apply to the consideration of the 27th as of the 11th. Now, to assume for a moment that you are satisfied that the facts in the former case are substantially the same as in this case, then there comes the further question, is it true that the offences which are now charged are offences for which the defendant might have been charged under the particular section, or might have been convicted under a particular other section of the Criminal Procedure Ordinance. Now, that is a question more for me than for you, but it is right that I should explain to you the conclusions on which I go, as the decision in form becomes yours. Now, Section 61 of the Criminal Procedure Code makes a provision which is unlike any general provision in English Criminal Procedure, but which has been in reference to a certain limited class of cases adopted in English procedure. It is mainly peculiar to the Indian Procedure Code and our Code which is taken from it. Now, the Penal Code defines offences, it defines larceny for instance, and then as another offence defines larceny by a servant which is a graver offence than the other and becomes graver by reason of the person who commits it. Then again it defines larceny in a dwelling house, again a still more serious offence. Now, it often happens that with the fine definitions of that kind you are unable to make up your mind as to what would be the proper charge to prefer; you may say "this looks very much like larceny by a servant, but it is not clear, the evidence on the points is not overwhelming, it may be that he may not be a servant after all; therefore lest he should escape, [having committed the larceny] because he is not a servant, I will indict him at the same time with simple larceny, so that if it turn out that he has committed larceny, I shall get a conviction, and he will not get off." That is a reasonable precaution for criminal procedure and where the definitions are so fine it is absolutely necessary: therefore Section 61 provides that when preferring the charges you may put in any number which are merely, as it were, different descriptions of the same facts. You may charge "larceny as a servant" or "larceny in a dwelling" and so on, and at the end of the trial the prisoner may be convicted of any one of those charges which is substantiated. Now, what is said here is this; the offences being charged now are the giving of a drug to one Marie Gorski and persuading her to take it [that is the way the charge is stated] with intent that she should miscarry. The charge in the former case was giving a drug, an unwholesome drug, to one Marie Gorski, with intent to hurt her.

Now, I tell you that upon such facts as were before the prosecution in that case, as evidence of the charges already preferred and withdrawn, they would have been justified in joining along with the charges of administration and intent, the charges on which he is charged here to-day. They could have alleged first, as they did, that he administered the drug intending to do her hurt; secondly, that he administered the drug to Marie Gorski in an attempt to make her miscarry; and thirdly, that he administered the drug to Marie Gorski by way of instigating her to cause herself to miscarry. They would have been authorised to continue the trial on those charges. These are different ways of stating what might turn out to be a fact. They really substantiate the same transaction and they are charges on which the prosecution had every opportunity of proceeding on the former trial; they might have preferred them and they might have given evidence upon them. The prisoner alleges that they might have done so, and I tell you that that is my opinion, these are just charges which might have been added by Section 61 of the Penal Code. Therefore if you are satisfied that these charges are founded substantially upon the same facts as the prosecution in the former case, then I tell you that you may come to the conclusion that the plea is made out. If you are satisfied upon the facts brought before you that the facts in the former case were the same as the facts on which this charge is based, then you may find as your verdict that the plea is made out as far as it concerns the 11th and 27th May. Now, we have to deal with a different charge, a charge that appears for the first time in the present trial; the defendant here is charged in the second count with instigating Marie Gorski to cause herself to miscarry on the 24th May. The charge was not founded on any matter before the previous Court and forming part of the former material. You have undoubtedly some evidence as read to you by Mr. Nanson that there were certain facts which took place on the 24th May, and you are to consider for yourselves upon this issue. In regard to the 24th May there remains the fact that in giving notice to the defendant of what matter would be preferred now, in the former proceedings there was no charge of any offence committed on the 24th May, the charges on the former trial were no acts done by the defendant on the 11th and 27th May. There was not a word in these charges of any acts alleged on the 24th May, so that this is at first sight apparently related to some new matter, and on following the same line of reason as that called out in considering the 11th and 29th May, it would be seen that no notice was given of any matter concerning the 24th May; in this trial notice has been given. In reference to the 24th May it is for you to decide whether the facts upon which the prisoner is being proceeded against have previously been preferred against him. The prosecution could have applied to amend their charge, and quite possibly the prisoner might have been convicted, but no such application was made. It seems therefore as if this charge must relate to some other matter than that upon which the charges in reference to the 11th and 27th were made. It is

O'MALLEY, C.J. 1890.

REGINA v. SYED MAHOMED ALSAGOFF.

your duty to consider that matter for yourselves, but I thought it right to separate the consideration of this charge. It would be right to come to your verdict separately for each date or for the 11th and 27th, and separately for the 24th.

His Lordship proceeded to enumerate at considerable length the possible reasons for believing that the new charge under date May 24th was founded on facts sufficiently distinct to permit it to be treated apart from the charges on the other dates. There had been nothing in the previous trial in reference to any instigation on the 24th May, and he saw no good and sufficient reason to connect it would the former charges. He pointed out that the Jury had the right of discrimination and could allow the plea for one or any of the dates concerned.

The Jury after deliberation said they found the plea had been made out on all counts, except the second one in reference to the 24th May.

Bonser, [*Attorney-General*] contended upon that verdict the Court could give a *respondeat ouster* or a verdict for the Crown or conviction. The practice seemed to be that when the plea was not made out judgment must be given for the Crown in all cases except felony. *Rex* v. *Taylor*, 3. B. & C. 502. In this Colony there is no distinction between felonies and misdemeanours. In *Regina* v. *Dayal Jairaj & Ors.*, 3 Bom. H. C. Rep., Crown Cases, 58, there was a trial whether an offence was a misdemeanour or a felony. The Court would have to consider, which this offence was. Felony originally was attended with forfeiture, and Section 61 of the Penal Code provides for forfeiture in cases of offences punishable with death. In cases of penal servitude or imprisonment for seven years or upwards, the Court had a discretion to order forfeiture or not. Applying the old test to this offence, there could have been no forfeiture, and it was therefore a misdemeanour. It was a modern offence and had never been made a felony or tried as such. Destruction of a child at birth was not murder and therefore only a misdemeanour—*Roscoe's Crim. Law*, p. 267;—the mere attempt to destroy an unborn child could be no greater offence, it was only a misdemeanour.

O'Malley, C.J. The Court is asked by the Crown to convict the prisoner and pass judgment on this charge without a trial. In the case of *The Queen* v. *Panna and Ors.*, already quoted, the plea seems to have been raised and disposed of, and the prisoner tried thereafter. My judgment is *respondeat ouster*.

The prisoner was hereupon tried in the usual way on the second count, and on the conclusion of the case, the Jury unanimously found him

Not Guilty.

SHENAYAH CHETTY & ANOR. *v.* VEYNA SULTAN MAHOMED.

PENANG.

WOOD, J.
1890.

Sept. 10.

Sub-section 2 of Section 24 of the Conveyancing and Law of Property Ordinance, 1886, has not materially altered the law as declared in *Jenaiboo* v. *Narainen Chetty and Anor.*, [*antè* p. 359] as to the right of a mortgagor to sue a mortgagee who exercises his power of sale under the mortgage in a careless and negligent manner.

Semble. The right given to a mortgagor by that sub-section against a mortgagee for an "unauthorised, improper, or irregular sale," is a right which exists only where the mortgage is a Statutory Mortgage, and the mortgagee cannot shew he has a right of sale under Sections 22 and 23 of the Ordinance, and the "notice" referred to in that sub-section, is notice "requiring payment" under Section 23, and not notice advertising the property for sale.

The mortgagor must also shew he is damnified by the sale before he has a right of action under that sub-section.

This was an action to recover $6,378.65 balance of principal and interest due on a deed of *Statutory* Mortgage, dated 28th February, 1888. The defendant having made default in payment of the mortgage, and the plaintiff's right of sale under Sections 22 and 23 of the Conveyancing and Law of Property Ordinance 6 of 1886, having arisen, the plaintiff, the mortgagee, sold the properties mortgaged to him under the mortgage. He first issued and placarded notices [in four languages] of sale of the properties [two in number] for 30th November, 1889, and caused a copy of the notice to be served on the mortgagor as well as his Solicitor. The plaintiff, however, did not proceed with the intended sale for some reason of his own; but on the 30th November, 1889, sent round a bellman with a Circular in the English language only, stating "the sale of Veyna Sultan Mahomed's land intended to be held to-day, is postponed to 14th December, at 2 o'clock on the spot." The Circular was taken by the bellman to persons he considered were likely to be purchasers, and was also carried in his hands in the streets and shewn to any person desirous to see it, or who the bellman thought might be likely to purchase. The notice was *not* shewn to the mortgagor nor his Solicitor and neither of them knew the fact of the postponement. On 14th December, the mortgagee sold one of the properties [in Bridge Street] unknown to the mortgagor, the defendant, and to his Solicitor. It was too late that day to sell the other property [in Beach Street] and the mortgagee and auctioneer merely proceeded to the spot, rang the bell and called out "the sale is postponed." No particular day was mentioned. *No* further notice of sale was issued for the Beach Street property, but on the 16th December, the bellman, by the mortgagee's instructions, went round the Streets, verbally notifying the sale of "Veyna Sultan Mahomed's land in Beach Street, on Tuesday, the 17th instant." He did the same on the 17th and at 3 p.m. that day, the mortgagee, without further notice, put up the Beach Street property for sale and sold it. After giving credit for the nett proceeds of the two properties, there was a balance still due on the mortgage for which this action was brought, as above stated. The defendant in his defence alleged that the sale was colourable, and the alleged purchasers mere nominees of the plaintiff. He further alleged the sales were "irregular," but

WOOD, J. 1890.

SHENAYAH CHETTY & ANOR. v. VEYNA SULTAN MAHOMED.

did *not* counterclaim for damages on account thereof. At the trial the purchasers were shewn to be *bonâ fide*, and the conveyances to the purchasers were made "in professed exercise of the power of sale conferred by the Ordinance" aforesaid. The above facts, as the notices of sale and subsequent proceedings by the mortgagee were also clearly proved. The evidence tended to shew that a fair value had been obtained by the mortgagee at both these sales.

The case was heard on the 10th and 11th September.

Van Someren, for the defendant contended, that this being a Statutory Mortgage under Ordinance 6 of 1886, the case of *Jenaiboo* v. *Narainen Chetty & Anor.*, [*antè* p. 359] no longer applied, by reason of Sub-section 2, Section 24 of the Ordinance, which gave a right of action to a mortgagor against the mortgagee for an "irregular sale"—the mortgage in *Jenaiboo* v. *Narainen Chetty* too was not a Statutory Mortgage; that the auction sale for November 30th, had been improperly postponed without any sufficient cause, and the auction of December 14th was irregular, and the sale of the Beach Street property on 17th was without any sufficient notice to the public; that even if the words "due notice" in Sub-section 2 meant notice "requiring payment" and not notice of sale, still the subsequent words giving the right of action by the mortgagor in damages against the mortgagee, was not so limited—the words "irregular exercise of the powers of sale" therein, included the not issuing of sufficient notices of *sale*. The mortgagee was liable in damages therefore to the mortgagor in this case—*Hole* v. *Smith*, 17 L. R. Ch. Div. 444; *Selwyn* v. *Garfit*, 38 L. R. Ch. Div. 273—and although the defendant had not counterclaimed, still this Court was bound to recognise his rights arising "incidentally" under Section 1, Clause 4 of the Civil Law Ordinance 4 of 1878, and his rights would be enforced even in the absence of a counterclaim. *Williams* v. *Snowden*, W. N. 1880, p. 124.

Adams, for the plaintiffs contended, that "notice" in Sub-section 2 of Section 24 did not mean notice of sale but of "requiring payment" under Section 23; that Sub-section 2 only gave a mortgagor a right of action when the mortgage was a Statutory Mortgage, and the mortgagee's power of sale had *not arisen* under Sections 22 and 23; when that power existed, the exercise of that power was in his absolute discretion, as shewn by the concluding portion of Section 22. The issuing of notice of sale and mode of doing it was one of the things so in his discretion. Sub-section 2 in fact therefore had no application to this case; it did not alter the law as laid down in *Jenaiboo* v. *Narainen Chetty & Anor.*, [*antè* p. 359], and this case was governed by that. He also referred to *Warner* v. *Jacob*, 20 L. R. Ch. Div. 220, and *Bettyes* v. *Maynard*, 49, L. T. [N. S.] 389, on App. 46 L. T. [N. S.] 776, which were cases subsequent to the English Conveyancing Act 1881 [44 & 45 Vict. c. 41] from which our Ordinance 1886 was taken.

Wood, J. I am of opinion that Sub-section 2 of Section 24 of the Conveyancing and Law of Property Ordinance, 1886, has not

materially altered the law as laid down in the English cases and followed by me in *Jenaiboo* v. *Narainen Chetty & Anor.*, [*ante* p. 359.] If an alteration of the law was intended, words more apt and specific than those found in this sub-section must be used. That sub-section is as follows:—

"24. [1] .....

[2] Where a conveyancing is made in professed exercise of the power of sale conferred by this Ordinance the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised: but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power."

I consider a fair and reasonable meaning can be given this sub-section by construing it in the way contended for by Counsel for the plaintiffs, and without materially altering the old law on this subject. The mortgagor too, to avail himself of sub-section 2, must shew he is "*damnified*" by the sale. I find as a fact he has failed in shewing this. I am of opinion on the evidence that although there may have been some slip or want of due precaution on the part of the mortgagee as to the issuing of notices of sale, yet the fair market value for the property on the date of sale, was obtained at the sales. The defendant therefore is entitled to claim nothing, and judgment must be for the plaintiffs for the amount claimed and costs.

Judgment for plaintiffs, with costs.

REGINA *v.* MAT AKIB & ANOR.

On a charge of keeping an unlicensed brothel under Section 10 of Ordinance 14 of 1888, it is for the *accused* to prove he has a license and *not* for the prosecution to shew he has not.

Although the fact of having such a license is not peculiarly within the knowledge of the accused, yet, as it is so conveniently within his knowledge and so easily produced by him, it is for him to produce it.

The accused were a Lance-Corporal in the Police Force and his wife. They were charged that they being the occupiers of a house or place in Magazine Road, in Penang, did keep it as a brothel without being duly licensed, contrary to Section 10 of Ordinance 14 of 1888. The case was heard by J. K. Birch, Esq., First Magistrate, when the evidence clearly proved the charge, and the accused were severally sentenced to pay a fine of $50. The prosecution did not however shew by evidence that the brothel was not licensed—the accused on the other hand did not produce any license nor allege that they had one. On conviction they appealed. The case was first heard before *Pellereau*, J. on 21st July, 1890, when the learned Judge remitted the case to the Magistrate to take some further evidence which Counsel for the appellants had pointed out was wanting, but which was easily obtainable. Further evidence having been taken, the appeal was remitted to this Court, and now came on for final disposal.

WOOD, J. 1890.

REGINA v. MAT AKIB & ANOR.

G. S. H. *Gottlieb*, for the appellants contended, there was no evidence to shew the brothel was not a licensed one. Brothels were licensed by the Police he believed, and so the fact of having such a license was not peculiarly within the knowledge of the appellants. It was as much in the knowledge of the prosecution as of the defence. *Municipal Commissioners* v. *Chuah Seng & Ors.*, 3 Kyshe, 140. In *Regina* v. *Green* [*antè* p. 401] the Court had followed this decision, and it was in accordance with the English decisions referred to in *Paley on Convictions*, p.p. 123, *et seq.*

Ross, for the Crown contended, that the *onus* of proving he had a license was on the accused; the affirmative was on him and no one could know better than he did whether he had a license or not; he could so very easily have produced it if he had one—and in the absence of his so doing, it was but fair to conclude he had none. *Regina* v. *Turner*, 5 M. & S. 206, was somewhat modified by *Regina* v. *Hanson*, cited in Paley on Convictions, p.p. 123-4; and the doctrine that the accused was to prove he had a license, only in cases in which the fact was *peculiarly* within his knowledge, was not adopted in the latter case. He also referred to *Khoo Aing Hong* v. *Meyapah Chetty*, 3 Kyshe, 124.

Gottlieb, replied.

Wood, J. On the facts I think it was clearly proved that the house was used as a "brothel" within the meaning of Section 10 of the Ordinance 14 of 1888. The question on whom is the *onus* of proving the possession or want of a license is perhaps not so easy to determine. The weight of the English authorities is in favour of laying the *onus probandi* on the prisoner, and the decisions of this Court also tend in the same direction. On the whole, I think although the fact of the license in not peculiarly within the knowledge of the accused in this case, yet it is so conveniently in their knowledge, and so easily produced by them if they had one, that I must hold that *they* should have produced it. The conviction will be affirmed.

Conviction affirmed.

PENDEK *v.* BROADRICK.

PENANG.

WOOD, J. 1890.

October 6.

The words "or any other disease" in the Order in Council of 7th August, 1889, [*Government Gazette*, 1889, p. 1480] made in pursuance of the Quarantine and Prevention of Disease Ordinance 19 of 1886, Sections 4 and 5, must be read as limited to "disease" as defined by Section 3 of the Ordinance; and before there can be a conviction for a breach of the Order in Council, the prosecution must shew the disease to be of an "infectious or contagious nature."

At the time of the trial, the Veterinary Surgeon who had examined certain cattle of the defendant was dead. The prosecution however, proved that the Surgeon after such examination pronounced in the presence of the defendant and the prosecutor that the disease was "cattle plague." This expression of opinion was in English and though made in the defendant's presence was not understood by him.

Held, the evidence was inadmissible both on this ground as well as on the ground that it was merely hearsay, and the Surgeon who had expressed the opinion being dead, could not be cross-examined.

This was a conviction by J. B. Elcum, Esquire, Magistrate, Bukit Martajam, convicting the appellant Pendek of a breach of the Order in Council of 7th August, 1889, made in pursuance of

the Quarantine and Prevention of Disease Ordinance 19 of 1886, by neglecting to report at once to the nearest Police Station the outbreak of disease amongst his cattle at Trans-Krian, on or about 18th July, 1890, and was fined $50 under Section 7 of the Ordinance. The Order in Council in question, is as follows :—

"It shall be the duty of the owner or person in charge of any cattle suffering from cattle plague *or any other disease* forthwith to report the fact at the nearest Police Station."

By Section 4 of the Ordinance, the Governor in Council is authorised to "make.....rules and regulations as may seem..... necessary or expedient for the purpose of preventing the introduction into the Colony of *any* disease, and also of preventing the spread of *any* disease,"—and by the proviso to Section 5, the rules and regulations so made may provide [amongst other things] for whatever the Governor in Council may think "expedient..... for the better carrying into effect the objects of the Ordinance."

By Section 3 of the Ordinance, "In the Ordinance *and any rule made thereunder*, unless the context otherwise requires ..... "Disease" means any disease of an *infectious or contagious nature* dangerous to mankind or animals and includes "leprosy" and "rabies," but does not include any venereal disease."

By Section 6, any person omitting to do anything required to be done by him by the Ordinance, or any rules or regulations made thereunder, is guilty of an offence against the Ordinance—and under Section 7, any person guilty of an offence against the Ordinance for which offence no penalty is prescribed by any rule or regulation made thereunder, shall be liable on conviction before a Magistrate to a fine not exceeding fifty dollars.

By Section 10, "where the person in charge of a diseased .....animal is charged with an offence against the Ordinance relative to such disease, he shall be presumed to know of the existence of such disease in such.....animal .....until he proves he had not the knowledge and could not with reasonable diligence have obtained such knowledge."

The prosecutor was the District Officer of Nibong Tebal—the defendant was the person in charge of cattle belonging to Koh Bu An on the Trans-Krian Sugar Estate. The *Government Gazette* was produced in evidence in the case, and the further evidence adduced was to the effect that the prosecutor could not of his own knowledge say whether the cattle were ill, but he had procured the attendance of Mr. Burghope, the Government Veterinary Surgeon to examine the cattle, and that he in the presence of the defendant and the prosecutor, had pronounced in English, the disease to be "cattle plague." The defendant did not understand English, and Mr. Burghope had died since the examination and before the trial. The Police Officer on visiting the estate on July 24th found seven cattle ill, and also the places where several others had been buried. The cow-herd of the estate was also called and proved that a month before, two cattle were first taken ill, and the matter reported to the defendant—on the next day, more were taken ill and ten of them died—two or three days after six more,

WOOD, J. 1890.

PENDER v. BROADRICK.

this was some seven or eight days before the Police visited the estate. The symptoms of disease were, the inability of the cattle to eat or dung—but after giving them castor oil, they were moved though with evident great pain and blood was passed in large quantities thereafter. There was no further evidence to shew what the disease was. The defendant, on conviction, appealed.

Adams, for appellant. The conviction is bad as the evidence does not shew a guilty knowledge in the accused, nor that the disease was infectious or contagious. The Order in Council must be controlled by the Ordinance, and by Section 3 "disease" is something infectious or contagious. The evidence of the prosecutor of the opinion expressed by the Veterinary Surgeon is not evidence—firstly, as defendant did not understand what was said; and secondly, it was mere hearsay, and Mr. Burghope being dead, could not be cross-examined.

Ross, for the Crown. A guilty knowledge need not be proved—Section 10. The evidence shewed the disease was one that attacked several of the cattle and was spreading among them—the symptoms were the same, and the only conclusion to be drawn was, that the disease was of an infectious or contagious nature.

Wood, J. It is clear the language of the Order must be controlled by the provisions of the Ordinance, unless there is something in the context shewing a different intention. There is nothing in the context of the present Order in Council to shew a different intention, the words "any other disease" in it must therefore be read as "infectious or contagious disease" as defined in Section 3 of the Ordinance. The evidence of what Mr. Burghope said was also clearly not admissible on both the grounds mentioned by Counsel for the appellant. This evidence being excluded, nothing remains but the facts relied on by the Crown to shew the disease the cattle were suffering from was infectious or contagious. The prosecution must clearly prove the disease to be of that nature—from these facts one is left to mere surmise and guesses—*non constat* that each bullock died of a different disease. It may be a case of suspicion, but in my opinion the proof fails, and the conviction must be quashed.

Conviction quashed.

REGINA *v.* TAN YOK LAN & ORS.

PENANG.

WOOD, J. 1890.

October 6.

The mere finding of instruments or appliances for gaming in a house, does not justify a Magistrate in convicting all the persons living in the house as assisting in the gaming—but the case of each person must be considered separately, according as the evidence connects him or not with the gaming or lottery.

A married woman supported by her husband and living in a house rented by him is not "the occupier" of the house within the Gaming House Ordinance 5 of 1888, although the husband may be absent from the Settlement. The husband is the occupier.

The warrant [omitting the name of the Informer, if any] under authority of which the Police enter a house under the Gaming Ordinance, ought to be produced in evidence before the Magistrate,—and on appeal, sent up with the stated case,—so

that the Magistrate or Court of Appeal can judge whether it be issued under the Ordinance or not so as to give rise to the presumption in Section 14 thereof.

WOOD, J. 1890.

REGINA v. TAN YOK LAN & ORS.

The appellants, three in number, were each convicted by J. K. Birch, Esquire, First Magistrate, with assisting in carrying on a public lottery to wit: a *Wha Whey*, under Section 5 Clause (c) of the Gaming House Ordinance 5 of 1888. There were nine prisoners before the Magistrate—the appellants standing as Nos. 4, 5 and 9. The evidence given before the Magistrate was to the effect that on the morning of the 4th September, the Police made a raid on two houses Nos. 62E. & 64, Church Street, under what the Inspector spoke of as a "gambling warrant." The warrant was not put in evidence nor sent up with the appeal case. House 62E. had three gold-smith's desks in front, belonging to Nos. 1, 4 & 5. House No. 64 was seemingly being prepared for occupation. There was no evidence to shew that the Police were authorised to enter this house. In this house, a box was found, belonging to No. 1, containing a *Wha Whey* lottery book, collector's tickets, and other appliances connected with gaming. On his person also, were found, several collector's tickets, and a book of accounts. He was in the act of leaving the house with No. 2 when the Police entered. No. 2 was said to be the attendant at the door. No. 3 was merely a lodger in the house. No. 4 was found in house No. 64, but was a gold-smith having his desk in No. 62E., in which no appliances for gaming were found. No. 5 was a gold-smith working at the time at his desk in 62E.—in his desk a *Wha Whey* collector's ticket was found, and on the window-sill, close by this desk, also some other *Wha Whey* lottery appliances. No. 6 who was the husband of No. 9 and was a tin miner in Larut, came over to Penang from time to time, and on such occasions resided in No. 62E. No. 7 was a visitor at this house. No. 8 was a son of Nos. 6 & 9, and had come over with his father—No. 9 was the wife of No. 6 and had resided in the house for several years, the rent of which was paid by No. 6 who also supported her. On this evidence the Magistrate fined Nos. 1, 4, 5 and 9, $500, each—and Nos. 2 and 3, $50, each—Nos. 6, 7 and 8, were discharged.

Van Someren, for the appellants. There is some evidence against No. 5, but the question is, was it sufficient to support the charge of *assisting* in carrying on a public lottery. As against Nos. 4 and 9, there is no evidence at all to support the charge. The mere living in a house in which gaming instruments are found does not render every person living there being convicted under the Ordinance—if so, no gentleman would be safe whose servants had a *Wha Whey* ticket in his box. The Magistrate evidently thought he *must* so convict, and on this footing alone, can the convictions of Nos. 3, 4, and 9, be understood. It is not shewn No. 9 had any control over the gold-smith's desks. None of the last mentioned persons were "the occupier" of the house. No presumption arises under Section 14, as it is not shewn the houses were lawfully entered under the Ordinance—but even if they were, the presumption is only against "the occupier." No. 9

WOOD, J. 1890.

REGINA v. TAN YOK LAN & ORS.

being a married woman under the care and control of her husband [No. 6,] she cannot be "the occupier"—her husband was, but he was discharged by the Magistrate.

Ross, for the Crown. House No. 64, was the gaming-house, and there was evident communication between the inmates of it and of No. 62E. No. 5 was evidently a collector, and the conviction against him ought to be affirmed. As to Nos. 1 and 2, there can be no doubt their conviction was right—Nos. 3, 4 and 9 being inmates of the houses, must have known all that was going on; they aided and abetted the others. A presumption arises under Section 14, as gaming instruments were found. No. 9 was "the occupier" of the house and the presumption attached against her. The case can, if needed, be remitted to the Magistrate for evidence that the houses were entered by a warrant under the Ordinance.

Wood, J. The mere being inmates of a house does not justify a conviction of them for *assisting* in gaming, if gaming instruments happen to be found in the house. Each person must be dealt with according as the evidence connects him or not with the gaming or lottery. There is no evidence against Nos. 4 and 9, except that they lived in the house. No presumption also arises under Section 14, against No. 9, as she was not "the occupier" of the house within the meaning of the Ordinance—her husband was, although he might be absent at times therefrom. Under the circumstances no good will come out of a reference again to the Magistrate even if it can be shewn that the Police entered under the Ordinance. I ought to add however, that in all these cases the warrant, omitting the Informer's name, should be produced as part of the evidence before the Magistrate—and it, or a copy, sent up with the case stated on appeal. The convictions against Nos. 4 and 9 will be quashed. That against No. 5 will be affirmed.

Convictions of Nos. 4 and 9 quashed. Conviction of No. 5 affirmed.

In re FREDERICK POOLES.

SINGAPORE.

O'MALLEY, C.J. 1890.

October 7.

The latter part of Sub-section 2 of Section 28 of the Bankruptcy Ordinance 2 of 1888, is limited to the case where the bankrupt has been reported as having committed some one or more of the offences previously mentioned, or has omitted to keep proper accounts or traded with knowledge of his being insolvent or done some one of the other facts set out in Sub-section 3—and the payment of 50 per cent. is *not* therefore a *sine qud non* to an application for a discharge in every bankruptcy.

This was an application by the abovenamed bankrupt who had traded under the firm or style of Frederick Pooles & Co., of Singapore, for his discharge under Section 28 of the Bankruptcy Ordinance 2 of 1888. The Official Assignee had filed his Report which stated that up to the present date the sum of $23,032.91 had been realised from the assets of the firm, and it was expected that the unrealised portion would amount to $5,000 which would therefore pay on the proofs of debt lodged by the creditors in this Settlement, a dividend of about $75 per centum; but if the liabilities of the firm in London were to be included, the dividend would not exceed $45 per centum. The bankrupt commenced business in 1886, in Singapore and London, in conjunction with

William Downie, Tan Guan Keat, Tan Keng Wah, and Hong Kun Shew, under the style of Pooles Downie & Co., as general retail store-keepers. The last named partner went out in August, 1887, receiving $10,000. In November, 1888, a disagreement arose between the applicant and William Downie which terminated in arbitration; the partnership with Downie was dissolved as regards the London branch as from November, 1888. The applicant and the other partners purchased Wm. Downie's interest in the Singapore business in April, 1889, and the firm was continued until January, 1890, when it stopped payment on account of information received from the London branch, that the liabilities there exceeded by $18,000, the amount appearing in the firm's books in Singapore. The Official Assignee had lately received notification from a London creditor to the effect that the Manager of the firm in London had absconded, and that a warrant for his arrest had been issued on a charge of misappropriation of the moneys of the bankrupt firm in London. It was therefore probable that the above bankruptcy had been caused by the conduct of this person. The Official Assignee further stated in his report that the books of the firm were kept in such a manner as to make it appear that none of the partners had a thorough knowledge of book-keeping; and it was impossible to ascertain with any accuracy the firm's business-transactions and financial position. With this exception, the Official Assignee was not aware of there being any evidence tending to prove any transgression by the bankrupt of the provisions of the Ordinance or the Penal Code. Section 28 of the Ordinance, is as follows:—

28. "[1]—A bankrupt may at any time after being adjudged bankrupt apply to the Court for an order of discharge, and the Court shall appoint a day for hearing the application, but the application shall not be heard until the public examination of the bankrupt is concluded. The application shall be made and heard in open Court.

[2]—On the hearing of the application the Court shall take into consideration a report of the Official Assignee as to the bankrupt's conduct and affairs and may either grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt or with respect to his after-acquired property: *Provided* that the Court shall refuse the discharge in all cases where it is proved to the satisfaction of the Court that the bankrupt has committed any offence under this Ordinance or under sections four hundred and twenty-one, four hundred and twenty-two, four hundred and twenty-three, or four hundred and twenty-four of the Penal Code or under any amendment of such enactments, and shall on proof of any of the facts hereinafter in the next following sub-section mentioned, either refuse the order or suspend the operation of the order for a specified time or grant an order of discharge subject to such conditions as aforesaid, *but so that in no such case shall the bankrupt obtain his discharge until he has paid a dividend of fifty dollars per centum on his debts.*

[3]—The facts hereinbefore referred to are—

[*a*] That the bankrupt has omitted to keep such books of account as sufficiently disclose his business-transactions and financial position within the three years immediately preceding his bankruptcy, or within such shorter period immediately preceding that event as the Court deems reasonable in the circumstances.

O'MALLEY, C.J. 1890.

In re FRED. POOLES.

[*b*] That the bankrupt has continued to trade after knowing or having reason to believe himself to be insolvent.

[*c*] That the bankrupt has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable ground of expectation [proof whereof shall lie on him] of being able to pay it.

[*d*] That the bankrupt has brought on or contributed to his bankruptcy by rash speculations or extravagance in living or by recklessness or want of reasonable care and attention to his business and affairs.

[*e*] That the bankrupt has delayed or put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action or other legal proceeding properly brought or instituted against him.

[*f*] That the bankrupt has within three months preceding the date of the receiving order when unable to pay his debts as they become due given an undue preference to any of his creditors.

[*g*] That the bankrupt has in the Colony or elsewhere on any previous occasion been adjudged bankrupt or made a composition or arrangement with his creditors.

[*h*] That the bankrupt has been guilty of any fraud or fraudulent breach of trust.

[*i*] That the bankrupt has within three months immediately preceding the date of the receiving order sent goods out of the Colony under circumstances which afford reasonable grounds for believing that the transaction was not a *bonâ fide* commercial transaction.

[4]—For the purposes of this section the report of the Official Assignee shall be *primâ facie* evidence of the statements therein contained.

[5]—Notice of the appointment by the Court of the day for hearing the application for discharge shall be published in the prescribed manner and sent fourteen days at least before the day so appointed to each creditor who has proved, and the Court shall hear the Official Assignee and may also hear any creditor. At the hearing the Court may put such questions to the debtor and receive such evidence as it thinks fit.

[6]—The Court may as one of the conditions referred to in this section require the bankrupt to consent to judgment being entered against him by the Official Assignee for any balance or part of the balance of the debts provable under the bankruptcy which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the Court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available for payment of his debts.

[7]—A discharged bankrupt shall notwithstanding his discharge give such assistance as the Official Assignee may require in the realisation and distribution of such of his property as is vested in the Official Assignee, and if he fails to do so he shall be guilty of a contempt of Court; and the Court may also if it thinks fit revoke his discharge, but without prejudice to the validity of any sale, disposition, or payment duly made or thing duly done subsequent to the discharge, but before its revocation.

[8]—*For the purposes of this section the following presumptions shall be made [that is to say]:—*

[*a*] *If at any time after the expiration of six months from the date of the adjudication, the Official Assignee reports to the Court that the value of the assets which have been realised together with the estimated value of the assets which are realisable is sufficient to pay a dividend of fifty dollars per centum on the debts proved in the bankruptcy it shall be presumed [until the contrary be proved] that the bankrupt has continued to trade after knowing or having reason to believe himself to be insolvent.*

[*b*] In determining whether a bankrupt was, or knew, or had reason to believe himself to be insolvent at any particular date, every debt owing to him by any person resident out of the jurisdiction which debt had been at such date due for more than twelve months shall be excluded from the computation of the value of the assets and for the purpose of such computation shall be deemed not to be an asset.

[*c*] A bankrupt shall be deemed to have continued to trade after knowing or having reason to believe himself to be insolvent if having continued to trade after he was in fact insolvent he

[i] is unable to satisfy the Court that he had reasonable ground for believing himself to be solvent; or

[ii] fails without reasonable excuse [proof whereof shall lie on him] to produce a proper balance-sheet for each of the three years immediately preceding the bankruptcy, every such balance-sheet being made within a reasonable time after the expiration of the year to which it relates and shewing the true state of his affairs at the end of such year.

[*d*] Any preference given by the bankrupt to any creditor within the three months immediately preceding the date of the receiving order shall [until the contrary be proved] be deemed to be undue."

The application was heard on the 6th October, and on this day.

The bankrupt appeared in person.

The Official Assignee, said a proper balance could not be obtained from the books because they had been kept in such an unbusiness-like manner. The books ought to have been so kept as to shew at once to a skilled accountant, the state of the business. *Re Reed and Bowen*, 17 Q. B. Div. L. R. 244. Since the new firm Frederick Pooles & Co., had been started, the books had been kept in a reasonable manner; and just prior to that time, the Deputy-Registrar, acting in his capacity of arbitrator between the parties had drawn up a balance. These further facts he had added by way of supplement to his report.

Buckley, for the New Oriental Bank and the Chartered Bank of India, Australia and China, creditors of the bankrupt, opposed the discharge. He contended the Court had no power to grant the discharge until the bankrupt had paid fifty per cent. By the English Bankruptcy Act of 1849, the Court had an absolute discretion to grant a discharge or not. By the Act of 1869, that discretion had been taken away, and it was left with the creditors to say whether the bankrupt should be discharged. By the recent Act of 1883, the discretion was again left to the Court. In our Bankruptcy Ordinance 2 of 1888, Section 28, it is enacted that no bankrupt should be discharged until he had paid fifty per cent. Were it not for the word "such" in the section, there could be no question as to its meaning. He submitted, the clause as to the fifty per cent. went to the whole section, and not the concluding portion only. It was not to be found in the English Act of 1883, but tacked on by our local legislature. The payment of fifty per cent. was here a *sine quâ non* to every discharge —this he understood had been held in Penang [*a*.] There was

[*a*.] There have been *obiter dicta* in Penang to this effect, but no actual decision. —J.W.N.K.

O'MALLEY, C. J. 1890. — *In re* FRED. POOLES.

also a provision in our Ordinance, which required the Court to presume the bankrupt had traded knowing that he was insolvent, until that presumption was rebutted. This was not in the English Acts, and the presumption had not been rebutted in this case. He referred to *Re Mew & Thorne*, 31 L. J. Bank. 89.

Cur. Adv. Vult.

9th October. *O'Malley*, C.J. In this matter, Frederick Pooles applies for his discharge as a bankrupt, having passed his public examination and the report of the Official Assignee having been read. The application is under Section 28 of the Bankruptcy Ordinance and is opposed on behalf of the Chartered Bank of India, Australia and China and the New Oriental Banking Corporation by Mr. Buckley. The simple ground of opposition is that the bankrupt's estate is reported as insufficient to pay 50 per cent. on his debts, and that that, of itself, apart from other circumstances, is enough to bar the Court from granting the discharge. The contention is founded upon the wording of the latter part of Sub-section 2 of Section 28 of the Ordinance, that the words "in no such case" govern the whole section. I have carefully considered and weighed this, and I do not think it supports any such conclusion. The words "in no such case" in my opinion being limited to the case where the bankrupt has been reported as having, or proved to have committed, certain offences, or under the following sub-section has omitted to keep proper accounts, or has continued to trade knowing or having reason to believe himself to be insolvent, etc.

In this case the question arises whether any of the facts in that sub-section have been established against the bankrupt. I was certainly inclined to think from the original report of the Official Assignee that there was a case against the bankrupt under Clause [*a*] for omitting to keep books sufficient to disclose his business-transactions and financial position for three years before bankruptcy, but it appears that the partnership was wound up in 1889, and a new firm started. The accounts of the new and old firms were gone into, and completely settled up by an arbitrator,—the Deputy-Registrar of the Court. The Official Assignee reports that since then sufficient books have been kept. I think under the circumstances that this is "a reasonable time" and that the bankrupt has therefore sufficiently satisfied the requirements of Clause [*a*], and is not prevented from getting his discharge on account of not having kept sufficient books. Sub-section 3 [*b*] gives the ground that the bankrupt has continued to trade after knowing himself to be insolvent; and instead of saying, which I think would be much clearer, that it would bar his discharge unless he can prove the contrary, it provides by Sub-section 8 [*a*]:

"If at any time after the expiration of six months from the date of the adjudication the Official Assignee reports to the Court that the value of the assets which have been realised together with the estimated value of the assets which are realisable is insufficient to pay a dividend of fifty dollars per

centum on the debts proved in the bankruptcy it shall be presumed [until the contrary be proved] that the bankrupt has continued to trade after knowing or having reason to believe himself to be insolvent."

O'MALLEY, C. J. 1890.

In re FRED. POOLES.

Then the question comes as to whether there is any presumption to the contrary, and whether the facts in the report of the Official Assignee shew that the presumption is rebutted in this case. The Official Assignee reports that in effect that the London firm were found to be very much more largely indebted than appeared from the information supplied in their letters—and, in fact, that it was more than probable that the deficiency was owing to the defalcations of the London manager, and that the large deficiency in the bankrupt's estate has arisen from the London manager making off with, as I understand, some $18,000 or $20,000; if the estate had not been weighted with this loss, it would have paid 75 per cent. In addition to this, I am influenced by the Official Assignee's statement that the bankrupt has done everything in his power to completely disclose his affairs, and rendered zealous assistance to him in realising the estate. Under these circumstances, the Court, having as I conceive, the discretion, thinks it is a proper case in which to grant a discharge.

LETCHMAN CHETTY *v.* HASSAN KUDUS & ORS. *In re* KHOO THEAN POH & ANOR.

A brick house built on Wakoff land with granite foundations buried under ground, is a "personal chattel" within the meaning of the Bills of Sale Ordinance 22 of 1870, [now repealed] and 12 of 1886. [*a*.]

PENANG.

WOOD, J. 1890.

October 7.

Interpleader. The subject-matter being two brick and two plank houses built on Wakoff or Charity land of Captain Kling, which were seized by the Sheriff on a *fi. fa.* at the suit of the Chetty. The brick houses where of solid granite foundations built some three feet into the ground. The houses belonged to Hassan Kudus and Chew Hock Seng the judgment-debtors, but had been mortgaged by them to one Khoo Thean Tek since deceased, of whom the claimants were the executors. The mortgage was the usual form of a bill of sale, of personal property in use *prior* to the new Bills of Sale Ordinance 12 of 1886, and was dated the 5th day of October, 1886, and was duly registered under the then Bills of Sale Ordinance 22 of 1870, Section 18, but the registration had never been renewed as required by the Bills of Sale Ordinance 12 of 1886, Section 14. At the time of the execution of the bill of sale, Hassan Kudus and Chew Hock Seng handed to the said Khoo Thean Tek the various bills of absolute sale of the houses from one person to another and ending with a bill of absolute sale of the same to themselves. Among these papers was a document signed by the trustees of the Wakoff by which they granted to the original builder of these houses, his executors, administrators, and assigns, "leave and license to

[*a*.] See *Mootyah Chetty* v. *Yacob, In re* Nyah Hamzah, *antè* p. 568.

WOOD, J. 1890.

LETCHMAN CHETTY v. HASSAN KUDUS & ORS. *In re* KHOO THEAN POH & ANOR.

enter upon a portion of the Wakoff land [described by metes and bounds] and thereupon to build any house or houses as they chose," on payment of a ground rent of six dollars per year. By this agreement it was provided that if the trustees at any time required the owner of the houses or his executors, administrators, or assigns to remove the houses, they should pay the owner of the houses, his executors, administrators, or assigns a sum of money to be fixed by two arbitrators as a compensation for all their losses. The evidence shewed that the custom as to houses built on Wakoff land was that they were always dealt with as separate from the land and could be sold, mortgaged, pulled down and removed by the builder or owner without the consent of the trustees or managers of the Wakoff; and if required by the trustees or managers to be removed, they were bound to make compensation therefor to the owner.

Wreford, for the claimants contended, that by Section 14 of the Bills of Sale Ordinance 12 of 1886, the former registration was rendered void for non-renewal, but as the bill of sale was under the old Ordinance 22 of 1870, that Ordinance though now repealed, was to govern the case—*Hickson* v. *Darlow*, 23 L R. Ch. Div. 690; and by Section 18 thereof, the effect of non-registration was to make the bill of sale void as regarded the "personal chattels" comprised therein—but "personal chattels" by Section 25 of that Ordinance was defined—it included "fixtures," but only such as were capable of complete transfer by delivery.

[*Wood*, J. The evidence clearly shews a custom applicable to buildings on Wakoff land. Were not these houses as capable of complete transfer by delivery as any large iron safe which could only be removed on rollers or something of the kind?]

The latter was clearly a "personal chattel," however heavy and bulky it might be. The definition of "personal chattels" in the old Ordinance is not so wide as in the new. This was not a fixture—*Sheffield Benefit Building Society* v. *Harrison*, 15 L. R. Q. B. Div. 358. Then again, the document granted by the trustees was a lease and gave the builder of the houses and his assigns an interest in the land—delivery of it to Khoo Thean Tek at time of the loan created an equitable mortgage over the debtors' interests in the land, and our title is good against the execution-creditor.

Van Someren, for execution-creditor was not called upon, but he mentioned the cases of *Wake* v. *Hill*, 7 L. R. Q. B. Div. 296, Affd. 8. App. Ca. 195, and *Ward* v. *Dudley*, 57 L. T. [N. S.] 20, as shewing these houses must be treated as "personalty."

Wood, J. The argument for the claimants is ingenious, but cannot be sustained. The document relied on as a lease created no interest in the land. The custom as to these houses on Wakoff land is well-known, and clearly proved in this case they are mere "personal chattels" within the Bills of Sale Ordinance, whichever be the one governing this case. The bill of sale not having been re-registered is void against the execution-creditor.

Judgment for Execution-creditor, with costs.

BAN CHIN HONG & CO. *v.* THE INDO-CHINA STEAM NAVIGATION COMPANY.

PENANG.

WOOD, J.
1890.

October 9.

Ambiguous language in exceptions in a Bill of Lading exempting the shipowner from liability for neglect of their servants or agents, must be construed most strongly against the shipowner and in favour of the shippers of cargo.

An exception in a Bill of Lading exempted the shipowner from liability for "any act, *neglect, or default whatsoever* of Pilots, Master, or Crew *in the management or navigation* of the ship." It was proved that the plaintiffs' cargo shipped on board under a Bill of Lading with such an exception, was damaged by sea-water leaking through a cargo-port of the ship which was insecurely closed while the ship was still taking in cargo at Calcutta.

Held, the word "management" must be limited to management of the ship only while she was actually on her voyage, and that the exception did not therefore cover the neglect or default of the shipowner's servants while in port, and he was therefore liable to make good to the shipper the loss he had suffered.

Evidence taken on Commission, when returned, becomes part of the proceedings in the case, and may be used by either party whether the Commission was his or not—but under Section 229 of the Civil Procedure Ordinance, 1878, an Order of Court must be obtained giving him leave to use it.

This was an action to recover $700 damages for loss sustained by the plaintiffs through the negligence of the defendants' servants. The plaintiffs had caused to be shipped for them at Calcutta on board the s.s. *Tai Sang*, certain chests of opium to be delivered to them in Penang. The goods were shipped on board, and while the steamer was still at her moorings and taking in further cargo, it was found necessary to close the cargo-port which was being gradually submerged. This port was closed and secured by the Chief Officer and servants of the defendant-Company who owned the steamer. The plaintiffs' goods were shipped on board under a Bill of Lading which *inter alia* contained an exception, exempting the shipowner from liability, which was as follows, "any act, *neglect, or default whatsoever* of Pilots, Master, or crew *in the management or navigation* of the ship." After the ship had been a day at sea, about two feet of water was found in her hold, and on examination it was found the sea-water had leaked in through the port. The cargo, including that of the plaintiffs, was shifted and the port properly secured. On discharge of the chests of opium at Penang, several of them were found damaged by sea-water. On arrival of the steamer at Hongkong, and after discharge of all her cargo, on survey and examination of the port, it was found the port had been insecurely closed at the first, and the sea-water had washed away the "*putty*" fillings, which had not been properly put in. At the trial these facts were practically admitted by the master and crew of the steamship, who had been examined and cross-examined on Commission issued on behalf of the *defendants.*

Adams, [*Wreford*, with him] for the plaintiffs, before closing their case asked to read the evidence taken on the Commission on behalf of the defendants. They submitted this evidence had become *theirs* by their cross-examining the witnesses and proving certain facts material to their case; and also, as the evidence being returned and filed with the Commission, had become part of the record in the case.

WOOD, J. 1890.

BAN CHIN HONG & CO. v. THE INDO-CHINA STEAM NAVIGATION CO.

Pesgrave, for the defendants objected and contended, the Commission was *his*; the plaintiffs had cross-examined his witnesses, but had not joined in the Commission. The witnesses and evidence were *his*, and he had the right to produce or withhold it as *he* thought best.

Adams, in reply referred to Section 229 of the Civil Procedure Ordinance, 1878.

Wood, J. said, the Commission and evidence returned with it, were part of the proceedings—1 *Arch. Q. B. Prac.* [13th Ed.] p. 315; they were part of the record now, and could be used by either party. By Sections 229 of the Civil Procedure Ordinance however, it was necessary for a party to have an order giving him leave to use it. He would make the order and give the plaintiffs leave to use the evidence obtained on the Commission.

The evidence was then read for the *plaintiffs*. On the conclusion of the evidence,

Pesgrave, for the defendants contended, that if there had been any negligence on the part of the defendants' servants, it was covered by the exception set out above, as the exception was intended to provide against neglect of the master and crew, and the word "management" was wide enough to include the closing of the port which was done to secure the ship, and so a part of the "management" of her. The exception was "management *or* navigation," evidently implying the two things were different. He relied on *Carver on Carriage by Sea*, Section 101, and *The Denero*, 38 L. J. Adm. 69.

Adams, [*Wreford*, with him] contended, that negligence had been proved; but *all kinds* of negligence on the part of the master and crew were *not* intended to be provided for by the exception, but only that done in the "management or navigation of the ship". The closing of the port while the vessel was at her moorings taking in cargo was not a "management" within the meaning of the exception. They also contended the ship was not "seaworthy," and referred to *Steel* v. *The State Line Steamship Co.*, 4 App. Ca. L. R. 72, and *The Glenfruin*, 10 Pro. Div. L. R. 103.

Van Someren, as *amicus curiæ*, *after* the judgment in this case had been delivered, called the attention of the Court to *Leggatt on Bills of Lading*, p. 241, and *Hayn* v. *Culliford*, 47 L. J. Q. B. 755, where the language of the exception was *identical* with that in the present case.

Wood, J. I consider the evidence clearly proves negligence on the part of the defendants' servants in securing the port; and that the plaintiffs' goods were damaged by sea-water leaking through the port, in consequence. The defendants therefore are liable to make good the plaintiffs' loss, unless the neglect in question is covered by the exception referred to. The word "management" is of doubtful import, and should, by itself, be construed most strongly against these fanciful exceptions to the shipowners' liability—but followed as it is here by the word "navigation," I think the latter word throws light on the "management" intended

to be referred to; and I hold that it means a "management" of the ship while she is in motion, actually on her voyage. The collocation of words I think is important, although they are in the disjunctive. I am of opinion therefore, the closing of this port while the vessel was at her moorings was not a "management" of the ship within the meaning of the exception, and the negligence of the defendants' servants in so closing the port is not covered by the exception, and the defendants are liable to make good to the plaintiffs the loss sustained by them.

WOOD, J. 1890.

BAN CHIN HONG & Co. v. THE INDO-CHINA STEAM NAVIGATION Co.

Judgment for plaintiffs, with costs.

THE THERMOPYLÆ.

SOLOMON & ANOR. *v.* GUTHRIE & CO.

SINGAPORE.

O'MALLEY, C. J. 1890.

October 15.

A Captain of a ship has no authority to pledge his owner's credit at a port where the ship is lying, and where the ship has an Agent authorised and ready to supply the ship's requirements.

Gunn v. *Roberts*, 9 L. R. C. P. 331, followed.

It makes no difference that the Master was not aware at the time he purported to pledge his owner's credit that the ship had such an Agent at the port.

Action to recover $2,040.05 for necessaries alleged to have been supplied to the abovenamed British ship, the *Thermopylæ*. The ship was owned by a Canadian Milling Company, and had arrived at Singapore on 8th September last, on a voyage from Cardiff. Messrs. Guthrie and Co. were duly authorised by the owners to act as Agents at Singapore for the ship and to pay for all necessaries required by her. They had given a letter to a certain *Dubash* to hand to the Captain, informing him that he was the man to whom all orders for the ship were to be given, but before this *Dubash* arrived on board, the plaintiffs, a firm of *Dubashes*, had boarded her, and on producing good references, they were engaged by the Captain to supply the ship with all requirements. After he had thus engaged the plaintiffs, the other *Dubash* arrived, but the Captain decided to keep to the plaintiffs as he had already engaged them, and thereafter continued to receive from the plaintiffs the various things ordered of them. The plaintiffs thereafter sent in a bill for the goods so supplied amounting to the above sum. The Captain had no funds to meet the claim, and Messrs. Guthrie and Co. refused to pay it, partly as every item in the bill was charged at a most exorbitant rate, and partly on the grounds that some of the goods were not "necessaries." They also considered, as they were Agents for the ship, the Captain had no power to employ the plaintiffs without their consent. Some bills for work and labour done and materials supplied to the ship in making port-holes and other work which had been ordered by the Captain of the "Victoria Works Company," without consulting the Agents, were paid for by them on presentation. On refusal to pay the plaintiffs' bill, they commenced this action against the ship. The Captain gave evidence for the plaintiffs.

Davidson, for defendants contended, that as they were Agents of the ship at Singapore and were ready to supply all necessaries,

THE THERMOPYLÆ. SOLOMON & ANOR. v. GUTHRIE & CO.

the Master had no authority to pledge the credit of the owners—*Gunn* v. *Roberts*, 9 L. R. C. P. 331. He submitted it was immaterial whether the existence of the Agents was known to the Master and plaintiffs or not.

Khory, for the plaintiffs contended, that the Master's acts had been ratified by the Agents paying the Victoria Works' bills. They thereby recognised his authority to pledge the owner's credit by an independent transaction without consulting them.

O'Malley, C.J. said, it was quite clear on the authority of the case of *Gunn* v. *Roberts*, that the Master had no authority to pledge the credit of the owners when there were properly authorised Agents in the port ready to supply all necessaries. The Agents had consented to pay certain bills to the Victoria Works though not bound to do so, but this did not amount to a ratification of the act of the Master in employing the plaintiffs—they were still at liberty to refuse to pay these bills. A large number of the items in the account too, could not be claimed as "necessaries." The action failed and there must be judgment for the defendants with costs. [*a*.]

ATTORNEY-GENERAL *v.* CHEW SIN YONG & ANOR. [*b*.]

PENANG.

WOOD, J. 1890.

October 27.

A claim for loss sustained by the Crown, by reason of the breach by the defendant of his contract—although such loss may be calculated and found by the Officers of the Crown to be a particular sum—is *not* a claim for an "ascertained" sum, within Section 2 of the Crown Suits Ordinance 15 of 1876; but a claim for "damages or account," within Section 3.

Where an Information and Writ of Summons, for such a claim, was filed and issued under Section 2,

Held, the defendant was quite right to apply, by Summons in Chambers, and before applying for leave to defend, for an order to set aside such proceedings as being irregular: and the same were set aside with costs.

The Writ of Summons, in Form C 1. of the said Ordinance, is intended to be used in cases falling within both Sections 2 and 3; but at time of issue, ought to be so adapted as to meet the provisions of the particular section under which it is issued, by striking out the alternative sentences which apply to the other section.

This was a Crown Suit [No. 2] under the Crown Suits Ordinance 15 of 1876, and was brought "for the recovery of $389,402.63 being for loss sustained by Her Majesty upon the reletting of the Opium, Spirit, and Toddy Farms of Penang, and of the Territory and Islands of the Dindings." The claim was based on a certificate signed by the Assistant Colonial Treasurer, which was as follows:—

"TREASURER'S CERTIFICATE.

I hereby certify that by two several contracts entered into by Chew Sin Yong and Chan Lye Kum under "The Excise Ordinance, 1870" the said Chew Sin Yong and Chan Lye Lum became bound to Her Majesty the Queen, Her Heirs and Successors to pay to the Assistant Colonial Treasurer the

[*a*.] The Agents upon this intimated they would pay the plaintiffs what was fair; in resisting the whole claim they only wished to put a stop to vexatious seizures of ships. It was then arranged between the parties to refer the accounts to the Registrar to decide what was a fair sum.—J.W.N.K.

[*b*]. See this case reported on another point, *antè* p. 648.

several sums of $92,700.00 and $2,350.00 monthly from the 1st day of January, 1889, to the 1st day of December, 1891, [inclusive], rent of the Opium, Spirit and Toddy Farms of Penang, and of the Opium, Spirit and Toddy Farms of the Territory and Island of the Dindings respectively, and also to pay to Her Majesty the Queen, Her Heirs and Successors, in case of any breach of their said contracts, any loss which might arise upon the re-letting of the said Farms—And that the said Chew Sin Yong and Chan Lye Kum did thereafter make breach in the performance of their said several contracts, in consequence of which breaches, the said Farms were jointly disposed of to other persons, as and from the 1st day of October instant, for the remaining 15 months of the terms comprised in the said two several contracts, at the monthly rental of $ 7,000.00, by reason of which, the sum of $389,402.63 is now due to Her Majesty the Queen, as follows:—

To Loss for 15 months or re-letting both Farms—	$420,750.00
By balance of Deposit-notes after deduction of August and September rents, and interest as shewn by H. E. the Governor's endorsements on contracts	$ 31,347.37
	$389,402.63

Dated at Penang, this 24th day of October, 1890.

[Signed] R. B. LEICESTER,

Assistant Treasurer."

This certificate was filed by the Attorney-General under Section 2, Clause 1 of the said Crown Suits Ordinance, and an Information filed, in Form of B1. of the Schedule of Forms given in the Ordinance, which stated that the above sum was for "loss sustained by Her Majesty upon the re-letting of the Opium, Spirit and Toddy Farms of Penang, and of the Territory and Island of the Dindings in consequence *of the breach by the defendants of their covenants contained in two several contracts under the Excise Ordinance, 1870*, under which the said Farms were held respectively, by the defendants, and *which loss* the defendants *by their contracts* became bound to pay to Her Majesty, as witness the certificate of the Assistant Colonial Treasurer." The writ of summons was in Form C1. of the said Schedule of Forms. It was headed "writ of summons [Sections 2 and 3, Ordinance 15 of 1876]" and called on the defendants to enter an appearance "within *four* days," and "shew cause why judgment should not be entered up..... and execution issued thereon [*or to answer Us concerning certain articles then and there on Our behalf to be objected against you*]....." The indorsement on this writ, after stating the claim as herein first set out, proceeded to state "and if an appearance is not entered by you within *four* days from service hereof, judgment will be entered up against you for the above amount with costs, *and execution issued without further notice, or* [*if under Section 3*] *judgment will be entered up against you without further notice, and damages will be assessed against you on further notice of four days, which notice may be issued on the expiration of eight days from the Service of this Summons.*" Sections 2, 3, and 54 of the said Crown Suits Ordinance, are as follows:—

"2. I.—If the amount so in default is *ascertained*, the Attorney-General, on filing in the Supreme Court a Certificate, in the Form in the Schedule A., by the Colonial Treasurer, or Officer of any Court or Department of Govern-

WOOD, J. 1890. — ATTORNEY-GENERAL v. CHEW SIN YONG & ANOR.

ment in which the amount is leviable, that the same is due and unpaid, in whole or in part, may file in the said Court an Information in the Form of Schedule BI.

II.—Certificates issued under Sections 2 and 4 shall be held to be within the provisions of Sections 197 and 198 of the Penal Code.

III.—On the filing of such Information, the Registrar of the Court shall forthwith issue a Writ of Summons in the Form of Schedule C1. to be served on the defendant, calling upon the defendant to shew cause, *within four days, why judgment should not be entered up, and execution issued.*

IV.—The defendants, on being served with such Writ of Summons, shall *not* be at liberty to defend the Suit, unless he shall obtain *leave* from the Court to do so.

V.—A defendant desiring to defend such Suit shall, within such four days, file a Statement, verified on oath, in the Form in the Schedule D. of the facts on which he bases his defence, and shall serve a copy of the same, on the Attorney-General; and if the Court, on reading the same, is satisfied that the defendant has a substantial ground of defence on the merits, an Order may be indorsed thereon granting leave to the defendant to defend, within such time as the Court may direct; *when* the Suit shall proceed, down to, and inclusive of, the hearing or trial, subject to the provisions of this Ordinance, in *the same manner* as is practised *in Suits* for a similar purpose *between subject and subject.*

VI.—Any such order may be set aside by the Court, on its being satisfied that the same was irregularly or improperly issued.

VII.—Leave to defend such Suit shall not be granted unless on the merits, shewing a substantial ground of defence, to be made out by the defendant on his application for leave to defend.

VIII. *No defect of form or procedure* shall be deemed a sufficient ground for *defence*, but such defect may be *amended*, by, or by leave of, the Court, *whenever brought to notice, on such terms, as to costs* and otherwise, as to the Court may seem right.

IX.—If the defendant does not apply for leave to defend a Suit, or if the Court declines, on the defendant's application, to grant such leave, the Attorney-General may, on the expiration of *four* days from service of the Writ of Summons, whether the defendant has appeared or not, and on proof of service of the Summons if he has not appeared, *enter up final judgment for the Crown, whereon execution shall at once issue.*

X.—It shall be lawful for the Court, if, after decree, it shall be made to appear to the Court to be reasonable and just so to do, and on four days' notice to the Attorney-General, to set aside any judgment entered up *ex-parte* under this section, and to allow the defendant to appear and defend the Suit.

For Sums not Ascertained.

3. I.—If the amount claimed on behalf of the Crown lies in *damages or account, or is otherwise not ascertained*, the Attorney-General may, in the first instance, file an Information, as in Schedule *B. II*, setting out shortly the nature of the claims of the Crown, and *requiring* the *defendant* to *answer the same*; and, on the filing of the Information, a Writ of Summons shall be issued as in Schedule C 1, in the usual course of the Court.

II.—The defendant, on being served with the Writ of Summons, *shall enter* an appearance within *eight* days.

III.—On such appearance, the Attorney-General shall cause to be served on the defendant a *notice to answer within eight days*; and, in default, that judgment will be entered up for the Crown, *and damages assessed on further notice of four days.*

IV.—*If the defendant appears and answers*, the proceeding shall be *continued*, down to, and inclusive of, the hearing or trial, subject to the provisions of this Ordinance, *as in ordinary Suits for a similar purpose between subject and subject.*

V.—If the defendant does not appear, or does not appear and answer, as required, *interlocutory* judgment may be entered up for the Crown; and, *on the amount of claim being proved, by the usual practice of the Court for assessment of damages, on a four days' notice*, execution shall follow at once.

54. Subject to the several provisions of this Ordinance, the law of *Practice* and *Procedure* in force in the Supreme Court, *for the time being in proceedings between subject and subject, shall be applicable to all proceedings of a similar kind under this Ordinance.*"

The action was begun on 24th instant and Copy, Writ, and Information served on defendants the same day: on 25th they took out a *Summons in Chambers*, in Form 20 of the *Civil Procedure* Ordinance 5 of 1878, "for an order setting aside the Certificate of the Assistant Colonial Treasurer, the Information and Writ of Summons issued in this suit on the grounds of irregularity; and for payment by the Crown, to the defendants, of their costs of the application: or for such further or other order as to the Court shall seem right." The Summons now, for sake of convenience, come on *before the Court* for argument.

Van Someren, for the defendants contended, the claim was in truth a claim for "damages" for breach of contract, and so was for an "unascertained" amount, and the Writ and Information should have been issued and filed under Section 3. "Ascertained" in Section 2, meant a sum agreed to or fixed by both parties. This objection was not one of form, but of substance, for under Section 2 the defendants could not appear and defend without the leave of the Court, and terms might be imposed on them on such leave being granted—under Section 3, they could appear without leave, and as a matter of right. They also had more time to do so under Section 3—in fact five times as much. The Crown had entirely misconceived their procedure—they should, for this claim, have proceeded under Section 3—filed their Information in the Form of Schedule *B. II.*, and adapt the Form of Summons C 1., so as to suit that section—their proceeding under Section 2 was irregular. But even if they were justified in proceeding under Section 2, still the present Writ of Summons was irregular and embarrassing—the heading of it stated it was issued under both Sections 2 and 3—the four days' time allowed by it would lead to the idea it was under Section 2—the parenthical clause as to answering certain articles to be exhibited, gave the idea that it was under Section 3. The indorsement was still more embarrassing—the defendants could not tell whether they were to appear within four days, or eight days, or twelve days; and whether they ran the risk of immediate execution, or the damages would be assessed. It was the duty of the Crown to make its process simple and explicit, so that any one, not a Lawyer, and not having the Ordinance at his elbow, could tell from the mere reading of the writ what he could do and what risks he ran. The present writ was not a compliance with this rule and was irregular. On both grounds the whole proceedings should be set aside and that, with costs.

D. *Logan*, [*Solicitor-General*] for the Crown contended, the defendants were irregular in applying to set aside these proceedings on a Summons in Chambers. Such a summons was unknown to the Crown Suits Ordinance, under which alone this case must be decided. Such a summons was entirely a procedure under the Civil Procedure Ordinance 5 of 1878. The only mode left to

WOOD, J. 1890.

ATTORNEY-GENERAL v. CHEW SIN YONG & ANOR.

the defendants to raise this objection was by pleading it *after* getting leave to defend, under Section 2. The practice, as in Civil Cases, only came in at an after stage of the case, under Section 2, Clause 5, and Section 3, Clause 4. Then, the Writ of Summons here was not liable to be set aside; the latter portion of the indorsement on the summons was mere surplusage, and the defect having been pointed out the Court could at once amend it under Section 2, Clause 8, by striking out the latter portion—Then the Crown was justified in suing under Section 2, for the claim here *was* for an "ascertained" sum. It was mere matter of calculation,—a deducting of the amount of the re-letting rent from the original rent, and multiplying the difference by the number of months that the original contract had still to run, and allowing interest on that sum at the contract rate. There were also some sums for which the defendants were to be credited with and this had been allowed them. The Assistant Colonial Treasurer had worked it all out, as shewn by his certificate, which was the foundation of the claim, and shewed the amount to be an "ascertained" sum. An "ascertained" sum is a sum *capable* of being ascertained, whether by both or *either* of the parties.

Van Someren, in reply contended, the defendants had taken the proper course in applying for this order by a Summons in Chambers. Such a summons, though in practice perhaps not met with here before the Civil Procedure Ordinance, 1878, was not unknown in England before the Judicature Acts, and so, in theory was known to the law here *before* the Civil Procedure Ordinance, 1878. There was nothing in the Crown Suits Ordinance to say such a summons could not be taken out—there was no provision in that Ordinance prescribing the mode how an objection to set aside proceedings for irregularity should be taken, and Section 54 of the Ordinance, brought in the practice and procedure *for the time being*, as in *ordinary civil* suits *between subject and subject*—and in such suits, Section 248 of the Civil Procedure Ordinance prescribed a Summons in Chambers as the mode of procedure. The defendants could not plead the irregularity for if the case were within Section 2, they must get leave first, and leave would not be given on such an objection, by reason of Clause 7 of that section. The defendants had taken the earliest opportunity to raise the objection, and to save costs—and the proper mode of doing this was by Summons in Chambers. The second contention on behalf of the Crown, *assumed* that Section 2 applied to this case; but if it did not, Clause 8 thereof could not. The Court undoubtedly could amend, and this under its ordinary powers as in Civil Cases, but only on payment of costs. The last argument for the Crown was based on a fallacy. It supposed the Treasurer's Certificate made the sum certain—but the certificate only was available if the case fell within Section 2—to start with the idea of the certificate being the basis of the claim, was to beg the question whether the case fell within Sections 2 or 3.

Under Section 3, no certificate was of any avail. The Treasurer was not the judge to assess the amount; this Court was, and the defendants had a right to reduce it as much as

possible. The damages here, no doubt, would be a matter of calculation, but every case of damages was the same—the figure the Treasurer started with, the amount of re-letting rent, is not accepted by the defendants as the proper sum to be deducted, and the whole of his calculations fell with it. "Ascertained" and "unascertained" were equivalent to "liquidated" and "unliquidated"—*Wharton's Lex.* under those titles. Unless there was the *consensus* of minds of both parties, the amount remained "unascertained." At all events, this claim was matter of "account," and then also fell within Section 3.

Wood, J. I have not the slightest doubt the claim here is *not* for an "ascertained" sum. The action is, in effect, a claim for damages for breach of contract, and the amount of those damages can only be arrived at after hearing both sides, and must be assessed by the Court. The Treasurer no doubt has made his calculations to his own satisfaction; but the defendants are by no means bound to accept it. The amount is undoubtedly capable of being ascertained, but was not an "ascertained" sum at time the writ issued. "Ascertained" sum, in Section 2, means a sum arranged on and agreed to by both parties. The writ and whole of the proceedings on the part of the Crown are therefore irregular, and must be set aside. I think the defendants adopted the right course to take this objection at the time and in the mode they have adopted. Objections for irregularity should be taken at the earliest opportunity. Questions connected with practice and procedure would ordinarily be decided in Chambers; but in Chambers, and in Court, the powers of the Judge are the same. Such a Summons was known long before the Judicature Acts and is a mode of procedure at this time, and I can see nothing in the objection taken by the Solicitor-General. As regards the Writ of Summons herein, undoubtedly it is informal and embarrassing; but, all that needed to have been done [if the defendants' first objection had failed] was to have amended it by striking out the alternative clauses, on terms. The Form C 1., given by the Crown Suits Ordinance, ought to be adapted to Section 2 or 3, as the case falls within the one section or the other—and the other alternatives struck out. The defendants' first objection succeeding, the writ and the whole of the proceedings of the Crown in this case must be set aside with costs.

Proceedings set aside with costs.

In re LAM TAI YING.

A warrant issued by the Protector of Chinese under the Women and Girls Protection Ordinance 14 of 1888 is *not* conclusive evidence, under Section 15, of the facts stated therein, and this Court is not deprived thereby of its jurisdiction to control the actions of the Protector and of going behind his warrant to ascertain his proceedings and the grounds of his order.

The Protector, in making the "due enquiry" under Section 6 of the Ordinance, can only do so after notice to all parties interested, taking the evidence given at such enquiry on oath and permitting the witnesses to be cross-examined.

WOOD, J.
1890.

In re
LAM TAI
YING.

This was an application by Chan Ah Luk, the mother of the abovenamed Lam Tai Ying, for a writ of *Habeas Corpus* to be directed to W. Evans, Esquire, Assistant Protector of Chinese and the Lady Superior of the Convent, to bring up the body of the said Infant with a view to her being set at liberty. It appeared, *inter alia*, from the affidavits filed on both sides, that the abovenamed Lam Tai Ying was a girl under sixteen years of age and was the daughter of the applicant; that the applicant was an *ayah* or nurse, with a Chinese family in Langkat, in Sumatra, and had left her said daughter [together with two younger daughters] in charge of her sister-in-law, one Li Ah Yi, a seamstress and hair-dresser residing in Campbell Street, Penang. Li Ah Yi, in the course of her business as a hair-dresser, used to visit certain brothels in the Street, for the purpose of dressing the hair of the prostitutes therein. One morning, the Inspector of Brothels noticed the abovenamed Lam Tai Ying on the five-foot pathway of one of these brothels apparently talking to one of the prostitutes who was seated inside—he arrested her, and brought her before the said Assistant Protector of Chinese who, after examining [not on oath] the Inspector, the said Lam Tai Ying, and the said Li Ah Yi, declared himself satisfied that the girl was being trained for immoral purposes and made an order under Section 6 of the Women and Girls Protection Ordinance 14 of 1888 for the removal of the said Lam Tai Ying to a place of safety—and by his first warrant directed the abovenamed Lady Superior to receive her until further order. The Court having granted the applicant a *Rule Nisi* calling on the said Assistant Protector and the said Lady Superior to shew cause why a *Habeas Corpus* should not issue, the Assistant Protector examined the mother [the applicant] of the said Lam Tai Ying on her arrival from Langkat, and thereupon issued a further warrant directing the keeper of a "home" newly established under the said Ordinance, to receive the girl and detain her until further order. The following are the sections of the said Ordinance bearing on the case:—

6. "[1]—The Protector if after *due enquiry* he is satisfied that any girl is being used for immoral purposes, or is being trained for such purpose and that such girl is under the age of sixteen years may by warrant under his hand and seal, order such girl to be removed to a place of safety, and there detained until further order, or until she attains the age of nineteen years or marries whichever first happens.

[2.]—A girl found living in or frequenting a brothel shall be deemed to be a girl who is being trained for immoral purposes.

13. [1.]—The Protector shall have full power to summon any person whom he may have reason to believe can give any information respecting any woman or girl suspected to have been brought into the Colony for immoral purposes by fraud or misrepresentation, or under any false pretence, or respecting any girl suspected of being used or trained for immoral purposes, or respecting any inmate of a brothel, and the person so summoned shall be legally bound to attend at the hour and place in the summons specified and to produce all documents in his custody, possession, or power relating to such woman or girl and to answer *truthfully* all questions which the Protector may put to him respecting any such woman or girl, or in any way relating to the matter being enquired into.

[2.]—The Protector shall be deemed to be a Public servant within the meaning of the Penal Code and *may* administer oaths to and examine on oath any person summoned before him for the purposes of this Ordinance.

15. Every warrant purporting to be issued in pursuance of this Ordinance and to be under the hand and seal of the Protector shall be received in evidence in every Court of the Colony without further proof and shall be *evidence of the facts therein stated*, and all acts done in pursuance of such warrant shall be deemed to have been authorised by law."

The *Rule Nisi* now came on for argument.

D. *Logan*, [*Solicitor-General*] for the Assistant Protector shewed cause. He contended that there had been "due enquiry" by the Protector within Section 6 of the Ordinance; that under Section 13, Clause 2 the Protector had power to administer an oath, but it was not obligatory on him to take evidence on oath; that Section 13, Clause 1, only required the witnesses to speak "truthfully"—that there was no need to summon the mother before making the order, as her agent the seamstress, was in attendance and examined; that the Protector was satisfied after due enquiry that the girl was being trained for immoral purposes—his warrant so stated,—and was evidence under Section 15 of these facts, and the Court therefore could not go behind the warrant.

G. S. H. *Gottlieb*, in support of the Rule contended, that there was no evidence the girl was being trained for immoral purposes; that there had been no "due enquiry" as the parties were not summoned—the witnesses were not examined on oath, and cross-examination had not been apparently allowed. That "due enquiry" meant a judicial enquiry—and it was obligatory on the Protector to take evidence on oath. That the Protector in making the enquiry and order was exercising "inferior jurisdiction," and this Court under the Courts Ordinance 3 of 1878, Section 10, had power to "control" his acts. Section 15 of the other Ordinance did not deprive the Court of this power.

Wood, J. I decline to hold that the Protector's warrant shuts out the jurisdiction of this Court. I consider the Protector, while sitting on the enquiry and making his order, was a judge exercising inferior jurisdiction—and this Court clearly has power, under Section 10 of the Courts Ordinance, 1878, to control his actions. This jurisdiction cannot be taken away by the somewhat obscure language of Section 15 of the Women and Girls Protection Ordinance. That section enables the warrant to be received in evidence; and enacts that it shall be evidence of the facts therein stated—but it does not make the warrant conclusive evidence of those facts; and to consider the section as merely making the warrant *primâ facie* evidence, would, I think, satisfy its language. That evidence may be rebutted; and I think here it has been. I also hold there was no "due enquiry" held by the Protector. "Due enquiry" here, means a judicial enquiry—an enquiry begun after properly summoning the parties interested

WOOD, J. 1890. — *In re* LAM TAI YING.

to attend—and the evidence given thereat, given on oath and the witnesses open to be cross-examined. The Protector was sitting as a "Court," and a Court can only act on legal evidence—evidence properly adduced, under the sanction of an oath. I further hold, the statements of the various witnesses examined, do not shew that the girl was being trained for purposes of prostitution or immoral purposes. The order of the Protector must be quashed, and the Rule made absolute for a *Habeas Corpus* to issue with the view to the girl being restored to her mother.

Order accordingly.

ATTORNEY-GENERAL *v.* SEVEN BARRELS OF GUN-POWDER, &c.

SINGAPORE. — O'MALLEY, C.J. 1890. — NOV. 3.

The Attorney-General has no power to "*direct*" the Registrar of this Court to enter up judgment for the Crown in any case whatsoever, and a paper so *directing* the Registrar to do, was ordered to be taken off the file.

The words "make himself a defendant" in Section 4, Clause 8 of the Crown Suits Ordinance 15 of 1876, mean "appear"—so that where a person claiming to be interested in opposing the claim of the Crown to an order for forfeiture of any property in proceedings *in rem* under Section 4, enters an appearance *without* obtaining leave from the Court under Clause 8 thereof, such appearance is a nullity, and the Attorney-General is entitled to treat it as such, and to sign final judgment as in default of appearance under Clause 5.

This was an Information *in rem* filed by the Attorney-General under the Crown Suits Ordinance 15 of 1876, Section 4 against certain ammunition which was seized on board the s.s. *Cecil C. Smith*, in Malacca, in February, 1890. The ammunition had been ordered to be forfeited by a Bench of Magistrates, but their order was quashed on appeal [*a*]. There being no valid order of forfeiture in force, this Information was filed under Clause 2 of the above section of the Crown Suits Ordinance aforesaid. The Summons, which was affixed to the barrels, &c., called on all persons interested in opposing the claim of the Crown, to appear within eight days, under Section 4, Clauses 4 and 5. Two of the appellants caused an appearance to be entered for them *without* having obtained leave from the Court to appear. The Attorney-General, notwithstanding the appearance, "*directed*" the Registrar to enter up final judgment as in case of default of appearance, which judgment was accordingly entered up. After the expiration of the eight days and after judgment had been entered up, the said appellants applied *ex-parte*, to the Court for leave to "make themselves defendants" under Clause 8. The Court directed notice to be served on the Attorney-General, which the said appellants accordingly did, calling on the Attorney-General to shew cause why the judgment should not be set aside as being irregular, and why they should not get leave to "make themselves defendants" in opposing the claim of the Crown to a forfeiture.

[*a*] See *Regina* v. *Mabot & ors.*, antè p. 638.

The following sections of the Crown Suits Ordinance, 1876, bear on this report:—

"2. ... ...

IV.—The defendant, on being served with such Writ of Summons, shall not be at liberty to defend the Suit, unless he shall obtain leave from the Court to do so.

V.—A defendant, desiring to defend such Suit shall, within such four days, file a statement, verified on oath, in the form in the Schedule D., of the facts on which he bases his defence, and shall serve a copy of the same on the Attorney-General; and if the Court, on reading the same, is satisfied that the defendant has a substantial ground of defence on the merits, an Order may be indorsed thereon granting leave to the defendant to defend, within such time as the Court may direct; when the Suit shall proceed, down to, and inclusive of, the hearing or trial, subject to the provisions of this Ordinance, in the same manner as is practised in Suits for a similar purpose, between subject and subject.

VI.—Any such Order may be set aside by the Court, on its being satisfied that the same was irregularly or improperly issued.

VII.—Leave to defend such Suit shall not be granted unless on the merits, shewing a substantial ground of defence, to be made out by the defendant on his application for leave to defend.

VIII.—No defect of form or procedure shall be deemed a sufficient ground for defence, but such defect may be amended, by, or by leave of, the Court, whenever brought to notice, on such terms, as to costs and otherwise, as to the Court may seem right.

IX.—If the defendant does not apply for leave to defend a Suit, or if the Court declines, on the defendant's application, to grant such leave, the Attorney-General may, on the expiration of four days from service of the Writ of Summons, whether the defendant has appeared or not, and on proof of service of the summons if he has not appeared, enter up final judgment for the Crown, whereon Execution shall at once issue.

X.—It shall be lawful for the Court, if, after decree, it shall be made to appear to the Court to be reasonable and just so to do, and on four days' notice to the Attorney-General, to set aside any judgment entered up *ex-parte* under this section, and to allow the defendant to appear and defend the Suit.

Informations in Rem.

4. I.—Whenever any moveable or immoveable property is declared, in any judicial proceeding, to be forfeited to the Crown, the Attorney-General may file in the Supreme Court a Certificate of the forfeiture, in the form in Schedule A. II or A. III, and, at the same time, may file an Information in Rem, in the form of Schedule B. III, against the person in whose possession, custody, or control the same may be; or, if no such person can be found, against the property.

II.—Informations in Rem, in the form of Schedule B. III, may, in like manner, be filed, as to property claimed to be forfeited to the Crown.

III.—A Summons, in the form of Schedule C. II., shall forthwith be issued by the Registrar of the Court.

IV.—Such Summons shall be served according to the usual practice of the Court; and a copy of the Summons shall be affixed, in a conspicuous way, on the property declared or claimed to be forfeited, and such affixing shall be held to be sufficient service, if no person is found authorised to accept service.

V.—If no person appears to oppose the forfeiture, at the expiration of four days in cases in which a Certificate of forfeiture has been filed, and eight days in cases in which no such Certificate has been filed, judgment may be entered up for the Crown, and the property may be sold, by an order of the Court, under a Writ in the form in Schedule T.

O'MALLEY, C.J. 1890.

ATTORNEY-GENERAL v. SEVEN BARRELS OF GUNPOWDER, &c.

Provided always that if, at any time within six months from the date of such forfeiture, any person appears as owner of such property, and, on a four days' notice to the Attorney-General, shews cause why the same should not have been forfeited, the Court may make an order on the Treasury requiring the amount of proceeds of sale of such property to be paid to such owner.

VI.—If any person appears to oppose the forfeiture, in cases in which a certificate of forfeiture has been filed, the provisions of Clauses IV. to X of Section 2, both inclusive, shall be applicable.

VII.—If any person appears to oppose the forfeiture, in cases in which no certificate of forfeiture has been filed, the Attorney-General shall cause to be served on him a notice to answer within eight days; and, in default, that judgment will be entered up for the Crown, and execution for the sale of the property will be issued without further notice. If an answer is filed, the subsequent proceedings, down to, and inclusive of, the hearing or trial, shall, subject to the provisions of this Ordinance, be had and taken in the same manner as in an ordinary Suit for a similar purpose, between subject and subject.

VIII.—Any person interested in opposing the Crown Claims may, by *leave* of the Court, obtained on motion *ex-parte*, *make himself a defendant* in any Suit under this Section."

The arguments of Counsel sufficiently appear from the judgment.

Nanson, appeared for the Attorney-General, and shewed cause.

Joaquim, contrà.

During the argument in this case, the following was said by

O'Malley, C.J. I must point out to you Mr. Nanson that I have before me a paper which purports to be in the nature of a direction of the Attorney-General to the Registrar to enter up judgment; that notice appears to me to be an irregularity. The Attorney-General, as such, has no power to give any orders in the nature of a direction to enter up any judgment in this Court. He is precisely in the same position as any ordinary private suitor, and the documents to be placed before the Court are precisely of the same character as the documents used by any private suitors. I do not think that power belongs to the Attorney-General to say "I hereby direct you to enter final judgment for the Crown." I think it is taking too much upon himself by the Attorney-General to perform functions which appertain strictly to the Court. I have given directions to the Registrar that no notice of this kind must after this be received by the Registrar.

Cur. Adv. Vult.

November, 6th. *O'Malley*, C.J. In this case an application is made by two persons who come forward as owners or claiming to be entitled to oppose the forfeiture, and it is in the form of a motion to set aside as irregular, a judgment entered for the Crown in default of appearance. The movers say, we appeared and you have no right to enter judgment over our heads and treat

our appearance as null. The Crown contends that the appearance was a nullity and says you cannot appear without the leave of the Court has first been obtained: you did not obtain leave within the time specified by the Ordinance and so your appearance without leave was null. The arguments in favour of the appearance being made, turn upon the construction of Section 4, Clause 8 of Ordinance 15 of 1876, which says:—

"Any person interested in opposing the Crown Claims may, by leave of the Court, obtained on motion *ex-parte*, make himself a defendant in any Suit under this Section."

For the opponents it was contended, that to "make himself a defendant" does not mean simply "appear," but means, after appearance, obtain leave to defend. The position of the Crown was the opposite. One side said that any one who wished to oppose might enter an appearance, the other side said any body could appear and become defendant, taking the first step when claiming. Then in answer, the opponents' contention, as I understand it, was based upon the inconsistency of the view put forward by the Crown—inconsistency with other provisions of the Ordinance applicable to this procedure. I certainly did not exactly follow, and cannot accept the whole of what Mr. Joaquim said on that point, but I have endeavoured since to deal with that line of argument. Taking the construction contended for by the Crown and assuming that construction to be correct, I have applied it to the procedure under this Section 4 in order to see how it works out with the other portions, whether it was reasonable or unreasonable, tested by that section. If you take the construction contended for by the Attorney-General—that you cannot appear without first getting leave, then the way the Ordinance will work is this. There are two different cases of information *in rem*; there is the case where judgment has been obtained either in this Court, a Magistrate's Court, or some other tribunal, and there is the case where no judgment has been obtained, where the Attorney-General merely asserts his right to come forward to make a claim. Taking the first case, the Attorney-General has to file a certificate of forfeiture and information. Upon that a summons has to be issued, and affixed upon the property alleged to be already condemned. This summons is to be affixed on a conspicuous place on the property that has been condemned. It is addressed to all persons entitled to oppose the forfeiture. If there are any persons who desire to oppose the claim, they must by Clause 5 appear within four days from the date of the issue of the summons. Assuming the Crown construction to be right, before the opponent so appears, he must obtain leave of the Court to do so before he appears at all. What has he to do? How far has he to go before he appears? That is laid down by Clause 8, assuming the Crown construction to be the right one. There seems to be some reason in that. It is hardly like a case of *caveat emptor*, as it is not a case of sale. A claimant might be called upon to prove his interest before he is entitled to contest the property, and it seems to me that was the

O'MALLEY, C.J. 1890.

ATTORNEY-GENERAL v. SEVEN BARRELS OF GUNPOWDER, &c.

object here. All persons are addressed; if any one thinks fit to come forward and claim he must do so *ex-parte* by a motion through the Court, and set up, some way or other, an interest in opposing the claim. Then he becomes a person such as is described in Clause 8 as a person interested in opposing the Crown rights, and then he is entitled to appear. The next step would be, having got leave and having appeared, he then becomes subject to a series of provisions in Section 2, Clauses 4 to 10 and he must take the next step himself and within a period which the clause specifies "as such four days" to file a statement on oath, stating the facts on which his statement is based, applying for leave to defend. There seems some obscurity about the words "such four days," because looking back to the earlier sub-sections of that Section 2 it is described as four days from the service of the writ upon the defendant: it would be nonsense here, because there is no defendant, only in this case they were considering "such four days" not from the service of the writ upon the defendant but upon the goods. Therefore, within the same four days he is to come forward with his affidavit and so satisfy the Court of the facts upon which his defence is based. Where there has been a judgment obtained forfeiting the goods and the Attorney-General proceeds under Section 4 to enforce that forfeiture, he has only to wait four days, and if anybody chooses to come forward they must first obtain leave; and secondly, set out the grounds on which they oppose. Then if they are permitted to defend, the matter goes forward to the next step. That is in a case where there has already been an adjudication. The law is much more stringent in that case than in a case where it is merely a claim. In a case where there is no adjudication, eight days are allowed and whatever be the meaning of Clause 8, it applies equally in that case. Whatever be the meaning of Clause 8 although Section 2, Clauses 4 to 10 do not apply, Clause 8 applies to both cases. Within eight days the person who wishes to oppose may do so, if on a motion *ex-parte* he has obtained leave and become a person answering to the description in that clause. He must satisfy the Court that he is interested in the forfeiture and is not a mere outsider. Having done that, there is nothing more to do. He is not called upon to shew what his defence may be; he is entitled to ground his claim on that, when no adjudication had been made, and he has a proper right to defend when he shews interest, without further distinction. The construction for the opponent was that anybody who chose might come in, and enter appearance without leave from the Court; that thereupon a duty is imposed upon the Attorney-General to serve them with a notice; the answer to that, as pointed out by the Crown, was any number of people might come forward, and simply by entering an appearance might require themselves to be served with notices to answer that claim. Considering that the object of the Ordinance is to expedite and facilitate the recovery of matters of this kind by the Crown it seems that that is not a reasonable construction to put upon the words. If the opponents' construction be correct they have perfect freedom to come in as they like to appear within

these eight days, but some time or other they must come forward and set out the facts upon which their defence is based. If they do not, then, notwithstanding their appearance, the Attorney-General may enter judgment. In the other case where there has been no judgment and the Attorney-General merely claims the goods, there according to the opponents' construction anyone may come forward without shewing interest and without permission, enter an appearance, and having done this, he must then go before the Court and before he can defend the action he must get leave to defend. That seems to me unreasonable; if a man has a right to appear why should he where there has been no adjudication, be called upon in this case more than an ordinary suit to shew his defence? Yet that is the construction for which the opponents contend. If considering the "reason" of the words, the more reasonable construction of this "make himself defendant" is enter an appearance, and not file his defence. I think that the real construction of that section is, that any person interested in opposing a Crown claim in a case where there has been no adjudication, must come forward within eight days, and obtain leave from the Court upon motion *ex-parte* shewing that he has some interest in the claim. I think Clause 7, Section 4 though it relates to another matter, confirmatory of that view, because the language used in the fifth line of the clause shews that the Legislature looked upon the appearing of a defendant as the same, and then it goes on to Clause 8. I think that the somewhat obscure expression "make himself defendant" really means "appear." That being so it seems to me that the appearance in this claim, was irregular. Is it an irregularity requiring to be set aside, or is it a nullity, to be treated as such? I have looked as carefully into all I can find, as to a distinction between what is a nullity and what is irregular, and there does not seem to be any principle by which you can distinguish one case from the other. I think the right distinction and one applicable in this particular case is, if there has been a mere directory clause or provision treated as directory, which has been ignored, you might treat this as a mere irregularity which could be set aside, but, where the step to be observed is a condition, there it seems that a step taken without that is a nullity. The construction of that section, although not drafted in the approved way for a directory provision seems to be so, and I think what it means is, that any person interested cannot appear without leave and therefore it is a nullity in this case and in spite of that appearance the judgment must stand. At the same time, as was pointed out, that judgment was obtained, upon an application which was irregular in form, through the Registrar. In this case that direction to the Registrar should be withdrawn and a proper application, following the procedure which is adopted in every case for entering judgment for the plaintiff, should be followed here. I do not think that that direction should be allowed to remain on the file. That being so the opponents are not entitled to have the judgment set aside. Then as to the question whether they may not be strictly entitled in law and whether there are grounds

O'MALLEY, C.J. 1890.

ATTORNEY-GENERAL v. SEVEN BARRELS OF GUNPOWDER, &c.

upon which, on terms, they should be practically admitted to dispute the validity of the claim. I certainly do not think, so far, that they have shewn any claim whatever; they have not placed before the Court any facts shewing that they are even interested, much less that they have anything in the shape of a *bonâ fide* defence. Nothing short of satisfying the Court on both of these points would entitle them to any consideration under these circumstances. They have had opportunities; it was not an unreasonably short time—eight days, within which all that was required of them was to shew interest, and that they did not do. I think the least that they would be required to do would be to shew interest and the ground of a substantial defence on the merits. If they are in a position to do that, justice does not require that they should gain anything on this motion, because the proviso in Clause 5, Section 4 seems precisely to meet the case. It provides, if at any time within six months any person appears as owner, and on four days notice to the Attorney-General shews cause why the property should not be forfeited, &c., the Court might make an order, &c. It seems to me that the opponents are in a position to do that. The law has provided a remedy which would substantially meet any real merits. It is not necessary to justice, in this case, to give them any other opportunity. If they could not within eight days shew reasonable cause why the judgment of forfeiture should not be recorded, I do not think they should be at liberty to ask any more. The decision of the Court is that the judgment should stand as entered. There will be no order as to costs.

END OF VOL. IV.

INDEX.

ABETMENT—*see* CONVICTION. 4. 493
—— PRINCIPAL. 1. 118
—— SPIRITS - 546

ABUSE OF PROCESS—Where the process of this Court is abused, as for instance, by a plaintiff issuing a summons for a gross and scandalous claim, the Court will summarily without notice to the plaintiff, order it to be taken off the file and the service set aside. DONOHUE *v.* JOAQUIM - 628

ACCESS—Right of, - - - - 10
see SEA SHORE.

ACCESSORY—A person who is shewn to have committed an offence as a principal cannot be convicted as an accessory 493
see CONVICTION. 4.
2. —— Court of Appeal—amendment of charge—person formerly charged as an —may be charged as a principal - 546
see SPIRITS.

ACCOMPLICE—Informer—Evidence 597
see LOTTERY. 2.

ACCOUNTS—Although appeals in matters of detail, as accounts, should not be encouraged, yet where the evidence preponderates in favour of the appellant, this Court will act on such evidence and even reverse the judgment of the Court below, or the Registrar's certificate, on a point of fact. CHIH LIM NEO *v.* SIT HOON NEOH - - - - - - - 492
see also CROWN CONTRACT. 2. 680
———PARTNERSHIP. 1. 380

ACKNOWLEDGMENT—A document acknowledging that the debtor had received a sum of money from the claimant for personal property [describing them seriatim] that day sold by him to the claimant, is a Bill of Sale within Section 5 of the Bills of Sale Ordinance 12 of 1886 - - 530
see BILL OF SALE. 7.

ACKNOWLEDGMENT OF DEED—*see* MAHOMEDAN MARRIED WOMAN. 3. 225
see REPLY - - - - 416

ACQUITTAL—A prisoner charged with assault was discharged by a Magistrate on the prosecutor informing the Court that he did not wish to prosecute as the prisoner had settled the matter to his satisfaction. The Police disapproving of this step, summoned the prisoner for the same assault before another Magistrate who considered

ACQUITTAL—*continued.*

that the discharge under the circumstance was equivalent to an acquittal, and refused to entertain the charge, and dismissed the summons. The Police appealed. *Held*, the proceedings in the first instance implied an acquittal, and the prisoner could not be tried a second time. REGINA *v.* MONTEIRO - - - - - - 556

ACTION—Payment by defendant of amount claimed and costs before execution - - - - - - - - 614
see SHERIFF.

ACTION FOR DAMAGES—Judge 437
see CONSULAR COURT. 2.
——*also* CROWN CONTRACT. 2. 680
——— DAMAGES.
——— LAND. 13. - 533
——— POLICE. 1. 2. 214, 240

ACTION FOR RENT—Limitation—Covenant—lease - - - - - - 587
see RENT. 5.

ACTION ON PROMISSORY NOTE—Defence—Part payment—agreement 587
see PROMISSORY NOTE. 3.

ACTS:

20 of 1837 - - - - - - 119
see HEIR.
see LIMITATION. 1. - 311
see TESTATOR. 3. - - 608
16 of 1839 s. 11 cl. 2 - - 178
see DECLARATION OF TRUST.
13 of 1850, s. 11 - - - 323
see BREACH OF TRUST. 1.
15 of 1852, s. 7 - - - 570
see FOREIGN COURT.
31 of 1854 - - - - - 225
see MAHOMEDAN MARRIED WOMAN. 3.
2 of 1855, s. 12 - - - 630
see BIGAMY. 2.
——— s. 31 - - - 349
see THEFT. 2.
14 of 1856 - - - - 431
see VERANDAH.
——— s. 126 - - - 450
see RIPARIAN RIGHTS.
25 of 1856, s. 4 - - - - 103
see ASSESSMENT.
27 of 1856, s. 21 - - - 103
see ASSESSMENT.

ACTS—*continued.*
8 of 1859, s.s. 32, 385, 525 cl. 4 - 311
see LIMITATION. 1.
14 of 1859 - - - - 225
see MAHOMEDAN MARRIED WOMAN. 3.
——— s. 1 cl. 12 - - 311
see LIMITATION. 1.
——— s. 1 cl. 8 & 11 - - 587
see RENT. 5.
——— s 4- - - - 136
see AGREEMENT. 1.
ACTUAL KNOWLEDGE—*see* CONTRACT. 12. - - - - - 544
ADJOURNMENT Part heard Criminal trial—Court will adjourn where no harm done to a prisoner to enable prosecution to procure further evidence - - 630
see BIGAMY. 2.
ADJOURNMENTS—Magistrates- 287
see HABEAS CORPUS.
ADMINISTRATION—The Court will not revoke Letters of Administration *durante absentia* granted to a person under a power of attorney from a next-of-kin, or declare it to have ceased or expired, merely on the ground that since such grant of administration such next-of-kin had cancelled and revoked the power of attorney. MAHOMED MYDIN *v.* PANA SITTEE MAHOMED. *In the goods of* MAHOMED HUSSEIN - 191
2. ——Chinese Widows Intestacy 380
see WIDOWS.
3. ——When the Court has granted Letters of Administration to an estate, to a person, no one has a right to detain such letters from such person. A party entitled to land is entitled to the Title Deeds thereof; and the proper person to sue in detinue for their detention is the person entitled to the legal interest in the land. MASIAMAH *v.* PACHAK - - - - - - 444
4. ——Under special circumstances, Court may dispense with security for due administration of Estate - - 594
see SECURITY. 3.
——— *also* COMMISSION. 1. 558
——— DECLARATION OF TRUST - - 178
——— EXECUTOR. 1. - 8
——— LIMITATION. 1. 311
——— MAHOMEDAN MARRIAGE ORDINANCE. 1. - 98
ADMINISTRATION BOND- The Probate Act of 1857 [20 & 21 Vic. c. 77] does not extend to this Colony and this Court therefore has no power to order an Administration Bond to be assigned in order to be put into suit. *Query.* How are Administration Bonds made in former years in favour of the Secretary of State for India to be put into suit? *In the goods of* ISMAIL - - - - - - - 187
ADMINISTRATOR—*see* ADMINISTRATION.
ADMIRALTY PROCEEDINGS—
see COLLISION - - - 478
—— DERELICT VESSEL - 638
—— PIRACY JURE GENTIUM 169
—— SALVAGE - - - - 200
—— SHIPPING - - - 679
ADOPTED CHILDREN—*see* CHILDREN. 1. - - - - - - 128
ADVANCE OF INTEREST—*see* CREDITOR. 2. - - - - - - - 559
ADVERSE POSSESSION—*see* MAHOMEDAN MARRIED WOMAN. 3. - - - 225
—— TITLE—*see* LAND. 12. - 453
ADVOCATES AND SOLICITORS—Right to appear before Justices of the Peace - - - - - - - 151
see JUSTICE OF THE PEACE.
—— *also* COUNSEL. 1. 2 317, 569
AFFIDAVIT—Occupation of attesting Witness—Execution-Creditor- - 120
see BILL OF SALE. 1.
2. ——Defective under Bill of Sale—void as against Sheriff when seizing under process - - - - - - - - 183
see BILL OF SALE. 2.
AFFRAY The prosecutor had rented a strip of land at the back of a shop in Prangin Lane in which he resided. The appellants [thirteen in number] were carrying granite stones, passing and re-passing over the strip, thereby scattering some paddy the prosecutor had laid out to dry. This led to words and eventually to blows. The strip lay at the back of the shop by the sea side, and though some distance from the public thoroughfare, it was open on all sides and was distinct from the shop land which was fenced all round; over the strip was a lane or foot-path. Crowds of people were attracted to the spot by the noise of the fight. *Held*, that the strip was not a "public place" within the meaning of Section 159 of the Penal Code, so as to render the appellants guilty of an affray. REGINA *v.* ONG KONG POON - - - - 346
AGENT—An agent under a power of attorney whose power gives him no authority to use his principal's name and credit in financial transactions has no authority to bind his principal though he assumes to act under the power and puts his principal's *chop* on the Note, Bill, or Document he gives. *Query.* What if it is shewn that the money was borrowed and used for the purpose of the principal's business, or for his benefit? There can be no ratification by a principal of the act of his agent, who in doing the act exceeds his authority, until it can be shewn that the principal in doing the act which is relied on as the ratification, acted with full knowledge of the nature of the act committed by his

AGENT—*continued.*
agent and with an intention to adopt that act at all events. *Freeman* v. *Rosher*, 13 Q. B. 780, followed. A "material fact" is one which if communicated to the other of the parties would induce him either to refrain altogether from the contract, or not to enter into it on the same terms: this definition applies equally to the doctrine of subsequent ratification as it does to the Law of Insurance. QUAIK SIEW SOON *v.* WEE KIM GUAN - - - - - 319
2. ——Captain of Ship—authority to pledge owner's credit - - - 679
see SHIPPING.
see also BILL OF LADING - 677
——— CONTRIBUTION - 528

AGREEMENT—Disturbances existing in the Native State of Larut between two opposing factions or Kongsis of Chinese relative to the possession of certain tin mines there, a number of mines belonging to the faction or Kongsi of which the defendant was a headman, were taken from them by their opponents. The Muntri as the chief authority of the country sided with the defendant's faction or Kongsi and with his knowledge and consent, the defendant and others, headmen of that faction or Kongsi applied to the plaintiff's firm for help in money and provisions, in arms, ammunition and food for their "armed men" to an "unlimited credit." In consideration of the plaintiff's firm agreeing to render this help, the defendant by an agreement made in Penang, agreed that after the conclusion of peace between the two factions or Kongsis, ever to pay to the plaintiff's firm seven-tenths of the percentage which their faction or Kongsi received from the miners on all tin obtained by them at their mines, but should the defendant change his mind and not pay such seven-tenths he was to pay to the plaintiff's firm $10,000 per month in lieu thereof. The agreement then provided in a separate clause that should the mines *fall in other hands* than those of the defendant's faction or Kongsi, or should the mines be *wrenched* from the hands of the defendant's faction or Kongsi, so that they became unable to draw their aforesaid percentage, then the plaintiff's firm could not claim payment of the seven-tenths. The plaintiff's firm provided the necessary moneys and goods up to the extent of $60,000; with the help so rendered the defendant's faction or Kongsi were able to recover most of the mines they had lost, and on the British Government shortly thereafter interfering and bringing about peace and establishing a Residency in Larut, the defendant and his co-headmen and the miners of their mines met, and

with the knowledge and consent of the British Resident made a further agreement which—after reciting the previous agreement and the fact that the supplies had been rendered and thereby most of the mines had been recovered, and that peace had been restored—provided and declared that the defendant and his co-headmen and their miners were to follow and abide by such previous agreement. The defendant's faction or Kongsi thereafter drew and received their aforesaid percentage from their miners and thereout paid seven-tenths thereof to the plaintiff's firm for about two years whereby the debt to the plaintiff's firm was reduced by $16,500. While the plaintiff's firm were thus collecting their seven-tenths, the British Government with the consent of the Perak authorities took possession of and re-allotted the mines among the Chinese mine-owners, and thereafter issued a proclamation prohibiting the further levying of the aforesaid percentage and proceeded to levy a duty on tin for themselves for the upkeep of the Government of the country, whereby the plaintiff's firm were deprived and hindered from obtaining their seven-tenths. The plaintiff's firm then sued the defendant for the balance of their advances. *Held* [by *Wood*, J. and affirmed by the Court of Appeal] that the plaintiff could not recover—[1] as the expression "other hands" in the first agreement was not limited to the faction or Kongsi opposing or fighting the defendant's faction or Kongsi, but included the British Government; and the construction apparently put on these words by the parties themselves by the second agreement was immaterial, and the acts and proclamation aforesaid, were acts within the provisions of the aforesaid clause, and the agreements were rendered impossible of performance as the subject-matter of them, the percentage, had been put an end to; [2] that the alternative provision to pay $10,000 a month did not arise as it applied to a free and voluntary change of mind on the part of the defendant and not by constraint, and the defendant under the aforesaid circumstances could not be said to have "changed" his mind. If a plaintiff be resident or his firm be established in this Colony, and the payment of a debt has to be made to the plaintiff or his firm, the cause of action is one that "arises in this Colony" within Section 29, Ordinance 5 of 1868, and Sections 18 and 19 of Ordinance 3 of 1878, so that this Court has jurisdiction to entertain the suit if the defendant be absent from the Colony —per *Wood*, J. *Semble*. If a contract is made in the Colony, though confirmed by a subsequent contract made out of the

AGREEMENT—*continued.*

Colony, and the breach be committed abroad—the case is one which "on general principles of international law and comity, is to be determined by the law of the Colony" within the aforesaid sections—per *Wood*, J. The English rule that once the Statute of Limitation begins to run nothing can prevent its operation, although the defendant be in hiding or out of the jurisdiction is merely a rule of construction on the language of the English Limitation Acts 21, James 1, c. 16, and 4 Anne, c. 16, Section 19, and is not a hard and fast rule of law, and is inapplicable to the Indian Limitation Act XIV. of 1859, in face of Section 13 thereof. *Gregory* v. *Hurrill*, 5 B. & C. 341. *Gan Kim Swee* v. *Lee Ah Kee* [infrà, note p. 138.] not followed—per *Wood*, J. *Semble*. The word "present" in Section 29 of Ordinance 5 of 1868, and Section 19 of Ordinance 3 of 1878 means *bonâ fide* and actual presence in an open and undisguised manner and not in hiding and concealment—per *Wood*, J. *Semble*. It does not mean presence at the time of action brought, but at the time of breach or thereafter—per *Wood*, J. The earlier English Statutes of Limitation of James and of Anne as above, are law here, except as modified by subsequent Acts and Ordinances of the Indian and Straits' Settlements Legislature, but Lord Tenderden's Act 9, Geo. IV. c. 14, is not in force here—per *Wood*, J. Section 4 of the Limitation Act XIV. of 1859, only deals with acknowledgments in cases of a "legacy or debt" and does *not* like Lord Tenterden's Act extend to "actions on the case grounded on any simple contract," so that a letter written by directions of a defendant, though *not signed* by him, but from which a promise to pay may reasonably be inferred is a sufficient acknowledgment under the old law, prior to Lord Tenterden's Act, to revive his liability—per *Wood*, J. A promise to pay "when of ability" will revive the debt if it can be shewn by evidence that between the date of the promise and the commencement of the action for recovery of the debt, the defendant has had the ability—per *Wood*, J. In an action for breach of an agreement, the plaintiff in answer to a defence of the Statute of Limitations put in evidence the three following letters written within six years of the commencement of the action by the defendant's directions and with his name, but *not* signed by him. 1. "It is true that the "kindness bestowed by you .... is to no "small extent. Although others may be un- "grateful, I cannot be so bad as that .. "it is really on account of my being hard "up that I cannot further my wish..... "although I wish to put the matter to "right, it is not within my powers to do "it.....should in future I receive the sum "from the Government I will not be un- "grateful to you." 2. "With regard to the "matters mentioned in your letter, you "say you wish me to manage to pay one- "half of the amount, but should I have "any means in my power, I have nothing "to complain of even if I had to pay the "whole." 3. "Day or night I cannot for- "get your kindness, should I have little "better prospects in the future, I would "never forget you. I must then first of all "repay you your kindness." *Held*, that the letters were conditional promises to pay on being of ability to do so, and there being proof of such ability, they were acknowledgments which took the case out of the Statute of Limitations—*per Wood*, J. *Tanner* v. *Smart*, 6 B. & C. 603, and *Hammond* v. *Smith*, 33 Beav. 452, followed. KOH SEANG THYE *v.* CHUNG AH QUEE 136

2. ——Division of work—restraint 158
see CONTRACT. 3.

3. ——A document which is encumbered with conditions or puts a person on enquiry to ascertain whether any uncertain event has happened, is not a Promissory-note. Where therefore A. gave a paper promising and agreeing to pay a sum of money by instalments to B. or his order in consideration of B. discontinuing certain actions which he then had against A. *Held*, as it was necessary to shew that the actions had been discontinued, the document obliged any intending holder of it to enquire whether that event had occurred; it was therefore encumbered with a condition, and was not a Promissory-note but an agreement only. *Carlos* v. *Fancourt*, 5 T. R. 482, followed. Costs and expenses incurred by a plaintiff before action in order to perfect his title to commence the action should not be allowed on taxation between party and party. HAJEE SHAIK ABDUL CADER *v.* MAHOMED CADER HUSSAIN - 181

4. ——Clause in, that disputes be referred to arbitration—Jurisdiction of Court not ousted without express words - 596
see ARBITRATION. 3.
—— *also* BREACH OF CONTACT.
———— CONTRACT.
———— CROWN CONTRACT. 1. 2 648, 680
———— SEA SHORE - - 10

ALIENATION—Power of—Testator—Lands - - - - - - 608
see TESTATOR. 3.

2. —— RESTRAINT—BEQUEST—WAKOFF - - - 101
see LAND. 2.

ALTERNATIVE SENTENCE—Conviction bad—Court of Appeal may amend 188
see OFFENCES.
2. ——Bad—Power of Court to amend 493
see CONVICTION. 4.
AMENDED CHARGE—*see* MAGISTRATE. 1 - - - - - - - - - 79
AMENDMENT OF CHARGE—Trial—Jury - - - - - - - - 258
see JURY
see also MAGISTRATE. 12 - 405
——— SPIRITS - - - 546
——— OF CLAIM—Different state of facts—new cause of action - - 437
see CONSULAR COURT. 2.
——— OF DEFENCE—*see* STATUTE OF FRAUDS. 1 - - - - - - - 344
APPEAL—The Crown though not a party to an—from the decision of a Magistrate nevertheless has a right to be heard on the appeal - - - - - - 238
see CROWN. 1.
2. ——It is not sufficient in a memorandum of appeal simply to state that the appeal is for "wrong determination in point of Law," but the grounds of appeal should be set forth - - - - - - 533
see LAND. 13.
3. ——Magistrate's decision—conviction quashed—Crown ordered to pay appellant's costs of appeal - - - - - 597
see LOTTERY. 2.
4. ——The only parties to an appeal are the appellant and respondent, the committing Magistrate has no locus standi 606
see MAGISTRATE. 18.
5. —The warrant under which Police enter a house under Gaming Ordinance, on appeal should be sent up with the stated case 668
see LOTTERY. 3.
APPEARANCE—*see* CROWN SUITS 688
APPELLANT—It is not necessary on the hearing of an appeal from the decision of a Magistrate, under the Appeal's Ordinance 12 of 1879, that the appellant should be in Court or within the jurisdiction - 638
see ARMS AND AMMUNITION. 2.
see also COURT OF APPEAL.
——— MAGISTRATES.
APPLIANCES OF GAMING—
see POLICE. 2. - - 240
——*also* GAMING. 5. - 615
——— LOTTERY. 3 - 668
APPURTENANCES—*see* SEA SHORE 10
ARBITRATION—A suit in which the main point was whether the plaintiffs were or were not members of a certain Society of the "Yeoh" tribe or clan, and the object of which suit was to have a declaration that the plaintiffs were such members and for administration of the Society's affairs under the directions of the Court, so that the plaintiffs might enjoy the benefits of the Society, was at the trial by consent of both

ARBITRATION—*continued.*
parties referred to the arbitration and award of certain well-known and influential members of the Chinese community of the Settlement who were no t members of the Society, but who were each and all office-bearers in similar Societies of their respective "Sehs" or clans. The order of reference was, of the "suit and all matters in difference therein." The parties and arbitrators were all Chinese, and the question was one entirely dependant on Chinese custom, usage, and religious practices in connection with such Societies. In accordance with Chinese usage and practice, the arbitrators first of all called and met the plaintiffs and their witnesses, and heard all that they had to say [through certain of their number who were chosen as "spokesmen"] in support of their claim: they [the arbitrators] on a subsequent day, called and met the defendants and their witnesses, and also heard all they had to say [through their "spokesmen"] against the plaintiff's claim. On neither of these occasions was the opposite party present, and no notice was given to them of the arbitrator's intention to hear the case of their opponent, and in consequence there was no cross-examination on those occasions by either party. On a third occasion, the arbitrators called for and met *both parties* at one and the same time, and enquired into certain accounts, and the contents of certain title deeds of lands belonging to the Society, and then heard further statements made by the plaintiff's party in the presence of the defendants, and of the defendant's party in the presence of the plaintiffs. Both parties having each had their full say, the arbitrators announced that they would make and publish their award in a few days. Within a few days they did so, and by the award found as a fact that certain persons through whom the plaintiffs claimed, had been members of the Society, and then proceeded to award that the defendants should pay the plaintiffs the sum of $2,000 and also convey to them two houses in Beach Street belonging to the Society [and which they valued at $22,000], and ordered that the plaintiffs from thenceforth should have no further interest in the Society. The plaintiffs being dissatisfied, moved to have the award set aside. *Held*, [by *Sheriff*, J.] that the proceeding of the arbitrators in examining the one party in the absence of the other was irregular and the award must be set aside. *Held*, on appeal [affirming the judgment of the Court below] that the arbitrators had not decided or awarded, but had settled or compromised the dispute—that they had acted *ultra vires* in excluding the plaintiffs from further

ARBITRATION—*continued.*
membership [if they found them to be members] and they had been guilty of "misconduct" within Section 454 of the Civil Procedure Ordinance 5 of 1878, and the award was rightly set aside. *Held also*, that the award was indivisible and must be set aside as a whole, and that there had been no waiver on the part of the plaintiffs by their attending and proceeding at the first and third meetings. The Court of Appeal here has full power and authority on granting leave to appeal to Her Majesty in Her Privy Council to impose as a term, that the appellant lodge his appeal with the Registrar of the Privy Council within a given time [*dissentiente—Pellereau & Goldney*, J.J.] YEOH HIM & ORS. *v.* YEOH CHENG KANG & ORS. - - - - 204
2. ——Separation - - - 327
see HINDU HUSBAND AND WIFE.
3. ——A clause in an agreement requiring that disputes thereunder should be referred to arbitration, does not prevent any of the parties thereto suing in this Court thereon. In order to oust the jurisdiction of this Court there must be words expressly excluding such jurisdiction. Section 11 of the Common Law Procedure Act, 1854, was adopted in this Colony by Section 3 of the Civil Procedure Ordinance 4 of 1878, and is still in force here—but the provisions of that section must be complied with before a defendant can claim a right to go to arbitration under an agreement as aforesaid. MEYER *v.* COLDENBURG & ANOR. - 596
ARCADE—Obstructions—Notice - 431
see VERANDAH.
ARMS AND AMMUNITION—
Exportation - - - 515
see EVIDENCE. 10.
2. ——It is not necessary on the hearing of an appeal from the decision of a Magistrate under the Appeals Ordinance 12 of 1879, that the appellant should be in Court or within the jurisdiction. It is no objection to a conviction for an offence against the Arms and Ammunition Exportation Ordinance 18 of 1887, that an order of forfeiture of the arms, &c., is not at the same time made. The exportation of arms, &c., which is prohibited by the Arms Exportation Ordinance abovementioned, is an exportation *direct* to some prohibited place, and not an exportation from this Colony to some unprohibited place, although accompanied with an intention afterwards to export such arms, &c., from such latter place to the prohibited port. The language of any Proclamation issued under the Ordinance must be controlled by the provisions of the Ordinance. REGINA *v.* MABOT & ORS. - - - - - - - - 638
see also CROWN SUITS 688
ARREARS OF RENT—Collector of Land Revenue—attachment - - - 533
see LAND. 13.
ARREST—Mesne Process—Security—Defendant liberty to leave jurisdiction 1
see SECURITY. 1.
2. ——Mesne Process before Judgment—Security—writ held void - - 71
see BOND.
3. ——Action for Malicious Prosecution—non-payment of damages by defendant - - - - - - - - 433
see MALICIOUS PROSECUTION.
4. ——Police cannot legally arrest a person for breach of a mere Bye-law - 615
see POLICE. 4.
ARREST WITHOUT WARRANT—
Crown Lands Ordinance - 76
see FOREST RANGER.
ARTIFICIAL WATERCOURSE—
see RIPARIAN RIGHTS - 450
ASCERTAINED SUM—Crown Suits Ordinance—damages - - - - 680
see CROWN CONTRACT. 2.
ASSAULT—*see* ACQUITTAL - - 556
see MAGISTRATE. 18 - - 606

ASSESSMENT—In assessing the rent which a tenant might reasonably be supposed to give for any premises, it is not necessary to suppose such tenant will occupy the whole of the premises: any portion which is capable of separate beneficial occupation might be rated separately. Where Wharves and Warehouses adjoin each other, and the one is an adjunct to the other and must be worked together, it might reasonably be expected that no tenant would rent the one without the other, and the two might therefore well be rated together, and that as "buildings" within the meaning of Acts 25 and 27 of 1856. Coal sheds connected with the business of a Wharf and Warehouse Company, but not inseparably so, and being capable of separate beneficial occupation, ought to be valued and assessed separately from the Wharves and Warehouses. Profits of trade, such as on labour supplied, on insurance, on cartage and such like should not be rated; but as under the aforesaid Acts the question is what would a tenant reasonably be expected to give for his occupation of any given premises, and the capacity to carry on a profitable trade would very largely enter into his consideration when deciding what rent he could afford to pay, such profits may properly be taken into consideration in estimating the rent which such a hypothetical tenant might reasonably be expected to pay for the occupation. Interest on capital employed in a business ought to be deducted in rating premises in which such business is carried on. Nine per cent on such capital is a fair rate of

ASSESSMENT—*continued.*
interest to allow. General charges for management of a business, expenses of office, Directors' remuneration, and payments to shareholders for bringing in business ought to be deducted from the general receipts of the business. "Land" in the above Acts is not necessarily confined to land used for purposes of agriculture only, but may include land upon which there has been anything artificially done, and money invested for commercial purposes. The fact however that a detached dry Dock is used for commercial purposes is not alone sufficient to prevent it being "land" within the aforesaid Acts. A Dock would be liable however to be rated under the higher scale provided by the aforesaid Acts if it is so mixed up with warehouses, jetties and other things surrounding it; and in that case the whole must be considered one entire property and rated as "buildings." The enhanced value given to land by the presence of machinery thereon, cannot be taken into consideration under Ordinance 3 of 1879, Section 2, except in cases where the "machinery is employed for manufacturing the produce of such land." The word "buildings" in Section 4 of the aforesaid Act of 1856 and Section 21 of Act 27 of 1856, is *ejusdem generis* with "houses" in the same sections and a detached dry "Dock" is neither a "house" nor a "building" within the meaning of those Acts. The provisions of these sections are not so general as those of Section 33 of 3 and 4 Wm. IV., c. 90, and the English authorities on the latter section giving a narrow interpretation to it are *a fortiori* authorities on the former sections. The above held by the Court of first instance, and on appeal as to the sixth seventh, eighth, and ninth points, the same was affirmed by the Court of Appeal. TANJONG PAGAR DOCK CO. *v.* MUNICIPAL COMMISSIONERS - - - - - 103
ASSIGNMENT—Administration Bond—Probate Act - - - - - - 187
see ADMINISTRATION BOND.
—— *also* WAKOFF. 2 - 568
ASSIZES—*see* ATTORNEY-GENL. 1 605
—— JURY - - - 258
—— MAGISTRATES. 1 560
—— WITNESSES. 1 - 317
ATTEMPT—Conviction altered to one of - - - - - - - 250
see MISCHIEF.
ATTORNEY-GENERAL—The Attorney-General of this Colony like the Attorney-General of England, has the right of reply, even when no witnesses are called for the defence. *Query.* Whether the right can be claimed by the Solicitor-General or private Counsel prosecuting for the Crown. REGINA *v.* PANTALANI - - 605
ATTORNEY-GENERAL—*continued.*
2. ——The Attorney-General has no power to "direct" the Registrar of this Court to enter up judgment for the Crown in any case whatsoever, and a paper so *directing* the Registrar to do, was ordered to be taken off the file - - - 688
see CROWN SUITS.
—— *also* CHARITY. 2. - 500
ATTORNEY—POWER OF—*see* CONSULAR COURT. 2. - - - - 437
AUCTION—Purchase of land—conditions of sale—Statute of Frauds - - 82
see LAND 1.
—— *also* MORTGAGEE. 2. - 359
———— LAND. 12. - 453
AUTHENTIFICATION OF DOCUMENT—Seal - - - - - 150
see EXTRADITION. 1.
AUTREFOIS ACQUIT—Plea - 472
see PROPER CHARGE. 2.
—— *also* PLEA IN BAR - 651
————CONVICT—Plea - - 651
see PLEA IN BAR.
AVERAGE CONTRIBUTION—*see* CONTRIBUTION - - - - - - 528
AWARD—Irregularity—misconduct of Arbitrators - - - - - 204
see ARBITRATION. 1.
BADGE—*see* Hackney Carriage - 234
BAIL—Arrest on mesne process—security - - - - - - - 1
see SECURITY. 1.
2. ——Magistrate's Court—adjournments—Supreme Court jurisdiction to order - - - - - - - 287
see HABEAS CORPUS. 1.
—— *also* BOND. - - - 71
BALANCE—*see* PROMISSORY NOTE. 3. 587
BANGKOK—Defendant resident in—contract with plaintiff resident in Singapore—performance - - - - - 511
see CONTRACT. 10.
————CONSULAR COURT—*see* CONSULAR COURT. 1. 2. - - 274, 437
BANK—*see* FOREIGN COURT - 570
BANKRUPTCY—The C. M. Bank had branch houses in both Calcutta and Singapore. A. purchased a draft in Calcutta of the Bank and endorsed it to the Bankrupts in payment of his debt to them. The Bankrupts received the draft before their Bankruptcy, but never presented it for payment: they were at the time of Bankruptcy the holders of the draft. On the adjudication of Bankruptcy, the Bank claimed to set-off the amount of the draft in reduction of their claim against the Bankrupts. *Held,* [reversing the judgment of the Court below] that the above facts constituted a "mutual dealing" between the Bankrupts and the Bank, within Section 41 of the Bankruptcy Ordinance, 1870, and the Bank was entitled to make the set-off. *In re* LIM TIANG WAH

BANKRUPTCY—*continued.*
—*Ex-parte* CHARTERED MERCANTILE BANK, &c. - - - - - - 281

2. ——A person examined under Section 26 of the Bankruptcy Ordinance 2 of 1888 as to a debt alleged to be due by him to the Bankrupt, is not entitled to the assistance of Counsel; but the Official Assignee in person, or Counsel in his behalf, is not by the section, excluded from carrying on such examination. *In re* CHOA HONG - 569

3. ——The latter part of Sub-section 2 of Section 28 of the Bankruptcy Ordinance 2 of 1888, is limited to the case where the Bankrupt has been reported as having committed some one or more of the offences previously mentioned, or has omitted to keep proper accounts or traded with knowledge of his being insolvent or done some one of the other facts set out in Sub-section 3—and the payment of 50 per cent. is *not* therefore a *sine quâ non* to an application for a discharge in every Bankruptcy. *In re* FREDERICK POOLES - - - 670

BARRISTER—*see* CONSULAR COURT. 2. - - - - - - - - 437

BELIEF—Reasonable and honest 240
see POLICE. 2.

BEQUEST—Rule in *Wild's Case*—life estate - - - - - - - 584
see LEASEHOLD PROPERTY.
—— *also* DEVISE - - 212
———— MAHOMEDAN MARRIAGE ORDINANCE. 2. 265

BIGAMY—A Mahomedan married woman is *not* exempt from prosecution on a charge of bigamy under Section 494 of the Penal Code. REGINA *v.* RABIA - - 513

2. ——*Query.* Can a *Chinaman* be convicted of *bigamy* in this Colony? Where a Chinaman was prosecuted for bigamy under Section 494 of the Penal Code, and the prosecution were unable to prove that by Chinese law, custom, or religion, the second marriage was void by reason of its taking place in the lifetime of the first wife, *Held*, he was entitled to be acquitted. The *onus*, under the said Section 494 of proving that the second marriage is void as aforesaid, is on the prosecution, and not on the prisoner, to prove that the marriage is valid. Books purporting to contain the Code or laws of a Foreign Country, before they can be admitted as evidence under Section 12 of the Indian Evidence Act II. of 1855, of such laws, must be shewn to be books not only compiled or written by permission of the Government of that country, but in its compiled form as tendered, to have been printed or published under the authority of that Government so as to appear to have in that condition and language the sanction of that Government and so to be accepted as reliable. Books on foreign

BIGAMY—*continued.*
law, to be admissible under the other part of the said Section 12, must be shewn to be books "*commonly admitted*" in the Courts of that Foreign Country, "as *evidence* of the law of such country." Where therefore it was proved by a witness [not an expert] that he was in the habit of attending the Courts of the Foreign Country, but was seldom present at the hearing of cases, and that certain books [produced] were used as reference of the laws by the Judges of that country who tried Civil and Criminal Cases—and that he had seen such books in the Courts of Justice there, and had seen them turned over and looked at by the Judges, but he had no knowledge whether they were admitted as evidence of the law in those Courts. *Held*, the books were not admissible under Section 12 aforesaid. No other books or writings on foreign laws, customs, or manners, other than those falling within Section 12 aforesaid, are admissible in evidence or can be read to a Jury. In a case of importance, and where no harm will be done to a prisoner, the Court will adjourn a part heard criminal trial for a longer or shorter period to enable the prosecution to procure evidence to prove the charge laid against the accused. REGINA *v.* YEOH BOON LENG - 630

BILL OF LADING—Ambiguous language in exceptions in a Bill of Lading exempting the shipowner from liability for neglect of their servants or agents, must be construed most strongly against the shipowner and in favour of the shippers of cargo. An exception in a Bill of Lading exempted the shipowner from liability for "any act, *neglect, or default whatsoever* of Pilots, Master, or Crew *in the management or navigation* of the ship." It was proved that the plaintiffs' cargo shipped on board under a Bill of Lading with such an exception, was damaged by sea-water leaking through a cargo-port of the ship which was insecurely closed while the ship was still taking in cargo at Calcutta. *Held*, the word "management" must be limited to management of the ship only while she was actually on her voyage, and that the exception did not therefore cover the neglect or default of the shipowner's servants while in port, and he was therefore liable to make good to the shipper the loss he had suffered. Evidence taken on Commission, when returned, becomes part of the proceedings in the case, and may be used by either party whether the Commission was his or not—but under Section 229 of the Civil Procedure Ordinance, 1878, an Order of Court must be obtained giving him leave to use it. BAN CHIN HONG & Co. *v.* THE INDO-CHINA STEAM NAVIGATION COMPANY - 677

BILL OF SALE—An affidavit of the execution of a Bill of Sale which describes the occupation of an attesting witness as a "Clerk" merely, is insufficient under the Bills of Sale Ordinance 22 of 1870, Section 18, and the Bill of Sale is void against an Execution-Creditor. DUVAL *v.* SCULLY. *In re* HO KIM HOCK - - - - 120

2. ——A defective affidavit filed with a Bill of Sale on its registration under Ordinance 22 of 1870, Section 18, only renders the Bill of Sale void as against the Sheriff when he is seizing under process issued against the property of the person giving the Bill of Sale, and in respect of whom the affidavit is defective. Where therefore a Bill of Sale was given by two persons A. and B. and the affidavit filed, on its registration, only gave the abode and occupation of A., but not the abode of B. though it gave his occupation—and the Sheriff seized under process issued against the property of A. alone. *Held*, that although the affidavit was deficient as to B. yet as it was sufficient as to A. and the execution was only against A. the Bill of Sale was not void as against the Sheriff. DORAL *v.* LESSLAR. *In re* MEYAPPAH CHETTY - - - - - - - 183

3. ——Ignorance of law may amount to negligence; and negligence is included in the term "inadvertence' in Section 16 of the Bills of Sale Ordinance 12 of 1886. The Court in exercise of its discretion under that section ordered the time for the renewal of the registration of a Bill of Sale to be extended, but without prejudice to the rights of a subsequent Bill of Sale holder. *In re* MCALISTER & Co. - 279

4. ——Ignorance of the law requiring the registration of a Bill of Sale to be renewed every twelve months may be "inadvertence" within the meaning of Section 16 of the Bills of Sale Ordinance 12 of 1886. The entire omission to renew the registration of a Bill of Sale under Section 14, Clause 1, of that Ordinance stands precisely on the same footing as a renewal of registration under an affidavit which does not comply with all the particulars under Clause 2 of the section. A Judge of this Court has power under Section 16 of the aforesaid Ordinance, if satisfied that the renewal of the registration has been omitted, by "inadvertence, accident, or absence from the Colony" to rectify the registration by extending the time for the renewal thereof, notwithstanding that several months have elapsed and an execution-creditor has seized the property comprised in the Bill of Sale and insisted on his title by Interpleader as against the Bill of Sale. *Re* Dobbins' Settlement, 57 L. T. [N S.] 277 *s.c.* 56 L. J. Q. B. 295, followed. MEYAPPA CHETTY *v.* ONG HONG PEE & ANOR. *In re* ONG AH POH 399

BILL OF SALE—*continued.*

5. ——A Bill of Sale which provides that "in case of default of payment of any one instalment [secured thereby] the whole amount remaining unpaid should become immediately due and payable" is void under Section 8 of the Bills of Sale Ordinance 12 of 1886 as not being in the form set forth in the Schedule to the Ordinance. A Bill of Sale is also void as not being in accordance with such form if it omit to shew the rate at which interest is to be charged. JAMALSAH *v.* VERSHAT. *In re* RAMAN CHETTY - - - - - - - 471

6. ——Although a Bill of Sale of personal property may be void *quâ* mortgage under Section 8 as not being in accordance with the form prescribed by the Bills of Sale Ordinance 12 of 1886, yet the covenant to pay the amount thereon may be a good note or memorandum to satisfy the fourth section of the Statute of Frauds. Where a document is stamped *quâ* mortgage and is void as such, there is nothing in Section 11 of the Stamp Ordinance, 1881, to prevent the stamp being used as on a document of some other nature if the document is capable of being so construed. A creditor who takes a void Bill of Sale of goods as security for his debt, discharges a surety who, under the belief of such security being valid, becomes surety. OOI KOEY CHUAN *v.* LOW CHIN - - - - 475

7. ——The fact that an Execution-creditor had notice of a Bill of Sale given by his debtor to a third party for value and to which he [the Execution-creditor] has actually subscribed as an attesting witness does not prevent him afterwards seizing the property comprised in such Bill of Sale and insisting that the Bill of Sale is void for non-registration or defect of registration or otherwise under the Bills of Sale Ordinance 12 of 1886. *Edwards* v. *Edwards*, 2 L. R. Ch. Div. 291, followed, A document acknowledging that the debtor had received a sum of money from the claimant for personal property[describing them seriatim] that day sold by him to the claimant, is a "Bill of Sale" within Section 5 of the Bills of Sale Ordinance 12 of 1886. The claimant having *bonâ fide* purchased certain carts and bullocks of the debtor [some two years prior to the execution put in by plaintiff] immediately on the execution of the Bill of Sale [to which the plaintiff was an attesting witness] took possession of the carts and bullocks, but left them in the same shed adjoining the debtor's house as they had previously been, and took in the debtor as a servant at fixed monthly wages who drove the said carts, conveyed and sold red earth and sand there-

BILL OF SALE—*continued.*
in as he had previously done, but now for the benefit of the claimant on whose account he paid all the earnings to a Chetty, in liquidation of the claimant's debt to the Chetty on the mortgage of the said carts and bullocks—but the claimant personally, monthly paid the rent for the said shed to the landlord and took his receipts therefor in his own name. *Held*, the carts and bullocks were in the "apparent possession" of the debtor and the Bill of Sale not having been registered under the abovementioned Ordinance, the same was void against the plaintiff, the Execution-creditor, notwithstanding he was aware of the purchase by the claimant of the said carts and bullocks. In an Interpleader case when the Court has a doubt as to the *bonâ fides* of the sale by the debtor to the claimant, which sale is alleged by the Execution-creditor to be fraudulent, the Court is bound to decide in favour of the claimant, as the person alleging fraud is bound to prove it. SABAPATHY CHETTY *v.* SITRA MOOTAR *In re* SAMEH MOORDEE - - - - - - 530

8. ——A cargo boat or tongkang is a "vessel" within Section 5 of the Bills of Sale Ordinance 12 of 1886, and therefore a Bill of Sale by way of mortgage thereof, is not within its provisions. *Gapp* v. *Bond*, 19 L. R. Q. B. 200, followed. NAGORE *v.* NAGORE GUNNY. *In re* SAVAVATHY CHETTY - 595

9 ——A Bill of Sale of personal property to secure the re-payment of a loan with interest "*within* three months from the date thereof," is *not* contrary to the form in the Schedule to the Bills of Sale Ordinance 12 of 1886; and is payable within a "stipulated time" within the meaning of the italicized words in that form. Such a Bill of Sale need not contain an express power of sale—such a power being implied from Section 10, Sub-sections 1 and 2 of the Ordinance. *Ex-parte* Official Receiver *Re* Morritt. 18 L. R Q. B. Div. 222 [*per* Lord *Esher*, M.R., and *Lopes*, L. J.], followed. ANAMALAI CHETTY *v.* KADER TAMBY - - 620

see also MORTGAGEE.

—— —— WAKOFF. 2. 3. 568, 675

BOAT—Cargo—Tongkang—"vessel"—Mortgage - - - - - - 595

see BILL OF SALE. 8.

—— *also* COLLISION - - 478

BONA FIDE PURCHASER—Valuable consideration—notice - - - 193

see COMPANY. 1.

BOND—A Writ on mesne process before judgment, was directed to issue under Section 422 B. of the Civil Procedure Ordinance, 1878, for the arrest of a defendant and his imprisonment for six weeks, "unless he give security that he would not leave the jurisdiction without the leave of the Court."

BOND—*continued.*
The form of such a Writ is No. 53 in the appendix to the amending Ordinance 8 of 1880. The plaintiff thereupon took out a writ in accordance with the repealed form No. 40 in the appendix to the Civil Procedure Ordinance 5 of 1878, directing the arrest of the defendant and his imprisonment for six months, unless he gave security in the sum of $1,200 for his "appearance at any time when called upon, while the suit was pending or until execution or satisfaction of any judgment that might be passed therein against him, and in default of such appearance, for the payment of any sum of money that may be adjudged against him in the said suit with costs, or until he shall otherwise be lawfully delivered from custody." The defendant having been arrested and kept in custody, a few days after was released on bail. The bond which he and his sureties were required by the Sheriff's bailiff to execute, before releasing the defendant, was in $2,000, and after reciting the aforesaid suit and writ, was conditioned to be void, if the defendant, would "not go or attempt to go into parts beyond the jurisdiction of the Court without first satisfying the amount of judgment and costs recovered against him in the suit." The defendant and sureties were aware of the terms of the bond and executed the same willingly, they did not then know however, that the writ was void or that the security they were required to give, was beyond what the law required under an arrest on mesne process. The plaintiff having thereafter obtained judgment with costs, the defendant immediately absconded, without paying up any part thereof. The plaintiff then sued the sureties to recover the $2,000 on the aforesaid bond. *Held* [1] the writ which had been issued against the defendant was void *ab initio*, as being in contravention of the order of Court and not authorised by law; [2] that the sureties in the bond were not estopped by their bond and the recital of the writ of arrest therein, from questioning the validity of such writ, and [3] that the bond was void,—as having been obtained by duress, as the security required of the sureties in order to procure the release of the defendant was more than was required by law, and as the detention of the defendant under the aforesaid writ was illegal and could not be enforced against the sureties by the plaintiff. CHEAH POH NHOO *v.* ONG LOON TEK & ORS. - 71

see also SECURITY. 1. - 1

BOOK—Entry in Kali's—marriage—consideration - - - - - - 583

see MARRIAGE SETTLEMENT.

BOOKS—Evidence—Foreign Law. 630

see BIGAMY. 2.

BREACH OF AGREEMENT—Letters—Conditional promises - - - 136
see AGREEMENT. 1.
——— CONTRACT—Contract made in Colony—breach committed abroad—determination—law of the Colony - 136
see AGREEMENT. 1.

2. ——The plaintiffs had contracted to build certain houses for the defendant and the contract provided *inter alia* [Clauses 2 and 3] that the houses should be completed by a given date, and that if they were not so completed then for each day's delay, they would pay the defendant $3 for each house as liquidated damages. By a further Clause [8] it was provided that if the plaintiffs did not continue to execute and advance the works to the satisfaction of the architect, or should delay the same from any other cause than the default of the defendant and should continue such default six days or more after notice in writing thereof given to them under the hand of the architect, then in any of those cases the defendant might if he thought fit determine the contract, and in that case all money then due to the plaintiffs and all penalties for non-fulfilment of contract and all materials, &c., should be forfeited to the defendant. By a subsequent Clause [9] it was provided that in case of any breach of the contract on the part of the plaintiffs, it should be lawful for the defendant by writing under his hand to determine the contract without any previous notice to the plaintiffs. The plaintiffs did not complete the houses by the date named, but the defendant consented to allow them twenty days further time by reason of there having been an error in the plans and delay in pointing out the sites of the intended houses. On the evidence the Court held the plaintiffs were entitled to further time for certain alterations in the plans and otherwise. After the date named in the contract for the completion of the houses, but before the expiration of the twenty days given by the defendant, and the further time allowed by the Court, the architect gave the plaintiffs notice in writing notifying to them that they were not executing and advancing the works to his satisfaction, and for six days thereafter the plaintiffs still continuing to progress slowly and not to the satisfaction of the architect, the defendant on the date of the expiration of the twenty days' extension given by him, by notice in writing determined the contract and stated that he required the plaintiffs to have forty men a day at work on the buildings. The defendant then proceeded to complete the buildings which cost him more than he would have had to pay the plaintiffs under the contract. The

plaintiffs thereupon sued the defendant for wrongfully determining the contract, but the Court found on the evidence it would not have been possible for the plaintiffs, progressing as they had done, to have completed the buildings even within the further time allowed them by the Court. Under the circumstances—*Held*, 1stly, Clause 9 did not apply to the case of delay in advancing the works which was specially provided for by Clause 8; but even if it did it could only do so after there was a "breach" of the contract, but there could be no "breach" on the score of delay until the requirements of Section 8 had been complied with. *Held*, 2ndly, that if the first part of Clause 8 had stood alone it would have been sufficient for the Court to have before it the certificate of the architect expressing dissatisfaction with the unadvancement of the works, but as it also provided for delay caused otherwise than by the fault of the defendant, which was a provision unclogged with the expression of satisfaction or dissatisfaction by the architect,—and the six days' default after notice applied to both parts—it was necessary that there should be a notice from the architect expressing dissatisfaction, but it was the duty of the Court to determine whether the delay had not been caused by the defendant and whether the notice from the architect was under all the circumstances of the case a reasonable one. *Held*, 3rdly, that the Court being satisfied there was no delay on the part of the defendant and the architect's notice was a reasonable one, that the defendant had a right by reason of such extension of time to determine under Clause 8 the contract *after* the date named in the contract and *within* the extended time; and the requiring of 40 men to be at work was no waiver of the determination. *Walker* v. *L. & N. W. Railway Co.*, 1 L. R. C. P. Div. 518, distinguished. *Held*, 4thly, that under the peculiar wording of the whole contract, Clause 8, which provided for the forfeiture of "penalties" on the contract being determined, could only have reference, by the use of the word "penalties" to Clause 3, which was the only clause in the whole contract which provided for a penalty, and as that penalty could only accrue *after* the date named in the contract for completion, Clause 8 itself implied that it could be enforced *after* that date, even independently of the extension of time. *Held*, 5thly, that the defendant having determined the contract prior to the expiration of the extended time, he could not at the same time claim the penalty of $3 per house per day, under Clause 3, which only

BREACH OF AGREEMENT—*contd.*
applied to default to complete beyond the given and the extended date; but he was entitled to damages against the plaintiffs for all moneys spent by him in completing the houses according to the contract beyond the amount to be paid to the plaintiffs under the contract. On appeal this judgment was affirmed. UNG AH MOI & ORS. *v.* HAMPSHIRE - - - - - 296

3. ——Where there is a breach of contract for the purchase of shares, but the vendor is able to go into the market and sell the shares at once, his duty is to do so and sue the vendee at law for the difference in price as damages for the breach, but where there is no market for the share, he is entitled to sue the vendee in equity for specific performance of the contract. The defendant agreed to purchase from the plaintiff certain shares in a Tin Mining Company registered in London, the bought-note was as follows: "Bought from Jos. Heim, Esq., three hundred Bentong Straits Tin Company's Shares £1 paid up at $23\frac{1}{2}$. delivery in about one month on arrival of scrips from London." At the end of the month the plaintiff was unable to deliver the "scrips," but tendered the defendant certain documents in reference to the shares known as "certified transfers" which would have enabled the defendant to have got himself registered in London as the owner of the said shares. *Held*, that the "certified transfers" enabling registration in London, were not equivalent to delivery of the "scrips" at Singapore, and the Court would not force the same on the purchaser. *Hunt* v. *Gunn*, 13 C. B. [N.S.] 226, distinguished. The "certified transfers" were prepared and signed by the Secretary to the Company in London—the name of the transferee was left blank and was subsequently filled in by the plaintiff [the vendor] at Singapore. *Held*, the transfers were void, and the transferee, the defendant, could not be compelled to take them. *Hibblewhite* v. *McMorine*, 6 M. & W. 200; and *Société Générale de Paris* v. *Walker*, 11 L. R. Ap. Cas. 20, followed. HEIM *v.* LIM TIANG HEE - - - - - 465

see also AGREEMENT.
——— COMPANY.
——— CONTRACT.
——— CROWN CONTRACT.
1. 2 - - 648, 680

BREACH OF THE PEACE—*Semble.* There can be no conviction under Section 11 of the Preservation of the Peace Ordinance 6 of 1872, without evidence that warning was given, under Section 9, on *the occasion* of the riotous assembly. Although such a conviction cannot be sustained, yet in the case before the Court there being

BREACH OF THE PEACE—*continued.*
evidence of riot and other offences, the Court refused to quash the conviction, but under Section 34, Sub-section 2 of the Appeals Ordinance 12 of 1879, annulled the proceedings and sent back the case to the Magistrate to be tried again on a proper charge. *Query.* Whether a Magistrate who sentences a prisoner to six months' imprisonment under the Preservation of the Peace Ordinance has power to couple with it a sentence of whipping? REGINA *v.* HOEY HOON & ORS. - - - 357

see also RECOGNIZANCE TO KEEP THE PEACE. 1. - 276

BREACH OF TRUST—The Indian Act XIII. of 1850 is still law in this Colony and is a "Special Law" within the meaning of Sections 5 & 41 of the Penal Code. *Regina* v. *Overree & anor.*, 2 Kyshe [Cr. Rulings] 88, followed. *Semble.* The Criminal Procedure Ordinance 6 of 1873 is however applicable to a prosecution under that Act, and the charge must, under Section 59 of the Ordinance, be limited to three charges and not "any number" as provided by Section 11 of the Act. REGINA *v.* RODRIGUEZ - - - - - 323

2. ——Illegal or fraudulent contract—trust funds - - - - - - 409

see EXECUTOR. 2.

BRITISH CONSULAR COURT—*see* CONSULAR COURT. 1. 2 - 274, 437

——— RESIDENT OF PERAK—*see* EXTRADITION. 1. 4. - - 150, 368

BROKER—Principals—shares—refusal to accept - - - - - - - 561

see CONTRACT. 13.

BROTHEL—A common brothel is not a "public place" within the meaning of Section 159 of the Penal Code. A person, not an inmate of the place, who is found armed in a brothel is not found "abroad" within the meaning of Section 32, Clause 5 of Ordinance 13 of 1872. REGINA *v.* CHEAH TEE & ANOR. - - - - - - 84

see also PROSTITUTION. 1 385
——— CONVICTION. 4. - 493
——— HABEAS CORPUS. 2. 685
——— LICENSE. 2. - 665

BUILDING—*see* TRESPASS. 1 - 443

BUILDINGS--Principles of assessment 103

see ASSESSMENT.

BURIAL GROUND—Charity - 100

see TRUSTEE 1.
— LAND. 2 - - 101

BYE-LAW—Police cannot legally arrest a person for a mere breach of—such as overloading a passenger boat under Harbour Ordinance 8 of 1872 - - - 615

see POLICE. 4.

CAPITAL—Interest - - - 491

see PARTNERSHIP. 2

CARGO—*see* BILL OF LADING - 677

CARGO BOAT—Vessel—mortgage 595
see BILL OF SALE. 8.
—— COLLISION - - 478
CARRIAGE—*see* HACKNEY CARRIAGE - - - - - - - - - 234
CASE—Supreme Court—withdrawal—postponement, &c. - - - - - 345
see ORDER OF HEARING.
—— *also* CROWN SUITS - 688
CASE STATED—Parties to the Appeal 606
see MAGISTRATE. 18.
2. ——Magistrate ordered to pay costs on rule being made absolute - - 606
see MAGISTRATE. 18.
3. ——In Gaming Cases, warrant on which Police act should be sent up with appeal - - - - - - - 668
see LOTTERY. 3.
CASES—*Abdulrahim* v. *Drahman* [1 Kyshe, 171], followed - - - - - 225
see MAHOMEDAN MARRIED WOMAN. 3.
—— *Abud* v. *Riches* [2 L. R. Ch. Div. 529], distinguished - - - - - 433
see MALICIOUS PROSECUTION.
—— *Armstrong* v. *Lewis* [2 Cr. & M. 27], distinguished - - - - - 186
see NEW TRIAL. 1.
—— *Barrell, Ex-parte* [10 L. R. Ch. Ap. 512], distinguished - - - - 251
see CONTRACT. 4.
—— *Blake* v. *White* [1 Y. & C. Ex. Eq. 421], distinguished - - - - - 559
see CREDITOR. 2.
—— *Bryson* v. *Russell* [14 L. R. Q. B. 720], distinguished - - - - - 240
see POLICE. 2.
—— *Calvert* v. *Sebbon* [4 Beav. 222], followed - - - - - - - - 88
see LEGACY.
—— *Carlos* v. *Fancourt* [5 T. R. 482], followed - - - - - - - - 181
see AGREEMENT. 3.
—— *Cartan* v. *Meenachee* [3 Kyshe, 151], over-ruled - - - - - - 188
see OFFENCES.
—— *Cattlin* v. *Brown* [11 Hare, 372], followed - - - - - - - - 212
see DEVISE.
—— *Chawana Mahomed Hussein* v. *Mahomed Mustan* [*infrà*—p. 1], followed- 240
see POLICE. 2.
—— *Choa Choon Neoh* v. *Spottiswoode* [1 Kyshe, 216], discussed - - - 329
see GUARDIANSHIP.
—— *Chooashary* v. *Cassim* [3 Kyshe, 98], followed - - - - - - 230
see LABOUR. 1.
—— *Compton* v. *Bloxham* [2 Coll. Ch. Rep. 201], distinguished - - - - 88
see LEGACY.
—— *Cooke* v. *Eshelby*, 12 L. R. Ap. Ca. 271, considered - - - - 561
see CONTRACT. 13.
CASES—*continued.*
—— *Dobbins' Settlement, Re* [57 L. T. [N. S.] 277, *s. c.* 56 L. J. Q. B. 295], followed 399
see BILL OF SALE. 4.
—— *Doe d Cross* v. *Cross* [8 L. R. Q. B. 714], distinguished - - - - - 178
see DECLARATION OF TRUST.
—— *Eaton* v. *Storer* [22 L. R. Ch. Div. 91], followed - - - - - - - 416
see REPLY.
—— *Edlin* v. *Battaby* [2 Lev. 152], followed - - - - - - - - 416
see REPLY.
—— *Edwards* v. *Edwards* [2 L. R. Ch. Div. 291], followed - - - - - 530
see BILL OF SALE. 7.
—— *Ferguson* v. *Ferguson* [10 L. R. Ch. Div. 662], distinguished - - - - 433
see MALICIOUS PROSECUTION.
—— *Finch, Re* [23 L. R. Ch. Div. 267], observed on - - - - - - 311
see LIMITATION. 1.
—— *Flower* v. *Local Board of Low Leyton* [5 L. R. Ch. Div. 347], followed - 484
see CONTRACT. 9.
—— *Freeman* v. *Rosher* [13 L. R. Q. B 780], followed - - - - - - 319
see AGENT. 1.
—— *Fuller* v. *Abrahams* [3 Bro. & Bing. 116], followed - - - - - - - 359
see MORTGAGEE. 2.
—— *Gan Kim Swee* v. *Lee Ah Kee* [*infrà*—p. 138], not followed - - - 136
see AGREEMENT. 1.
—— *Gregory* v. *Hurrill* [5 B. & C. 341], not followed - - - - - - - 136
see AGREEMENT. 1.
—— *Gunn* v. *Roberts* [9 L. R. C. P. 331], followed - - - - - - - 679
see SHIPPING.
—— *Hammond* v. *Smith* [33 Beav. 452] followed - - - - - - - 136
see AGREEMENT. 1.
—— *Hibblewhite* v. *McMorine* [6 M. & W. 200], followed - - - - - 465
see BREACH OF CONTRACT. 3.
—— *Hunt* v. *Gunn* [13 C. B. [N.S.] 226], distinguished - - - - - 465
see BREACH OF CONTRACT. 3.
—— *Jemalah* v. *Mahomed Ali & ors.* [1 Kyshe, 386], over-ruled - - - - - 311
see LIMITATION. 1.
—— *Jenaiboo* v. *Narainen Chetty* [*infrà* p. 359], observed on - - - - 663
see MORTGAGEE. 3.
—— *Jones* v. *Matthie* [11 Jur. O. S. 504], followed - - - - - - 359
see MORTGAGEE. 2.
—— *Kader Mydin* v. *Shatomah* [Str. L. R. 260], followed - - - - - 225
see MAHOMEDAN MARRIED WOMAN. 3.

CASES—*continued.*

—— *Kitchee Pakirmah* v. *Syed Akil* [*Penang Case unreported*], explained and adhered to - - - - - - - - 608
see TESTATOR. 3.

—— *King* v. *Kemp* [8 L. T. 255, applied - - - - - - - - 126
see LOTTERY. 1

—— *Ko Bo An* v. *Punghulu Shaik Beenan* [1 Kyshe, 273], distinguished - 240
see POLICE. 2.

—— *Lewers* v. *Earl of Shaftesbury* [2 L. R. Eq. 207], considered - - - 251
see CONTRACT. 4.

—— *Lloyds Banking Co.* v. *Jones* [29 L. R. Ch. Div. 221], followed - - - 154
see LAND. 5.

—— *Lyon* v. *Fishmongers' Co.* [1 L. R. Ap. Ca. 662], considered and applied - 10
see SEA SHORE.

—— *Midland Railway Co.* v *Local Board of Wittington* [11 L. R. Q. B. 788], distinguished - - - - - - 214
see POLICE. 1.

—— *Morritt, Re* [18 L. R. Q. B. Div. 222], followed - - - - - - 620
see BILL OF SALE. 9.

—— *Municipal Commissioners* v. *Chuah Seng & ors.* [3 Kyshe, 140], considered 401
see LICENSE. 1.

—— *Official Receiver, Ex-parte* [18 L. R. Q. B. Div. 222], followed - - 620
see BILL OF SALE. 9.

—— *Olley* v. *Fisher* [34 L R. Ch. Div. 367], considered - - - - - 251
see CONTRACT. 4.

—— *Ong How* v. *Abdulrahman* [Str. L. R. 354], followed - - - - - 230
see LABOUR. 1.

—— *Opium Farmer* v. *Koh Boo Ann* [Str. L. R. 278], over-ruled - - - 188
see OFFENCES.

—— *Oriental Inland Steam Navigation Co.* v. *Scinde Railway Co.* [9 L. R. Ch. Ap. 557], followed - - - - - 570
see FOREIGN COURT.

—— *Palaniapah Chetty* v. *Lim Poh* [1 Kyshe, 548], distinguished - - 6
see PROMISSORY NOTE. 1.

—— *Palmer* v. *Temple* [9 Ad. & E. 508], followed - - - - - - 251
see CONTRACT. 4.

—— *Pearks* v. *Moseley* [5 L. R. Ap. Ca. 714], followed - - - - 212
see DEVISE.

—— *Punghulu Allang* v. *Him* [3 Kyshe, 144], dissented from - - - 238
see CROWN. 1.

—— *Quarrier* v. *Colston* [1 Phil. 147], applied - - - - - - 126
see LOTTERY. 1.

—— *Regina* v. *Abass* [3 Kyshe, 184], distinguished - - - - - 237
see GAMING. 1.

CASES—*continued.*

—— *Regina* v. *Brittleton* [12 L. R. Q. B. Div 266, s. c. 50 L. T. [N.S.] 276], followed - - - - - - - - 122
see MAHOMEDAN MARRIED WOMAN. 1.

—— —— v. *Dunn* [12 Ad. & E. 617, 619], followed - - - - - - - 276
see RECOGNIZANCE TO KEEP THE PEACE. 1.

—— —— v. *Kadir* [2 Kyshe [Cr. Rulings] 105], over-ruled - - - 162
see MARRIED WOMAN. 2.

—— —— v. *Ooi Tim* [3 Kyshe, 119], over-ruled - - - - - 188
see OFFENCES.

—— —— v. *Overree & anor.* [2 Kyshe [Cr. Rulings] 88], followed - - 323
see BREACH OF TRUST. 1.

—— —— v. *Shaik Ishmael Lebby* [3 Kyshe, 199] dissented from - - 238
see CROWN. 1.

—— —— v. *Thompson* [1 L. R. C. C. R. 377], followed - - - - 122
see MAHOMEDAN MARRIED WOMAN. 1.

—— —— v. *Weil* [9 L. R. Q. B. Div. 701], followed - - - - - 368
see EXTRADITION. 4.

—— *Roe d Dodson* v. *Grew*, 2 Wils. 322, followed - - - - - - 608
see TESTATOR. 3.

—— *Ross' Trusts, Re* [13 L. R. Eq. 290], followed - - - - - - 325
see INTESTATE.

—— *Sayers* v. *Collyer* [28 L. R. Ch. Div. 103], considered - - - - 251
see CONTRACT. 4.

—— *Seaton* v. *Seaton* [36 W. R. 865], followed - - - - - - 416
see REPLY.

—— *Selmes* v. *Judge* [6 L. R. Q. B. 724], distinguished - - - - - 214
see POLICE. 1.

—— *Société Générale de Paris* v. *Walker* [11 L. R. Ap. Ca. 20], followed - 465
see BREACH OF CONTRACT. 3.

—— *Tanner* v. *Smart* [6 B. & C. 603], followed - - - - - - 136
see AGREEMENT. 1.

—— *Taylor* v. *Caldwell* [32 L. J. Q. B. [N.S.] 164], distinguished - - 158
see CONTRACT. 3.

—— *Thomas* v. *Brown* [1 L. R. Q. B. 714], distinguished - - - 251
see CONTRACT. 4.

—— *Walker* v. *London & N. W. Railway Co.* [1 L. R. C. P. Div. 518], distinguished - - - - - - - 296
see BREACH OF CONTRACT. 2.

—— *Warner* v. *Jacob* [20 L. R. Ch. Div. 220], followed - - - - 359
see MORTGAGEE. 2.

CASES—*continued.*
—— *Wild's Case* [6 Coke's Rep. 17], observed on - - - - - - - 584
see LEASEHOLD PROPERTY.
—— *Yeap Cheah Neoh* v. *Ong Cheng Neoh* [6 L. R. P. C. 381, *s.c.* 1 Kyshe, 326], discussed - - - - - - - 329
see GUARDIANSHIP.
—— *Yorkshire Engine Co.* v. *Wright* [21 W. R. 16—*dictum* of Bramwell B.], approved of, and followed - - - 1
see SECURITY. 1.
CATTLE DISEASE—The words "or any other disease" in the Order in Council of 7th August, 1889, [*Government Gazette*, 1889, p. 1480] made in pursuance of the Quarantine and Prevention of Disease Ordinance 19 of 1886, Sections 4 and 5, must be read as limited to "disease" as defined by Section 3 of the Ordinance; and before there can be a conviction for a breach of the Order in Council, the prosecution must shew the disease to be of an "infectious or contagious nature." At the time of the trial, the Veterinary Surgeon who had examined certain cattle of the defendant was dead. The prosecution however, proved that the Surgeon after such examination pronounced in the presence of the defendant and the prosecutor that the disease was "cattle plague." This expression of opinion was in English and though made in the defendant's presence was not understood by him. *Held*, the evidence was inadmissible both on this ground as well as on the ground that it was merely hearsay, and the Surgeon who had expressed the opinion being dead, could not be cross-examined. PENDEK *v.* BROADRICK 666
CAUSE OF ACTION—Plaintiff—residence—debt—jurisdiction - - 136
see AGREEMENT. 1.
CERTIFICATE OF JUDGMENT—Proof—seal - - - - - - - - 570
see FOREIGN COURT.
CERTIFIED TRANSFER—Scrips—shares—Company - - - - - 465
see BREACH OF CONTRACT. 3.
CESTUIS QUE TRUST—*see* COMPANY. 1. - - - - - - - - 193
see TRUSTEE. 1. - - 100
CHAMBERS—Magistrate sitting in,—when in summary jurisdiction bound to hear case in open Court - - - 350
see MAGISTRATE. 8.
—— *also* JUSTICE OF THE PEACE - - 151
——— MAGISTRATE. 16. 589
CHANCERY DIVISION—*see* CONTRACT. 4. - - - - - - - - 251
CHANDU—Section 5 of the Excise Ordinance 4 of 1870, gives no discretion to the Opium Farmer as to whether he will sign an export permit brought to him for signature, or not. He is bound by the section to sign it, and his refusal to do so is ground for an action in damages as at Common Law, and it is not necessary to allege or prove malice on his part under Section 88. WEE SWEE HIN *v.* OPIUM FARMER 527
2. ——"Opium Pills" are "Chandu" within the Excise Ordinance 4 of 1870. A "recognised druggist" under Section 13, is a person "recognised" as such by some authority. OPIUM FARMER *v.* LEE HO NAM - - - - - - - - 557
3. ——The "Chinchew" or Nakodah of a ship on board which some illicit chandu is found in a box which is in no way shewn to be his, is *not* to be "deemed to have imported" the chandu within Section 7, Clause 2, simply because he is the responsible person on board, and the ownership of the box cannot be traced to any other person. ING AH MENG *v.* OPIUM FARMER - 627
see also CROWN CONTRACT. 1, 2. - - 648, 680
——— EXCISE - - 321
CHARGES—Limited to three committed within one year of each other - - 188
see OFFENCES.
CHARGE WITHDRAWN—Discharge of prisoner—not triable a second time - 556
see ACQUITTAL.
CHARACTER—Security to be of good behaviour without evidence as to— 375
see MAGISTRATE. 9.
CHARITY—Burial ground - - 100
see TRUSTEE. 1
2. ——The "Seh" or tribal Kongsis in these Settlements are *public charities* and the Attorney-General is the only person who can sue in any suit relating to them. The objection that the Attorney-General ought to be such a party is fatal, although the suit may have proceeded through various stages and even to final judgment and appeal. Such an objection cannot be waived by the parties to the suit. *Query.* If a Judge after reserving judgment in a civil suit, reads papers touching on the matters in question in the suit, which are found among the cause papers, but were *not* put in evidence at the trial, what would be the effect of such an act on the verdict? Would it make any difference if there is sufficient evidence to support the verdict, independently of the matters mentioned in such papers? The Court of Appeal however refused to draw the inference that a Judge had so read such papers, merely because certain dates and one or two immaterial expressions were found in his judgment, which dates and matters to which such expressions referred, could not be found in the evidence laid before him at the trial. The Registers kept by the Pro-

CHARITY—*continued.*
tector of Chinese as Registering Officer under the late Dangerous Societies Ordinance 19 of 1869 are not admissible in evidence on their mere production by that Officer when he is unable to speak to the matters contained in them. YEOH HIM & ORS. *v.* YEOH CHENG KANG & ORS. 500
see also DEVISE - - 212
——— LAND. 2. - - 101
——— WAKOFF.
CHARTER OF 1855—Native laws and customs - - - - - - - 329
see GUARDIANSHIP.
CHATTELS REAL—*see* HEIR - 119
see LIMITATION. 1. - 311
—— MAHOMEDAN MARRIED WOMAN. 3. - 225

CHEATING—Before there can be a conviction for cheating under Section 417 of the Penal Code, there must be conclusive evidence of a dishonest intent at the time of obtaining the money or goods; where the evidence does not necessarily shew a dishonest intent at the time, but is consistent with such either being or not being the fact, no conviction can be had. Where therefore the prisoner obtained a sum of money from the prosecutrix, promising to give her a share in a boat or tongkang belonging to him, and to let her hold the certificate of registration of the boat—but a few days after excused himself for not giving the certificate on the ground that her share was a small one, and a few days later on declined to admit she had a share at all, and denied receipt of any money. *Held*, as the evidence was consistent with a dishonest intent at the time of obtaining the money, as also with the denials being due to a subsequent change of mind, a conviction for cheating under Section 417 could not be sustained. LEE KANG WYE *v.* NG AH MIN - - - - - 335

2. ——To bring a person within Section 415 [cheating] of the Penal Code, it is necessary to shew that he intended to cause damage or loss to the person he was deceiving. Where, therefore the prisoner, belonging to a Foundry Company was desirous of procuring certain firebars from the prosecutor's firm, a rival Foundry Company, but knowing the prosecutor's firm would not supply them to his [prisoner's] firm, he went to the prosecutor and ordered the firebars, telling the prosecutor they were wanted by one A. H. [which was false]—but on the firebars being subsequently manufactured, the prisoner asked for them and offered to pay prosecutor their costs, but the prosecutor then for the first time suspecting they were not wanted by A. H. did not deliver them or take payment, and having afterwards found from A. H. that

CHEATING—*continued.*
the prisoner's statement was false, prosecuted him for cheating, and the Magistrate convicted the prisoner under Section 417 of the Penal Code. *Held*, on appeal, the conviction could not be sustained, and it was accordingly quashed. JOHNSON *v.* MCLARTY & ORS. - - - - - - - 430

CHIEF POLICE OFFICER—*see* POLICE. 2. - - - - - - - - 240
CHILD—Custody of— - - - 385
see PROSTITUTION. 1.

CHILDREN—The word "children" in a Will, means children born in wedlock; but if from the context or in the surrounding circumstances, the word is shewn to have been used by the testator in a broader sense, such wider meaning will be given to it so as, if necessary, to include illegitimate or even *adopted* children. A subsequent ambiguous clause in a Will, which is somewhat inconsistent with a previous unambiguous clause, does not necessarily revoke or modify the previous clause, but the Court will, if possible, place such a construction on the ambiguous clause so that the two may stand together. A testator, a Chinese domiciled in Singapore, made a Will by which, after directing all his just debts, funeral and testamentary expenses to be paid by his Executrix as soon as conveniently may be after his decease, gave, devised, and bequeathed all his household furniture, wearing apparel, chattels and other effects, and also all and every sum or sums of money which might be found in his house or be about his person, or due to him at the time of his death, and also all his stock, fund, rent and securities for money due on bonds, bills or notes or other securities, and all and every other his estate and effects whatsoever and wheresoever, whether in possession or reversion, remainder, or expectancy, unto his "*wives or widows and children both in Singapore and in China.*" The testator then nominated, constituted and appointed his widow [in Singapore] to be the Executrix of his Will "and to make also a remittance of money to his wife or widow and *son* in China, one-fourth [¼] part of the residue of his estate." The testator at the date of his Will and time of his death had two wives [one in Singapore and one in China]—a daughter of his own in Singapore [who had since died leaving a husband but no issue] —an *adopted* son in Singapore [since deceased]—and *two adopted sons* in China. He had no sons of his own, either in Singapore or China. From the evidence it appeared that the position of *adopted* children was the same in all Chinese families and in ordinary language they would be included in the word "children," and it was not usual to make a distinction between

CHILDREN—*continued.*
those born in wedlock and those adopted. *Held* [by *Ford,* Acting C.J. and affirmed by the Court of Appeal], that the word "children" in the Will included the adopted sons both in Singapore and in China; and that the clear language of the first part of the Will, giving the "children" all like shares was not cut down by the latter ambiguous words as to "one-fourth part of the residue"—which latter clause indicated the class to be benefited, but applied—only to a "remittance" to be made [in part execution of the general bequest] to support the China wife and adopted sons, pending the winding-up of the Estate. QUAIK KEE HOCK *v.* WEE GEOK NEO - - 128
2 ——Descendants—Statute of Distributions - - - - - - - 325
see INTESTATE.
—— *also* LAND. 2. - - 101
CHINESE LAW AND CUSTOM—
see BIGAMY. 2. - - 630
—— CHARITY. 2. - - 500
—— CHILDREN. 1. - 128
—— CONVICTION. 4. - 493
—— DISTRESS - - - 97
—— HABEAS CORPUS. 2. 685
—— INTESTATE. - - 325
—— TRUSTEE. 1. - - 100
—— WIDOWS - - - 380
CHINESE PROTECTOR—
see CHARITY. 2. - - 500
—— HABEAS CORPUS. 2. 685
—— *also* IMMIGRATION - 604
—— IMMIGRATION ORDINANCE—*see* IMMIGRATION - - 604
CLAIM—Amendment of statement of—different state of facts—new cause of action - - - - - - - 437
see CONSULAR COURT 2.
CLAIMANTS—*see* BILL OF SALE. 7. 530
CLASS OF THE PUBLIC—
see GAMING. 4. 5. - 518, 615
CLUB—Feast—guests—public or class of the public—Private house-518, 615
see GAMING. 4. 5.
CO-DEFENDANT—Non-service of process—progress of suit - 409
see EXECUTOR. 2.
COLLECTOR OF LAND REVENUE
see LAND. 9. 13. - 413, 533
COLLISION—When a vessel runs foul of a stationary object, the presumption is that she is in fault, and the burden is cast on her to repel the presumption. There is no rule or regulation in force in this Colony rendering it obligatory on tongkangs lying alongside vessels for purpose of discharging or relieving cargo to carry lights. The plaintiff was the registered owner of the tongkang, but at the time of action brought, had ceased to be the true owner
COLLISION—*continued.*
he having sold the tongkang to one M. who brought the action in the plaintiff's name, and at the trial personated the plaintiff and gave evidence under that name. On enquiry into the damages before the Registrar these facts came to light, whereupon the defendant moved to stay all further proceedings in the action and costs to be paid by M.—M. moved that all proceedings might be amended by the substitution of his name for the plaintiff. *Held,* however wrongly M. had acted, yet as to the merits of the case it was absolutely of no consequence who was the real plaintiff, or by what name he called himself, and no possible injury or inconvenience could be caused to the defendant by allowing the amendment—the proceedings therefore should not be stayed, but leave given to amend by substituting the name of M. for the plaintiff, on M. paying the defendant the costs of his application. PAYNA EMAMSAH *v.* THE GLENFALLOCH - - 478
COMMERCIAL LAW—*see* TRADE-MARK. 1. 2. 3. - - - - - 269, 394, 403
COMMISSION—Executors in this Colone have a right of retainer, out of the estaty of their testator, for disbursements made by them and for commission due to them for administering the estate in preference to creditors of the estate. WEE NGA NEO *v.* YEO KIAN GUAN & ANOR. - 558
2. ——Evidence—proceedings - 677
see BILL OF LADING.
—— *also* LEGACY. - - 88
COMMITMENT—Warrant of—Certificate—Judicial document - - - 150
see EXTRADITION. 1.
COMMON GAMING HOUSE—
see GAMING.
—— LOTTERY. 2. 3. - 597, 668
—— LAW—Equity—Probate Division of the High Court of Justice in England—Common law—Equity—Jurisdiction 251
see CONTRACT. 4.
COMPANIES' ORDINANCE 1889—
see FOREIGN COURT - 570
COMPANY—It is not sufficient that Promoters and Directors of a Company, or partnership, or person standing in a fiduciary relationship, to have purchased for themselves property of the Company, or partnership, or of which they are the Trustees at its actual market value; it is also necessary that they should have done so with the full knowledge and consent of the shareholders, partners, or *cestuis que* trust, and have first placed themselves absolutely at arm's length from the vendors: otherwise, the shareholders, partners, or *cestuis que* trust [the vendors] are entitled to follow their property and recover it back for themselves. Such Promoters, Directors

COMPANY—*continued.*
or Trustees are bound to disclose all information they may acquire as to the property, to the shareholders, partners, or *cestuis que* trust; and to give them the fullest explanation relating to it. If such Promoters, Directors or Trustees purchase such property without acting as abovestated and afterwards sell the property to third parties who had notice of their position and circumstances—but afterwards re-purchase it from them for themselves [the Promoters, &c.,] at a higher figure—they will not be allowed to deduct as against the shareholders, partners, or *cestuis que* trust, the amount they so paid in excess of the sum they had sold it to such third parties for. Had the third parties sold to *bonâ fide* purchasers for valuable consideration *without* notice, it would have been different. *Query.* Whether the third parties *with* notice, are liable to refund the excess to the Promoters, Directors or Trustees arising from a failure of consideration by reason of the shareholders, partners, or *cestuis que* trust recovering back such property? Where therefore the defendants as Promoters and Directors of a land speculating Company or partnership acquired for themselves a valuable portion of the land at its actual market value, but unknown to the shareholders or partners,—and afterwards sold a portion of such land to third parties who were aware of their position and the circumstances of the whole transaction—but subsequently re-purchased the portion from such third parties for a sum in excess of the amount they had sold it to them. *Held*, the shareholders or partners the plaintiffs, were entitled to follow and recover back the land in the hands of the defendants, and were not bound to refund to the defendants the sum so paid in excess by them to such third parties. HABIB ABDUL RAHMAN & ANOR. *v.* ABDUL CADER & ANOR. - - - - - - 193

2. ——Purchase of shares—duty of vendor—vendee—specific performance 465
see BREACH OF CONTRACT. 3.

3. ——Payment suspended—sale of shares—fraud - - - - - 544
see CONTRACT. 12.

4. ——Failure—Broker—principals—shares—refusal to accept - - 561
see CONTRACT. 13.

5. ——Effect of Companies Ordinance 5 of 1889—Trust—equal distribution—assets - - - - - - - - 570
see FOREIGN COURT.
see also AGREEMENT 1. - 136
——— BREACH OF CONTRACT. 3. - - 465
——— CONTRACT. 3. 11. 12. 13. - 158, 512, 544, 561

COMPENSATION—Improvements 409
see EXECUTOR. 2.
—— *also* REPLY - - 416

COMPETENT COURT—Selangor—decisions recognized - - - - - 570
see FOREIGN COURT.

CONDITIONAL PROMISE—Ability to pay—breach of agreement - - 136
see AGREEMENT. 1.

CONDITIONS OF SALE—English language - - - - - - - - 453
see LAND. 12.
—— *also* LAND. 13. - 533

CONSTRUCTIVE NOTICE—*see* REPLY - - - - - - - - 416

CONSULAR COURT—Though the Supreme Court is a Superior Court to the Consular Court at Bangkok, in the sense that it is a Court of Appeal under the Order in Council of 1856, yet it does not possess in relation to that Court all the powers of the Court of Queen's Bench in England. It has therefore no jurisdiction to issue a Writ of *Mandamus* to that Court. MARRABLE *v.* SATOW - - - 274

2. ——Rule 211 of the British Consular Court in Bangkok, requires the Consul to exercise a discretion, as to whether he will file or not a power of attorney given by a suitor in the Court to a Barrister to appear for him as Counsel in a cause—and his exercising that discretion and filing or refusing to file the power is not merely a ministerial act. The law to be deduced from the existing authorities on the subject is, that upon grounds of general public convenience a Judge is not liable in the form of an action for damages for acts done or words spoken in his judicial capacity, unless such acts or words are done or uttered without jurisdiction and with knowledge of such want of jurisdiction. The principle also covers things omitted to be done. Although the form of a special plea is the usual one by which a defence that the defendant acted judicially is raised yet when the facts in the statement of claim shew a state of things upon which the legal question can be at once raised, a demurrer thereto is not only allowable, but the better form of proceeding. An amendment which will amount to a different state of facts from those in the statement of claim and disclosing a new cause of action—and fresh facts being admittedly intended to be inserted without reference to the plaintiff who is out of the jurisdiction—will not be allowed. MICHELL *v.* FRENCH - 437

CONTAGIOUS DISEASE—*see* Cattle Disease - - - - - - - 666

CONTRACT—Sale of land—plaintiff—Statute of Frauds - - - - - 82
see LAND. 1.

CONTRACT—*continued.*

2. ——Made in Colony—breach committed abroad—law of Colony—determination - - - - - - - 136

see AGREEMENT 1.

3. ——A contract by which two firms agree to divide a work between them, so that the one should not interfere or compete with the other, is not void as being in restraint of trade. A contract between A. & B. by which A. agrees to indemnify B. for all losses occasioned to him by the interference of a third party over whom he [A.] has no control—is not void, as being impossible of performance by A. by reason of such third party persisting in interfering with B. *Taylor* v. *Caldwell*, 32 L. J. Q. B. [N.S.] 164, distinguished. CADERSAH & Co. *v.* MAHOMED EUSOFF & Co. - - - 158

4. ——If a contract for purchase contain no clause providing for the forfeiture of the deposit on breach by the purchaser, but provides a general penalty for breach of the contract, such latter provision excludes the idea that the parties intended the deposit to be forfeited and no forfeiture will be allowed. *Thomas* v. *Brown*, 1 L. R. Q. B. Div. 714. and *ex-parte* Barrell, 10 L. R. Ch. App. 512. distinguished. *Palmer* v. *Temple*, 9 Ad. & E. 508, followed. *Semble.* Although there might be good reason for considering that Sections 13 and 14 of the Courts Ordinance 3 of 1878 do not confer on this Court all the jurisdiction and powers of the Probate Division of the High Court of Justice in England, yet there is no reason for restricting Section 10 of that Ordinance in respect to powers and jurisdiction vested in such High Court of Justice in matters of Common Law and Equity—and this Court therefore might award damages in lieu of decreeing specific performance, as might be awarded by the Chancery Division of the High Court of Justice under Lord CAIRNS' Act [21 & 22 Vic. c. 27] and the Judicature Acts. *Semble.* If in a suit for specific performance, the Statute of Frauds would be no bar by reason of part performance—the Statute would be for the same reason no bar to this Court awarding damages under the aforesaid Section 10 in lieu of such specific performance. *Sayers* v. *Collyer*, 28 L. R. Ch. Div. 103; *Lavers* v. *Earl of Shaftesbury*, 2 L. R. Eq. 207. and *Olley* v. *Fisher*, 34 L. R. Ch. Div. 367. considered. TAN SENG QUI *v.* PALMER 251

5. ——Principal—Agent - - 319

see AGENT. 1.

6. ——Illegal or frandulent—trust funds - - - - - - - 409

see EXECUTOR. 2.

7. ——A contract formed by the tender by a person for a lease of a Bath House or Market and its acceptance by the party calling for the tender, is a contract which confers *an interest in land*, which interest cannot be put an end to by re-entry, unless the tender so provides. A contract for "Market Stalls" is a contract for the supplying of the *stalls* to the market and not merely of the market square, or a space in which stalls might be erected. Where tenders were called for three distinct subjects as a Bath, a Market and a Public Latrine—the terms of holding of which differ according to the particular subject-matter—it is improper to include them all in one subsequent lease; and the person sending in the tender is not bound to accept such lease Where it appeared that the tenders provided that the person sending it would enter into a formal lease "with similar conditions to those at present in existence" and it appeared that as regarded the Bath there was a previous lease in existence, but as regarded the Market and Latrine there never had been such lease or condition. *Held*, that one lease of the three subjects containing covenants and conditions which were in existence only as to the Bath, was not a lease as regarded the Market and Latrine, which the person making the tender was bound to accept. MOOTOO *v.* MUNICIPAL COMMISSIONERS - - - 446

8. ——A person who agrees to sell to another a certain quantity of goods which he has to procure from abroad, is not at the time he tenders the other goods, bound to inform that other that he has imported more of like goods and placed them in the market, and he commits no fraud in withholding such information. Where a contract stated that it was for "25,000/30,000 cases Kerosine oil," and it being shewn by evidence that the expression meant from 25,000 to 30,000 cases. *Held*, the fact that *the defendant* made the *proposal* to purchase that quantity was material, and his proposal having been accepted, he was bound to accept the *full* 30,000 cases if the vendor tendered him that quantity. In such a contract the option is with the *vendor* as to whether he would only deliver the 25,000 cases or the larger number of 30,000. BRANDT & Co. *v.* GOH GUAN LU - 481

9. ——The defendants were a Corporation constituted under Ordinance 9 of 1887, and were in possession [how it did not clearly appear] of a Town Hall the lower portion of which for many years had been fitted up as a theatre. It was considered advisable to replace the old scenery with new ones, and with that view the defendants through their Secretary wrote a letter to a gentleman in England ordering such new scenery. To meet the cost of such scenery they had passed a vote of $1,000

CONTRACT—*continued.*

from the Municipal Funds on their Budget for the present year which had been duly sanctioned by the Governor in Council in accordance with the Ordinance—by a subsequent vote they proposed to apply a further $260 of such funds towards such cost,—this $260 being transferred from another vote for a different matter which had also been sanctioned. The defendants were about paying this $1,260 to meet the said cost when the suit was begun at the relation of a rate-payer seeking to restrain the defendants from applying the said funds towards paying for the cost of such new scenery. *Held* by the Court of Appeal [reversing the judgment of the Court below] following *Flower* v. *Local Board of Low Leyton*, 5 L. R. Ch. Div. 347, that Section 259 of the aforesaid Ordinance incorporating therein Section 44 of the Police Ordinance 1 of 1872, did not apply to such a suit, and it was not necessary for the plaintiff to allege or prove "malice and want of reasonable and probable cause" on the part of the defendants in passing such votes and proceeding to make such payment. *Held further* by the Court of Appeal [*Pellereau & Goldney*, J J., *Wood*, Acting C.J. dissenting]—reversing the judgment of the Court below that the purchase of such scenery for the hall, for the theatre, for the benefit of the public was not a providing for the "convenience" of the public within Section 56 of the said Ordinance and that an injunction should be granted restraining the defendants from so applying the aforesaid funds towards the purchase of such new scenery. *Held further* [by *Goldney*, J.] that the contract for the purchase being over $200 in value, but not being under the seal of the defendant-Corporation, was not a contract of the Corporation, and on that ground alone an injunction should have been granted. *Semble* [*per Pellereau & Goldney*, J.J.—*Wood*, Acting C.J. dissenting] that the defendant-Corporation could not undertake to have a theatre [as a condition to their holding possession of the Town Hall] unless such an undertaking was within their powers under the Ordinance which it was *not*. ATTORNEY-GENERAL *v.* MUNICIPAL COMMISSIONERS - - - - 484

10. ——The defendant, a resident of Bangkok, made a contract in Singapore with plaintiff, a resident of Singapore, for the supply *at Bangkok* of certain number of cattle and that payment should be made *there*. The plaintiff began an action on the contract in Singapore, and on affidavit that the contract was made in Singapore obtained an order under Section 66 of the Civil Procedure Ordinance, 1878, to serve the writ of summons at Bangkok. Service was

CONTRACT—*continued.*

thereupon effected at Bangkok, whereupon the defendant moved to set aside the order. *Held*, the contract was one to be performed in Bangkok, and as the witnesses would necessarily be there, leave to serve the writ of summons should not have been granted and the order was accordingly discharged. MANA NONDU & CO. *v.* POONASAMY NAIKU & CO. - - - - - - - - 511

11. ——A person who contracts for the purchase of "transfer and scrip," cannot be compelled to take a "bearer-warrant." There is no rule of law like the saying "Silence gives consent" applicable to mercantile contracts; and an omission to reply [in connection with such a contract] does not constitute a waiver. Under a contract for scrips for Mining shares "expected to be mailed about the end of March," and which if mailed would have arrived on 23rd April, it is not a delivery within a reasonable time, to have the scrips mailed early in April, and to offer them on 15th May. FRASER *v.* EVERETT - - 512

12. ——If a person having actual knowledge—not mere suspicion—that a Company has suspended payment, sell shares therein to another knowing that other was ignorant of that fact and not disclosing it to him, but representing that the financial position of the Company was sound and that large profits would accrue from a purchase of such shares, the sale will be set aside by the Court as obtained by fraud and misrepresentation. SIMONS *v.* TEO GUAN TYE - - - - - - - - 544

13. ——A broker being instructed by three distinct principals to sell three distinct sets of shares in a Company, sold the shares in a lump to the defendant; and he and the defendant signed one contract for the sale and purchase of the whole number of shares. This contract the broker signed as "broker"—the defendant knew this, but never enquired who the principals were or how the total number of shares was made up. On the whole number of shares being tendered, the defendant declined to accept them as the Company had failed. The one principal then sued the defendant on the contract for the number of shares he had ordered the broker to sell and recovered judgment. Another principal then sued the defendant on the contract for the number of shares he had ordered the broker to sell, and the third principal also sued the defendant on the contract for the number of shares he had ordered the broker to sell. *Held* [by *Wood*, J.] that there were three distinct contracts on the one paper, and each principal as he came to light was entitled to sue on the contract in respect to the number of shares in which he was

CONTRACT—*continued.*
interested. *Held on appeal* [the Court being equally divided]—*per Pellereau*, J.—That there were three distinct contracts; that the broker having signed as such, the defendant knew he was acting for one or more principals—that not having enquired, he was fixed with knowledge of the true relationship of the respective principals and the broker—that the rule in *Cooke* v. *Eshelby*, 12 L. R. App. Cas. 271, applied to the case of several principals as also to one principal, and also to the interests of each respective principal—that each principal was entitled to sue alone in respect of his number of shares—that the judgment for the one principal was not *res judicata* as to the others, and that he was entitled in so suing in respect of his number of shares, to rely on the contract made by the broker, and there was no variance between the contract he so sued for and the contract made by the broker which he adduced as evidence of contract. *Per O'Malley*, C.J.—That there were no grounds for objecting to want of parties in such an action, nor was the judgment in the suit by the one principal *res judicata*, in respect to this action by the other principal—but this action being in respect to certain only of the shares was not maintainable by proof of the contract for the whole number of shares, as the contract made by the broker was for a larger number of shares and such a contract was not the contract the plaintiff-principal had authorised him to make; that the contract that the plaintiff-principal had authorised him to make was only a contract for a less number of shares, but that was not the contract the defendant had bound himself by as he had contracted for a larger number of shares—That there was therefore a variance, and the action must fail, and that *Cooke* v. *Eshelby* [supra] did not apply to such a case. The Court being equally divided, the judgment in the Court below stood affirmed with costs. CARR *v.* TEO GUAN TYE - - - - 561

14. ——A contract to build a "suitable house" is too vague and uncertain and cannot be specifically enforced by this Court nor can damages be awarded - 583

see MARRIAGE SETTLEMENT.
see also AGREEMENT.
——BREACH OF CONTRACT.
——COMPANY.
——CREDITOR. 2. - 559
——CROWN CONTRACT. 1. 2. - - 648, 680
——LABOUR.
——LOTTERY. 1. - 126

CONTRACT OF SERVICE—*see* LABOUR.
——PRIVITY OF—*see* PRIVITY OF CONTRACT - 338

CONTRADICTORY STATEMENTS—Crown - - - 260
see FALSE EVIDENCE.
—— *also* LIMITATION. 1. 311
—— REPLY - - 416

CONTRIBUTION—The law of general average contribution, which is derived from the Civil Law and has become part of the Common Law, imposes on the Master of the ship the duty of having the contribution settled, and *of collecting the amounts*. This duty is thrown upon him as agent for the owner, and the owner is liable to a shipper of goods if the Master neglects his duty. It is not necessary in an action to enforce such duty to shew the nationality of the ship. SYED HASSAN BIN OMAR AL HADEED *v.* KHOO SOO TJIO & ORS. - - 528

CONTRIVANCES—*see* POLICE. 2. 240

CONVENIENCE—*see* CONTRACT. 9 484

CONVEYANCE—Costs - - 359
see MORTGAGEE. 2.
—— *also* DECLARATION OF TRUST - - 178
——BEFORE ADMINISTRATION—*see* MAHOMEDAN MARRIED WOMAN. 3. - - - - - 225
——DEED OF—ACKNOWLEDGMENT BY MARRIED WOMAN—CONSTRUCTIVE NOTICE - - - - 416
see REPLY.

CONVEYANCER—The terms "Conveyance" and Conveyancer" in Section 26 of the Civil Procedure Ordinance 5 of 1878 has a larger meaning than its more strictly professional sense. Where therefore the defendant in expectation of a fee or reward drew a Will relating to real or personal estate for another. *Held*, he was liable to a penalty under Section 26. VAUGHAN *v.* D'SILVA 286

CONVEYANCING AND LAW OF PROPERTY ORDINANCE—*see* MORTGAGEE. 2. 3. - - - - - 359, 663

CONVICTING MAGISTRATE—Appeal Court—power to send case back to other than - - - - - - - 392
see GAMING. 3.

CONVICTION—Alternative—one sentence for two offences—Court may alter—evidence - - - - - - 188
see OFFENCES.

2. ——One and same state of facts—offering gratification - - - 350
see MAGISTRATE. 8.

3. ——Maintaining obstruction - 431
see VERANDAH.

4. ——A conviction of offences in the *alternative* is bad, but may be amended by the Court of Appeal. A person who is shewn to have committed an offence as a principal cannot be convicted as an accessory. So, where a prisoner was shewn to have *purchased* a girl for the purpose of prostitution and kept her in her brothel,

CONVICTION—*continued.*
but the age of the girl not having been shewn to satisfy the section [Clause 1, Sub-section 1 of Section 4 of Ordinance 14 of 1888] creating the offence of purchasing, the Magistrate convicted the prisoner of *receiving* [Clause 3] the girl for purpose of prostitution knowing she had been purchased. *Held*, the conviction could not stand. The purchase and receipt of the girl having taken place *prior* to that Ordinance although the girl still remained with the prisoner while the Ordinance was in force, *Held*, the "*receiving*" was an act completed prior to the Ordinance and could not be punishable thereunder. *Held* however, the keeping of the girl was a distinct act from the purchase or receiving—it was a continuous act from day to day, and having continued while the Ordinance was in force, was a "*harbouring*" of the girl and was punishable under Clause 3 aforesaid. REGINA *v.* KOK SAH LAI - - 493

5. ——On quashing a conviction, it is the duty of the Court to consider whether on the facts there is not a proper charge on which the accused might not be charged and if there is, to direct that he be tried on such proper charge - - - 597

see LOTTERY. 2
see also APPEAL.
——— MAGISTRATE.
——— RECOGNIZANCE TO KEEP THE PEACE.

CORPORATION—*see* CONTRACT. 9. 484

CORROBORATIVE EVIDENCE—Statement - - - - - - 349

see THEFT. 2.

COSTS—Magistrate's Appeal—conviction quashed—Crown ordered to pay appellant's costs of appeal - - - - - 597

see LOTTERY. 2.

2. ——Case stated—Magistrate—Rule absolute—Costs follow the event - 606

see MAGISTRATE. 18.
——*also* CROWN CONTRACT. 2. 680
——— DERELICT VESSEL 638

COSTS BEFORE ACTION—*see* AGREEMENT. 3. - - - - - - 181

see also LAND. 1. - - 82
——— MORTGAGEE. 1. - 199
——— REPLY - - - 416
——— SHERIFF - - 614

COUNSEL—Defence—Crown Witnesses 317

see WITNESSES. 1.

2. ——Examination of a person as to a debt due a Bankrupt—person examined not entitled to aid of - - - - - 569

see BANKRUPTCY. 2.
——*also* ADVOCATES AND SOLICITORS - - - 151
———ATTORNEY-GENERAL. 1. 605
——— CONSULAR COURT. 2. 437
——— MAGISTRATE. 1. - 79

COURT—In the exercise of its discretion, Supreme Court may refuse case to be withdrawn, postponed or otherwise - 345

see ORDER OF HEARING.

2. ——Abuse of process—summons taken off file and service set aside. - 628

see ABUSE OF PROCESS.
——*also* ARMS AND AMMUNITION.
——— BIGAMY. 2. - 630
——— COURT OF APPEAL.
——— CROWN SUITS - 688
——— JUSTICE OF THE PEACE. - 151
——— LOTTERY. 2. 3. 597. 668
——— MAGISTRATE 8. 16. - 350. 589
——— MAGISTRATES 1. 2. - 560, 592

COURT OF APPEAL—The Court has power under Section 25 of the Appeals Ordinance 12 of 1879, to reduce a sentence passed by a Magistrate. CHINA GUNNY *v.* MUNIANDEE - - - - - 161

2. ——Power and authority of—on granting leave to appeal to Privy Council, to impose as a term that appellant lodge his appeal with the Registrar of the Privy Council within a given time. - 204

see ARBITRATION. 1.

3. ——Power to refer case back for further evidence to other than convicting Magistrate - - - - - - 386

see MAGISTRATE. 10.

4. ——The Court of Appeal has power to amend a charge by charging a person as a principal who was formerly only charged as an accessory; and also by substituting a proper charge under Section 34, Clause 6, even when the appeal is from an order of a Magistrate *discharging* the accused - 546

see SPIRITS.

5. ——Duty of Court on quashing a conviction to consider whether on the facts there is not a proper charge on which the accused might not be charged, and if there is, to direct that he be tried on such proper charge - - - - - - - 597

see LOTTERY. 2.
——*also* APPEAL.
——— CHARITY. 2. - 500
——— CONSULAR COURT. 1. - 274
——— GAMING. 3. - 392
——— LOTTERY. 3. - 668
——— MAGISTRATE.
——— MISCHIEF - 250
——— PROPER CHARGE. 2. 472

COURT OF EQUITY—*see* RELIEF 353

—— TWO MAGISTRATES—*see* MAGISTRATES. 1. 2. - - - - 560. 592

COVENANT—Lease—action for rent—limitation - - - - - - 587

see RENT. 5.
——*also* CONTRACT. 7. - 446

COVENANT—*continued.*
—— FOR RENEWAL—*see* SEA SHORE - - - - - 10
COVERTURE—Husband and Wife—Desertion - - - - 376
see WIFE.
CREDIT—Master of Ship—Agent - 679
see SHIPPING.
CREDITOR—A creditor who takes a void Bill of Sale of goods as security for his debt, discharges a surety who under the belief of such security being valid, becomes surety - - - - - - - - 475
see BILL OF SALE. 6.
2. —— Although a creditor who takes interest in advance for several months, cannot sue for his claim till those months have elapsed, yet if the note or contract entered into provides that in default of payment in a particular manner within that time the whole amount remaining unpaid should become immediately due and payable, he is entitled to sue although those months have not elapsed. *Black* v. *White*, 1 Y. & C. Ex. Eq. 421, distinguished. Such a clause does not act as a forfeiture, and no rebate of interest can be claimed. PALANIAPAH CHETTY *v.* HASHIM NINA MERICAN & ANOR. - - - - - 559
CREDITORS—Right of Executors to retainer in preference to creditors—*see* COMMISSION. 1. - - - - - 558
CRIMINAL MISAPPROPRIATION—*see* MISAPPROPRIATION - - - 441
———— TRIAL—Where part heard, Court will adjourn to enable prosecution to obtain further evidence where no harm done to prisoner - - - - - - 630
see BIGAMY. 2.
———— PROCEDURE ORDINANCE—Ordinance 5 of 1870—As to its applicability to the Police Courts - 230
see LABOUR. 1.
CRIMPING—*see* LABOUR 1. 2. 3. 230, 396, 524
CROWN—*Semble*. The Crown, though not a party to an appeal from the decision of a Magistrate, nevertheless has a right to be heard on the appeal. *Punghulu Allang* v. *Him*, 3 Kyshe, 144, and *Regina* v. *Shaik Ishmael Lebby*, Ibid. 99 [on this point] dissented from. The simple fact that one of two Magistrates who have decided a case under the Dangerous Societies Ordinance 19 of 1869 is a Member of the Executive Council and as such, had under Section 3 seen and considered the evidence afterwards adduced by the prosecution in the case is no ground for quashing the decision, although the Court fully recognises the impropriety of his having sat to adjudicate on the case. Where persons had been convicted of being managers of a Dangerous Society under Ordinance 19 of 1869, but the
CROWN—*continued.*
evidence did not shew the Society consisted of ten or more members under Section 1, the Court refused to quash the conviction, but remitted the case under Section 25 of the Appeals Ordinance, for further evidence on the point. REGINA *v.* WEE SIM TIAN & ORS. - - - - - - - - 238
2. ——Evidence—Contradictory Statements - - - - - - - - 260
see FALSE EVIDENCE.
3. —— Private Counsel prosecuting for—witnesses for defence—right of reply 605
see ATTORNEY-GENERAL. 1.
4. ——Locus Standi of Magistrate to appear and support his conviction - 606
see MAGISTRATE. 18.
see also CROWN CONTRACT 1. 2. 648, 680
—— DERELICT VESSEL 638
—— LOTTERY. 2. - - 597
—— PLEA IN BAR - 651
—— SEA SHORE - - 10
CROWN CONTRACT—A defence that a Crown Contract purporting to be under the Excise Ordinance 4 of 1870, Section 3, is not in the form prescribed by that section and that therefore the defendants had not become entitled under that section to the exclusive rights of a Farmer under that Ordinance, is a "substantial ground of defence" and "on the *merits*" within the meaning of the Crown Suits Ordinance 15 of 1876, Section 2, Clause 7.—*Query*. Is the form of contract prescribed by Section 3 of the Excise Ordinance 4 of 1870, [as amended by Ordinance 15 of 1871,] obligatory on the Crown, and what is the effect of a departure from such a form? ATTORNEY-GENERAL *v.* CHEW SIN YONG & ANOR. - - - - - - - - 648
2. ——A claim for loss sustained by the Crown, by reason of the breach by the defendant of his contract—although such loss may be calculated and found by the Officers of the Crown to be a particular sum —is *not* a claim for an "ascertained" sum, within Section 2 of the Crown Suits Ordinance 15 of 1876; but a claim for "damages or account," within Section 3. Where an Information and Writ of Summons, for such a claim, was filed and issued under Section 2, *Held*, the defendant was quite right to apply, by Summons in Chambers, and before applying for leave to defend, for an order to set aside such proceedings as being irregular: and the same were set aside with costs. The Writ of Summons, in Form C 1. of the said Ordinance, is intended to be used in cases falling within both Sections 2 and 3; but at time of issue, ought to be so adapted as to meet the provisions of the particular section under which it is issued, by striking out the alternative

CROWN CONTRACT—*continued.*
sentences which apply to the other section. ATTORNEY-GENERAL *v.* CHEW SIN YONG & ANOR. - - - - - - 680
CROWN LANDS ORDINANCE—*see* FOREST RANGER - - - - - 76
CROWN SUITS—The Attorney-General has no power to "direct" the Registrar of this Court to enter up judgment for the Crown in any case whatsoever, and a paper so *directing* the Registrar to do, was ordered to be taken off the file. The words "make himself a defendant" in Section 4, Clause 8 of the Crown Suits Ordinance 15 of 1876 mean "appear" —so that where a person claiming to be interested in opposing the claim of the Crown to an order for forfeiture of any property in proceedings *in rem* under Section 4, enters an appearance *without* obtaining leave from the Court under Clause 8 thereof, such appearance is a nullity, and the Attorney-General is entitled to treat it as such and to sign final judgment as in default of appearance under Clause 5. ATTORNEY-GENERAL *v.* SEVEN BARRELS OF GUNPOWDER, &c. - - 688
see also CROWN CONTRACT.
1. 2. - - - - - - 648, 680
CROWN WITNESSES—*see* WITNESSES 317
CUSTOMARY LANDHOLDER—
see LAND. 6. 9. - 249, 413
CY-PRES DOCTRINE—*see* DEVISE 212
DAM—Watercourse—User - - 450
see RIPARIAN RIGHTS.
DAMAGES—In lieu of specific performance - - - - - - - 251
see CONTRACT 4.
2. ——Flooding of lands - - 459
see TRESPASS. 2.
3. ——Non-payment of—arrest and imprisonment of defendant - - 433
see MALICIOUS PROSECUTION.
see also CHEATING. 2. - 430
——— COLLISION - - 478
——— CONSULAR COURT. 2. 437
——— CROWN CONTRACT. 2. 680
——— LIBEL - - - 364
——— POLICE. 1. 2. 214, 240
——— RIPARIAN PROPRIETOR 4
DANGEROUS SOCIETIES ORDINANCE—*see* CHARITY. 2. - - 500
—— CROWN. 1. - - 238
DEBTOR—*see* BILL OF SALE. 7. 530
DECEASED PERSON—Charge of fraud - - - - - - - - 590
see FRAUD. 3.
DECLARATION OF TRUST—The deceased and his wife together, by an informal Malay document executed a paper appointing another their "Wakil Muthalak" [attorney] over all their property from the date of the paper, to take charge of the same and act in every way for them and on their behalf, and in case of his [the deceased's] death, the "Wakil" should pay all debts due by the deceased and demand and collect all debts due to him, and on refusal by the debtors to pay any of such latter debts to take legal proceedings for the recovery of the same and after payment of all his debts, the "Wakil" should divide the remainder of the property among his [the deceased's] children and his wife, share and share alike. *Held*, the paper was a declaration of trust merely and not testamentary in its nature, and Probate was refused to it as a Will. *Doe d Cross v. Cross*, 8 Q. B. 714, distinguished. As a Malay document cannot under Act 16 of 1839, Section 11, Clause 2, be registered—in order to enable the "Wakil" [the trustee] to convey the lands of the deceased to purchasers by Deeds or Conveyances that would be recognised and registered by the Registrar of Deeds, the Court granted administration to the "Wakil" [the trustee] as the nominee of the wife and next-of-kin of the deceased, but required that the dealing with the estate should be as prescribed by the Malay document or declaration of trust. *In the goods of* HAJEE MAHOMED THAIB. - - - - - - 178
DECREE—Specific Performance—Chancery Division of the High Court of Justice in England - - - - - - 251
see CONTRACT. 4.
——— FOR PARTITION—*see* PARTITION - - - - - - - - 74
DEED—*see* DECLARATION OF TRUST 178
—— TRUSTEE. 1. - - 100
——— ACKNOWLEDGMENT OF—*see* MAHOMEDAN MARRIED WOMAN. 3. 225
see REPLY - - - - 416
DEFAULT—*see* BILL OF LADING 677
——— OF APPEARANCE—*see* CROWN SUITS - - - - - 688
——— OF PAYMENT—*see* CONTRACT. 4. 13. - - - - 251, 561
see also MALICIOUS PROSECUTION - - - 433
DEFENCE—Costs - - - 199
see MORTGAGEE. 1.
2. ——Crown Witnesses - - 317
see WITNESSES. 1.
3. ——Amendment of - - 344
see STATUTE OF FRAUDS. 1.
4. ——Default in delivering reply to statement of—pleadings—extension of time - - - - - - - 416
see REPLY.
5. ——Special plea—Judge—action in damages - - - - - - - 437
see CONSULAR COURT. 2.
6. —— Action on Promissory Note—part payment - - - - - - 587
see PROMISSORY NOTE. 3.

DEFENCE—*continued.*
7. ——Right of reply - - - 605
see ATTORNEY-GENERAL. 1.
——*also* LABOUR. 1. - 230
——— LAND. 1. - - 82
DEFENDANT—Arrest on mesne process —security—liberty to leave jurisdiction without leave of Court after judgment 1
see SECURITY. 1.
2. ——Absconding after giving security not to leave jurisdiction—Bond held void 71
see BOND.
3. ——Progress of suit—non-service of process - - - - - - - 409
see EXECUTOR. 2.
4. ——Non-payment of damages in action for malicious prosecution—arrest and imprisonment - - - - - - 433
see MALICIOUS PROSECUTION.
5. ——Amount claimed in an action—Costs—Execution—payment - - 614
see SHERIFF.
DELEGATION OF POWERS—Administrator with Will annexed - - 8
see EXECUTOR. 1.
DELIVERY—Reasonable time - 512
see CONTRACT. 11.
DE NOVO—Trial - - - - 79
see MAGISTRATE. 1.
——*also* MAGISTRATES. 2. 592
DEPOSIT—Forfeiture—breach by purchaser - - - - - - - 251
see CONTRACT. 4.
———OF FILTH—Convenient places - - - - - - - - 554
see MUNICIPALITY. 4.
DEPOSITIONS—*see* EXTRADITION. 1. 2. - - - - - - - -150, 221
——*also* PLEA IN BAR - 651
DEPOT—*see* IMMIGRATION - - 604
DERELICT VESSEL—There being no claimants to a sum of money found on board a derelict vessel at sea, the same was declared to belong to the Crown; but the costs of the application to have it so declared were ordered to be paid out of the fund. THE ASSOLINE - - - 638
DESCENDANTS—Children—Statute of Distributions - - - - - 325
see INTESTATE.
DESERTION—Husband and Wife—property - - - - - - - - 376
see WIFE.
DETENTION OF PRISONERS—*see* HABEAS CORPUS. 1. - - - - - 287
———OF PROPERTY—*see* POLICE. 1. - - - - - - 214
DEVISE—A devise by a testator of land as "a Wakoff for his children and their descendants" is void as tending to a perpetuity and cannot be construed by application of the *cypres* doctrine as a devise to the children in fee. The doctrine of *cypres* can only be applied when the intention of
DEVISE—*continued.*
the testator can be ascertained. *Cattlin* v. *Brown*, 11 Hare 372, and *Pearks* v. *Moseley*, 5 L. R. App. Cases, 714, 19, per Lord SELBOURNE, followed. A bequest of $400 for "maintenance" of his wife, and to be spent in "Kunduris for the testator," without shewing how much of it was for "maintenance" and how much for "Kunduris," is void for uncertainty and as tending to a perpetuity. ASHABEE & ORS. *v.* MAHOMED HASHIM & ANOR. - - - - 212
see also LAND. 2. - - 101
——— MAHOMEDAN MARRIAGE ORDINANCE. 2. - 265
——— TESTATOR.
DEVOLUTION—Death of sole trustee—trust estate - - - - - - 497
see TRUST. 2.
DIFFERENT OFFENCES—*see* OFFENCES - - - - - - - 188
DIRECTOR—*see* COMPANY. 1. - 193
DISBURSEMENTS—
see COMMISSION. 1. - 558
—— *also* DERELICT VESSEL 638
DISCHARGE—*see* BANKRUPTCY. 3. 670
———— OF PRISONER—Withdrawal of charge equivalent to acquittal - - - - - - 556
see ACQUITTAL.
———— OF SURETY—*see* BILL OF SALE. 6. - - - - - 475
DISCOVERY—*see* LAND. 12. - 453
———— OF DOCUMENTS—The general provisions up to trial of the Civil Procedure Ordinance 5 of 1878, are not applicable to Small Causes under Section 31 of the Ordinance as amended by Ordinance 8 of 1880, except those specially applied by Clause 4 of the section. A party to a Small Cause cannot therefore obtain under Section 289 of the former Ordinance, discovery from his opponent of documents in his possession. BROWN *v.* TAYNAPPA CHETTY - - - - - - 268
DISEASE—PREVENTION OF—*see* CATTLE DISEASE - - - - - - 666
DISHONEST INTENT—
see CHEATING. 1. 2. - 335, 430
—— MISAPPROPRIATION 441
DISMISSAL—Servant—mercantile firm - - - - - - - - 91
see WRONGFUL DISMISSAL.
DISTRESS—Any question as to the right of property or possession to any goods taken under a Distress Warrant under Ordinance 14 of 1876, and claimed by a third party may be raised and decided as an Interpleader under Section 379 of the Civil Procedure Ordinance, 1878. Chinese theatrical costumes which are let to hire by their owner to another for purposes of enabling each other person to carry on a *wayang* or theatre are not exempt from dis-

DISTRESS—*continued.*
tress for rent put in by a landlord against such other person. RAMAN CHETTY *v.* GOLAM MYDIN. *In re* CHEW HOCK SENG 97
see also RENT.
DISTRIBUTIONS—STATUTE OF—*see* INTESTATE - - - - - - - 325
[illegible] MAHOMEDAN MARRIAGE [illegible] ORDINANCE. 2. - 265
DIVI[illegible]—*see* RIPARIAN RIGHTS 450
DIVISION OF WORK—Agreement—competition - - - - - - 158
see CONTRACT. 3.
DIVORCE—Joint earnings of husband and wife—separate estate - - 124
see MAHOMEDAN MARRIED WOMAN. 2.
2. ——This Court possesses no divorce jurisdiction, notwithstanding Sections 10 and 13 of the Courts Ordinance 3 of 1878. SCULLY *v.* SCULLY - - - - 602
DOCUMENT—Testamentary—Probate refused as a Will - - - - - 178
see DECLARATION OF TRUST.
2. ——Conditions—not a promissory-note - - - - - - - 181
see AGREEMENT. 3.
DRUGGIST—Opium Pills - - 557
see CHANDU. 2.
DYING DECLARATION—Defence—admissibility of statement of a deceased person - - - - - - - 176
see EVIDENCE. 2.
EASEMENT—*see* SEA SHORE - 10
EJECTMENT—*see* LIMITATION. 1. 311
—— RELIEF - 353
EMBANKMENT—*see* RIPARIAN PROPRIETOR - - - - - - - 4
see also SEA SHORE - - 10
EMIGRATION—*see* CONVICTION. 4. - - - - - - - - - 493
see also HABEAS CORPUS. 2. 685
—— IMMIGRATION - - 604
—— LABOUR.
EMPLOYER—Assault on servant—Magistrate no power to order contract of service to be cancelled - - - - - 606
see MAGISTRATE. 18.
—— *also* LABOUR.
ENGLISH—Sale of Land—conditions in—language - - - - - - -453, 533
see LAND. 12. 13.
see also CATTLE DISEASE. 665
ENQUIRY—Preliminary - - 151
see JUSTICE OF THE PEACE.
——*also* MAGISTRATES. 1. 560
ENTICING MARRIED WOMAN—*see* MARRIED WOMAN. 2. - - - 162
EQUAL DISTRIBUTION—Companies' Ordinance—Assets - - - - 570
see FOREIGN COURT.
EQUITY—Common law—jurisdiction and powers of the High Court of Justice in
EQUITY—*continued.*
England—decree for specific performance - - - - - - - - 251
see CONTRACT. 4.
—— COURT OF—*see* RELIEF 353
ESCAPE OF PRISONER—A conviction for the offence of allowing a person in lawful custody to escape under Section 221 of the Penal Code cannot be sustained, when that person is not legally in custody, or is punishable with a mere fine - - 615
see POLICE. 4.
ESTATE—Interest—Chattels real - 119
see HEIR.
—— *also* LABOUR. 1. 2. 230, 396
—— RECEIVING STOLEN PROPERTY. 2. - 388
ESTATE IN FEE—*see* LAND. 2. 101
—— TAIL—PERSONALTY - 608
see TESTATOR. 3.
EVIDENCE—Husband and wife—Criminal matters - - - - - - 122
see MAHOMEDAN MARRIAGE ORDINANCE. 2.
2. ——Although a prisoner might have successfully objected to the admissibility of a statement of a deceased person, either as a dying declaration, or a deposition under Ordinance 20 of 1870, Section 26, yet he is entitled, in his defence, if he so chooses, to put in the statement as something which was said by the deceased, which goes to help his defence thereby waiving the objection which was based on the omission of a formality required for his protection. REGINA *v.* CHEE TANG & ANOR. - - - - - - - 176
3. ——Improper admission of—irregularity—Magistrate - - - - 230
see LABOUR. 1.
4. ——Adjournment of cases—detention of prisoners in Magistrates' Courts—jurisdiction of Supreme Court - - 287
see HABEAS CORPUS. 1.
5. ——Corroborative—statement 349
see THEFT. 2.
6. ——Case remitted to Magistrate for further—convicting Magistrate - 386
see MAGISTRATE. 10.
7. ——Uncontradicted—estate of a deceased person - - - - - 416
see REPLY.
8. ——Further—Case remitted for—duty of Magistrate - - - - - 445
see MAGISTRATE. 14.
9. ——Perusal by Judge on reserving judgment—of papers touching on matters in question in suit before him, but which were not put in—effect on verdict—production of Registers - - - - - 500
see CHARITY. 2.
10. ——The evidence given by a prisoner under Section 10 of the Arms Exportation Ordinance 18 of 1887, is admissible against

EVIDENCE—*continued.*
a fellow prisoner tried at the same time with him. *Semble.* A prisoner who has exercised his option by refusing to tender himself as a witness under the above section may be allowed on his subsequently changing his mind to tender himself as such [*per Wood*, J.]—REGINA *v.* KHOO KONG PEH - - - - - - 515
11. ——Proof of marriage—books—foreign law—Court will adjourn for further evidence where no great harm done to prisoner - - - - - - - - 630
see BIGAMY. 2.
12. ——Deceased person—charge of fraud - - - - - - - - 590
see FRAUD. 3.
13. ——Rule of law—Informer—accomplice—corroboration - - - - 597
see LOTTERY. 2.
14. ——Proceedings—Commission - 677
see BILL OF LADING.
—— *also* CATTLE DISEASE 666
—— CROWN. 1 - 238
—— EXTRADITION. 2. 3 - 221, 346
—— FALSE EVIDENCE 260
—— GAMING. 3. 5. 392, 615
—— HABEAS CORPUS. 2 - - - 685
—— LABOUR. 2. 3. 396, 524
—— LOTTERY. 3. - 668
—— MAGISTRATE. 1. 9 - 79, 375
—— NEW TRIAL. 1 - 186
—— OFFENCES - - 188
—— PLEA IN BAR - 651
—— RECOGNIZANCE TO KEEP THE PEACE. 1 276
EXCEPTION—*see* BILL OF LADING 677
EXCESSIVE SENTENCE—The Court being satisfied that an—imposed by a Magistrate had caused a failure of justice, reduced the sentence though it was not larger than legally awardable to the offence - - - - - - - - 606
see MAGISTRATE. 18.
EXCISE—There is no power to order the forfeiture of any illicit exciseable article under Section 48 of the Excise Ordinance 4 of 1870, unless there has been a conviction of a person for breach of that section in respect to such illicit article. BAWASAH MERICAN *v.* KOOTYAN CHETTY - 321
see also CHANDU.
—— CROWN CONTRACT 1. 2. - - 648, 680
—— SPIRITS - - 546
EXECUTION—Payment by defendant of amount claimed and costs before - 614
see SHERIFF.
——CREDITOR—Interpleader - 399
see BILL OF SALE. 4.
2. EXECUTION CREDITOR—Assignment—Registration - - 568
see WAKOFF. 2.
—— *also* BILL OF SALE. 1. 7 - - 120, 530
EXECUTIVE COUNCIL—*see* CROWN. 1. - - - - - - - - - 238
EXECUTOR—An Executor [illegible] 401
trator with the Will annexed of a third person deceased, does not [illegible] the Estate of such third deceased; and this, notwithstanding the Administrator purports in his Will, to delegate his powers as Administrator to his Executor. The Executor, after entering into possession of the Estate of such third deceased, under the idea that he represented the said deceased's Estate, cannot on discovering his error and continuing his possession, set up his possession under the Statute of Limitations, against such Estate. TAN CHYE HOON *v.* LIM SEOW CHONG & ANOR. - - - 8
2. ——A person who is an Executor of a Will and also a Trustee thereunder to carry out certain trusts thereby created, at a certain period of his administration may dismiss the character of Executor and assume that of Trustee. Whether he has done so or not, and the time when he did it is a question of fact dependent on the circumstances of each case. A party to an illegal or fraudulent contract can derive no benefit from it, and all persons who obtain possession of trust funds, with a knowledge that their title is derived from a breach of trust, will be compelled to restore such trust funds. A purchaser of land with notice that his title was defective, erected buildings on the land and generally improved the land. Another person, who also *had* notice that the title was defective, subsequently purchased from him, but by reason of the building and improvements, gave more for the land than he otherwise would have. *Held*, though he did not erect the buildings or make the improvments himself still he was entitled in equity—*notwithstanding the notice he had of the defect in title*—to be compensated for the buildings and improvements. The non-service of process on a co-defendant is no ground of objection on the part of a defendant to the progress of a suit. STUBBS *v.* LOH HOH SENG & ORS. - - 409
3. ——Firm—accounts - - 491
see PARTNERSHIP. 2.
4. ——Right of commission—disbursements - - - - - - - 558
see COMMISSION. 1.
5. ——The mere fact of a person being named in a Will as an Executor does not prevent him purchasing the testator's property if he has never taken upon himself the duties of Executor or trustee unless he

EXECUTOR—*continued.*
makes use of his position in order to commit a fraud - - - - - - - 590
see FRAUD. 3.
—— *also* COMMISSION. 1. 558
——— LEGACY - - 88
EXPORTATION—Arms and ammunition [illegible]ited place— - - - - 638
see ARMS AND AMMUNITION. 2.
—— *also* EVIDENCE. 10. 515
EXTORTION—A Magistrate who dismisses a charge of extortion has no power to order the return of the property or re-payment of the money alleged to be extorted. ARMOTHA PULLAY *v.* MARIMOOTOO - 85
EXTRADITION—A Warrant of Commitment merely reciting the fact of a conviction is not a "certificate" or a "judicial document" within the meaning of the Orders in Council of 26th June, 1879, and 31st December, 1883, relating to Extradition. The "British Resident" of Perak, is not a "Minister of State" within the aforesaid orders, and his official seal is no authentication of a document intended to be used under these orders. REGINA *v.* WONG AH KUM - - - - - 150
2. ——The order of a Magistrate, committing a prisoner to prison under the Extradition Act, 1870 [33 & 34 Vic. c. 52] is final; and all this Court has to decide is, whether such order is legal or not; if therefore the evidence before the Magistrate, is deficient in any respect, or the formalities required by the Act have not been complied with, this Court has no power [in an Extradition Case] to remit the case to the Magistrate to supplement the evidence. *Query.* Whether the Supreme Court has power, in any case committed to the Criminal Assizes, to remit the case to the Magistrate to supplement the evidence against the accused? *Query.* Whether a proceeding by a Rule *Nisi* for a *Habeas Corpus* is the proper proceeding within Section 11 of the Extradition Act, 1870? Neither the "Resident" of the East Coast of Sumatra, nor the "Consul-General" for the Netherlands in Penang, are "Ministers of State" within Section 15 of the Extradition Act, 1870, and their seals are therefore no "authentication" of the "Foreign Warrant" or "Depositions" within the meaning of that Act If the "Foreign Warrant" is not "duly authenticated" according to Sections 9 and 15, the proceedings in Extradition fail, and the order of commitment by the Magistrate is illegal, and this Court will order the prisoner to be discharged. Where a Rule *Nisi* was made absolute for a *Habeas Corpus* to issue for a prisoner's discharge under the Extradition Act aforesaid, the Court, in order to be regular in its proceedings, declined to discharge the prisoner then and there, but required the *Habeas Corpus* to issue and be returnable "forthwith" and upon return made, discharged the prisoner. *In re* PIPER - - 221
3. ——Neither the Magistrate enquiring into an Extradition Case under the Extradition Act of 1870 [33 & 34 Vic. c. 52], nor this Court on proceedings thereunder for an *Habeas Corpus* can take *judicial notice* of any Treaty made with any Foreign Power, nor of any Proclamation or Order in Council—by Her Majesty or otherwise—applying such Act to the Treaty, even though such Treaty and Proclamation or Order exist in fact, and are duly published in the *Government Gazette* in accordance with the Act. There *must* be evidence before the Magistrate that the Act has been applied to the Treaty; but the bare production *in evidence* before him, at the enquiry, of the *Government Gazette* containing such Treaty and the Proclamation or Order in Council, is conclusive *evidence* of the Act having been applied. If this is omitted, this Court has no jurisdiction to supply the defect, by receiving the *Government Gazette* in evidence, for it has no power to receive any evidence, but is confined to the evidence and documents which were before the Magistrate. *Query.* Whether the Magistrate has power under the aforesaid Act to receive evidence tendered by the accused in reference, not to his identity or the matter being a political offence—but as to his innocence, and in disproof of the case for the prosecution? *In re* RAJAH SAMSUDIN TUNKU JAKSA - - - - - - 346
4. ——It is no objection in Extradition proceedings that the accused having been arrested on a warrant is temporarily set at liberty and re-arrested on a further warrant. Although the definition of offences under our present Criminal Law may not in all respects be identical with offences under the English Criminal Law, yet being in most offences the same though called under a different name, the Court is satisfied that the facts of the particular case in hand would amount to an offence within both definitions, will not discharge a prisoner simply because the names of the offences are different. Where therefore the Orders in Council of 26th June, 1879, and 31st December, 1883, in the schedules thereto, of extraditable offences, enumerated the offences by names known to the law of England, among others "larceny"—and the accused in the case before the Court was charged with "theft," *Held*, although there may be differences between the definition of "larceny" under the former law,

EXTRADITION—*continued.*
and "theft" under our Penal Code, yet as the facts of the case then before the Court were sufficient to bring it within both definitions, and the offences enumerated in the schedule were, by the note at the beginning thereof to be construed according to the law of this Colony, the accused was not entitled to be discharged on the ground that "theft" was not among the offences mentioned in the schedule, and was more comprehensive than "larceny." The Magistrate is not required under the aforesaid Orders in Council to make an enquiry into the truth of a charge against an alleged fugitive criminal prior to issuing a warrant for his apprehension. It is sufficient under Clause 4 of the former Order in Council that evidence is adduced before him which would be sufficient to justify the issue of a warrant if applied for the apprehension of a person charged with an offence committed within his jurisdiction—and a sworn information by a person in his presence, *ex-parte*, which discloses facts sufficient to justify such latter apprehension, is sufficient to justify the issue of a warrant under Clause 4, aforesaid. *Regina* v. *Weil*, 9 L. R. Q. B. Div. 701, followed. *In re* NG HOCK SENG - - - - - - 368

FAILURE OF COMPANY—Shares—refusal to accept—broker—principals - 561
see CONTRACT. 13.

————OF ISSUE—*see* TESTATOR. 3. - - - - - - 608

————OF JUSTICE—Excessive sentence—sentence reduced - - 606
see MAGISTRATE. 18.

FALSE EVIDENCE—The Crown is not bound in a charge of giving false evidence on two contradictory statements under Section 63 of the Criminal Procedure Ordinance 6 of 1873 to prove that both or either of such statements are or is false. The proviso at the end of that section requiring that *both* statements must be within Section 191 of the Penal Code does not refer to the falsity of the statements, but only to their being on oath. REGINA *v.* MAHOMED 260

FALSE REPRESENTATION—*see* MARRIED WOMAN. 1. - - 85

————STATEMENT—*see* TRADE-MARK. 3. - - - - - - 403

FARMER—*see* CHANDU. 1, 2, 3. - - - - 527,557,627
see also EXCISE - - 321
—— SPIRITS - - - 546

FEE—*see* CONVEYANCER - - 286

FEMALES—Chinese law and custom—Statute of Distributions - - 325
see INTESTATE.

FINAL JUDGMENT—*see* CROWN SUITS - - - - - 688
—— SECURITY. 1. - - 1

FINE—A conviction for the offence of allowing a person in lawful custody to escape, under Section 221 of the Penal Code, cannot be sustained when that person is not legally in custody or is punishable with a mere fine - - - - - 615
see POLICE. 4.

FIRM—Accounts—Executor - 491
see PARTNERSHIP. 2.
—— *also* TRADE-MARK. 1, 2, 3. 269,394,403

FIXTURE—*see* WAKOFF. 2. - 568

FLOOD—Removal of sluice-gate—action in damages - - - - - 459
see TRESPASS. 2.

FOREIGN COURT—Although by Act 15 of 1852, Section 7, the certificate of a judgment of a Foreign Court can only be proved if certified under the seal of that Court, or accompanied by a statement that the Court has no seal, yet if such certificate is admitted without objection, this Court will not, on review, reject such certificate. The Bank having obtained a judgment against the Company in Selangor—after notice of a winding-up order made by this Court in Singapore, of the Company—levied execution at Selangor under order of that Court made on an arrangement between parties, and received a large sum of money thereon; but out of this sum had to make certain payments, ordered by the Court in Selangor to certain Selangor creditors, which left a sum still due to the Bank for balance of their judgment. The Bank sought to prove for this balance in Singapore under the liquidation. *Held*, [by *O'Malley*, C.J.] that the effect of the Companies' Ordinance 5 of 1889 was to fix a trust for equal distribution on all assets of the Company, as from the date of the winding-up proceedings, and that the Bank having had notice of the proceedings, and now seeking to prove thereunder, was bound to refund the whole amount received to the Official Liquidator. *Held also*, [by *O'Malley*, C.J.] that the Selangor Court was a Competent Court and one whose decisions this Court would recognise, and its judgment would have been an answer to the claim of the Official Liquidator, had the Bank not had notice of the winding-up order. *On appeal*, affirming the judgment of the Court below, [by *Wood*, J.] that it was doubtful whether the Selangor Court was a Court properly constituted and one whose proceedings this Court would recognise; but that the so-called order by arrangement of the parties before it, for their own purposes, in absence of other parties interested, was not an order establishing any valid claim of any of such parties, and was no protection to the Bank against the claim of the Official

FOREIGN COURT—*continued.*
Liquidator. *Held*, [by *Pellereau*, J.] that the document put in as the order of the Selangor Court disclosed an order made by a Court having jurisdiction in Selangor; but the so-called order merely gave effect to a private arrangement between the parties before it, and was not such an order to which the trust created by the Companies' Ordinance, 1889, could be made subject, and was no protection to the Bank against the claim of the Official Liquidator for a refund. *Held further*, by both Courts, that the trust created by the Companies' Ordinance, 1889, affected the property at Selangor, a Foreign State, as being assets of the Company. *The Oriental Inland Steam Navigation Co.* v. *The Scinde Railway Co.*, 9 L. R. Ch. App. 557, followed. *In re* THE RAWANG TIN MINING CO., LTD. & THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA - - - 570
——— LAW—Books—Evidence 630
see BIGAMY. 2.
——— POWER—Treaty—judicial notice - - - - - - - 346
see EXTRADITION. 3.
——— STATE—*see* FOREIGN COURT 570
see also LOTTERY. 1. - 126
——— WARRANT—*see* EXTRADITION. 2. 3. - - - - - 221, 346
FOREST RANGER—A Forest Ranger has no power to arrest without a warant, except in the cases specified in Section 11 of the Crown Lands Ordinance 10 of 1883, and if he do so, his act is not an "official act" but a trespass, and any person offering him money to procure the release of the person or thing detained, cannot be convicted of offering a gratification, under Section 165 A. of the Penal Code. REGINA v. LOW LAN SEW - - - - - 76
FORFEITURE OF DEPOSIT—Breach by purchaser - - - - - - 251
see CONTRACT. 4.
——— OF EXCISEABLE ARTICLE—Magistrate no power to order without conviction - - - - - - - 321
see EXCISE.
see also ARMS AND AMMUNITION. 2. - 638
——— CREDITOR. 2. - 559
——— CROWN SUITS - 688
FORM—Excise - - - - - 648
see CROWN CONTRACT. 1.
FORMAL REPLY—*see* PLEA IN BAR 651
FRAUD—Import of goods—tender—vendor - - - - - - - - 481
see CONTRACT. 8.
2. ——Misrepresentation — Company — sale of shares - - - - - - 544
see CONTRACT. 12.
3. ——Where a charge of fraud was alleged against a deceased person, forty-five years after the transaction sought to be impeached, though the plaintiff was then unborn and the deceased person stood in a semi-fiduciary position to him, *Held*, there must be evidence of the fraud before the transaction could be set aside, and suspicion merely was not sufficient. The mere fact of a person being named in a Will as an Executor, does not prevent him purchasing the testator's property, if he has never taken upon himself the duties of Executor or Trustee, unless he makes use of his position in order to commit a fraud. YEOH KIAN GUAN v. SEAH LIANG SEAH - - 590
FRAUDS—STATUTE OF—*see* INTESTATE - - - - - - - 325
see LAND. 1. - - - 82
——— MAGISTRATE. 1. - 79
——— STATUTE OF FRAUDS. 1. 344
FRAUDULENT CONTRACT—*see*—EXECUTOR. 2. - - - - - - 409
FRESH CHARGE—A case which is remitted under Section 34, Clause 4 for hearing "on a *fresh* charge" need not necessarily be sent to, or be heard by, the same Magistrate who heard the original charge. The words "the Court below" in that clause, according to the context and circumstances of the case, may or may not mean the same Magistrate. REGINA v. GOH CHOO LAN - - - - - 407
2. ——Power of Court to direct a re-hearing on—discretionary - - - - 472
see PROPER CHARGE. 2.
——*also* MAGISTRATE. 1. - 79
——PROSECUTION—*see* MAGISTRATE. 12. - - - - - - - 405
FUGITIVE CRIMINAL—*see*—EXTRADITION. 4. - - - - - - 368
FURTHER EVIDENCE—Appeal Court—power to refer case back to other than convicting Magistrate - - - - 386
see MAGISTRATE. 10. -
——*also* GAMING. 3. - 392
——— MAGISTRATE. 10. 14. - 386, 445
GAMING—An ordinary dwelling house in no way fitted up or shewn to be previously used as a Common Gaming House was entered early one morning by the Police under a warrant. The appellant and three other persons were found in the house who attempted to rush out as the Police entered, but were arrested. No gaming of any kind was going on at the time, but on searching the room the Police found on the floor a solitary small bundle of papers which on examination proved to be *Wha Whey* or lottery collecting tickets on some of which names and stakes were written. There was no evidence to shew what a *Wha Whey* was. The appellant was the occupier of the house. The Magistrate convicted him of

GAMING—*continued.*
assisting in a place which was kept or used by the occupier thereof for the purpose of gaming. *Held*, on these facts that Section 11 of the Gaming Ordinance 15 of 1879 applied, and the house must be presumed to be a Common Gaming House, and to be kept by the occupier for the purposes of gaming until the contrary was shewn by him, and that as the contrary had not been shewn as occupier of a place so kept, the appellant must be taken to have assisted in it and the conviction was therefore right and should be affirmed. *Regina* v. *Abass*, 3 Kyshe, 184, distinguished. REGINA *v.* YEAP HOCK TIN - - - - - - - - 237

2. ——Search for appliances of—Contrivances—Arrest—Action in damages 240
see POLICE. 2.

3. ——On the trial of a prisoner for being the occupier of a house kept or used for the purpose of a Common Gaming House, the evidence whether of the prisoner himself or others given at a previous trial of persons found in the house and convicted of being present in a Common Gaming House is not admissible. It is unsafe for a Magistrate to convict a person of being the occupier of a Common Gaming House solely on the statutory presumption of its being a Common Gaming House because persons are seen or heard to escape from it on the approach of the Police—where there is *some* evidence in disproof of it. *Query*. Has this Court power to send a case back under Section 34, Clause 4 of the Appeals Ordinance 12 of 1879, to a Magistrate *other than* the convicting Magistrate? REGINA *v.* KHOO SEANG JU - - - - - - - - - 392

4. ——A Club at which there is a feast given and those present are *all* guests, is not for the time being, a Common Gaming House within Section 3 of the Gaming Ordinance 5 of 1888, though gaming goes on there among them—the guests not being "the public or a class of the public,"—and others not being guests having then no "access" to the Club. *Semble*. A Club to which all its members have access is within the Ordinance. The difference between a Club and a private house pointed out. REGINA *v.* CHAN AH TYE & ORS. 518

5. ——When appliances of gaming are found in a house, though a private house lawfully entered under the Gaming Ordinance 5 of 1888, the Magistrate and this Court *must* presume under Section 14, until the contrary is shewn, that the house is a Common Gaming House—*Per O'Malley*, C.J.—Very little evidence is sufficient to rebut this presumption. *Per Pellereau*, J.—As it is the law that that presumption shall be made, clear and full evidence is required to rebut the presumption—but what is such

GAMING—*continued.*
evidence depends on the circumstances of each case. The mere fact that the prisoners found gaming were Malays, and one of them is a young *unmarried* girl, and the manners, habits, and customs of Malays is not to allow such a girl to be associated with the *public*, does not of itself rebut the presumption. *Query*. What is meant by a "class of the public" in Section 3 of the Ordinance? REGINA *v.* DIN & ORS. - - - 615

6. ——In gaming cases, warrant on which Police act, should accompany appeal 668
see LOTTERY. 3.
—— *also* LOTTERY. 1. 2. 126, 597

GENERAL AVERAGE CONTRIBUTION—*see* CONTRIBUTION - - 528

GIFT—Wakoff—Bequest - - 101
see LAND. 2.
—— *also* TESTATOR. 3. - - 608

GOOD BEHAVIOUR—Recognizance—Evidence as to character - - 375
see MAGISTRATE. 9.

——FAITH—*see* POLICE. 2. - 240

GOODS—Importation of—tender—fraud - - - - - - - 481
see CONTRACT. 8.
—— *also* TRADE-MARK.

——RECOVERY OF—*see* NEW TRIAL. 1. - - - - - - - - 186

GOVERNMENT GAZETTE—Treaty—Proclamation—Order - - - 346
see EXTRADITION. 3.

GRATIFICATION—OFFERING—*see* Forest Ranger - - - - - 76
see MAGISTRATE. 8. - 350

GRIEVOUS HURT—A person who inflicts a wound on another is answerable for the results, if the results follow without unreasonable conduct on the part of the man wounded. Where, therefore the prisoner inflicted a wound on the prosecutor, which in itself was not a serious wound, but the prosecutor omitted to obtain proper and immediate remedies, by reason whereof the wound got into an unhealthy state and only after it got to that stage the prosecutor was sent to the hospital where he was kept by the Medical Officer for treatment for twenty-three days during which time he was unable to follow his ordinary pursuits, *Held*, that the foul state of the wound and the consequent detention in hospital must be considered the result of the prisoner's act, and the case was therefore one of grievous hurt under Section 325 of the Penal Code, and not simple hurt under Section 323, and a Magistrate's conviction for the latter could not be sustained as he had no jurisdiction over a case of grievous hurt. SAHAT *v.* HAJEE BRAHIM - - - - - 337

GROUNDS OF APPEAL—*see* LAND. 13. - - - - - - - - 533

GUARDIANSHIP—The Court in deciding who is a fit and proper person to be appointed guardian of a native infant is not bound by any hard and fast rule of the law of England on the subject, but will under the words "so far as circumstances will admit" in the Charter of 1855, take into consideration the law, religion, practice, or custom, of the nationality or class to which such infant belongs, on the subject of guardianship. *Choa Choon Neoh* v. *Spottiswoode*, 1 Kyshe, 211, and *Yeap Cheah Neo* v. *Ong Cheng Neo*, 6 L. R. P. C. 381, s. c. 1 Kyshe, 326, discussed. The Charter of 1855 by the combined operation of Ordinance 6 of 1878 and Ordinance 3 of 1878, Section 83, is still in force in this Colony so far as it is not inconsistent with the latter Ordinance and the Ordinances 4 and 5 of 1878. *Yeap Cheah Neo* v. *Ong Cheng Neo*, [suprà] as to this point, followed. *In re* SINYAK RAYOON & ANOR. - - - - - - - 329

GUILTY KNOWLEDGE—*see* RECEIVING STOLEN PROPERTY. 2. - - 388

HABEAS CORPUS—This Court has jurisdiction to issue a Writ of *Habeas Corpus* and discharge a prisoner thereon either absolutely or on bail as the facts might warrant, where the charge pending against him before a Magistrate, is adjourned from time to time over such a period of time, combined with the absence of evidence, as would make it a serious wrong to him to be longer detained, but the exercise of this jurisdiction is entirely in the discretion of the Court and will not be exercised except in cases of an unusual nature. Where prisoners were arrested and charged before a Magistrate with conspiracy, and with the exception of formal evidence are remanded into custody from time to time for a period of three weeks without any further evidence being adduced against them—but it was shewn that the case was of a peculiar nature, and evidence was being collected, even from a Foreign country, and that such evidence, if obtained, would certainly implicate the prisoners, but their discharge might possibly hinder the obtaining of such evidence and frustrate the ends of justice, *Held*, though the period of detention without proof being adduced was unusually long, yet it was not a case in which this Court would exercise its jurisdiction and discharge the prisoners whether on bail or otherwise. *In re* KOH AH POW & ORS. - - - - - 287

see also EXTRADITION.

2. ——A warrant issued by the Protector of Chinese under the Women and Girls Protection Ordinance 14 of 1888 is *not* conclusive evidence, under Section 15, of the facts stated therein, and this Court is not deprived thereby of its jurisdiction to control the actions of the Protector and of going behind his warrant to ascertain his proceedings and the grounds of his order. The Protector, in making the "due enquiry" under Section 6 of the Ordinance, can only do so after notice to all parties interested, taking the evidence given at such enquiry on oath and permitting the witnesses to be cross-examined. *In re* LAM TAI YING - - - - - - - - 685

HACKNEY CARRIAGE--A conviction for letting a hackney carriage to hire the license of which has been cancelled, can only be sustained where the license has not only been cancelled, but notice [in writing] thereof given under Section 11 of the Hackney Carriage Ordinance 5 of 1879 to the owner. The driver of a *first* class hackney carriage is bound as much as the drivers of a carriage of any other class to take out a license as such driver: and the word "himself" at the end of the proviso to Section 21 of the aforesaid Ordinance is confined to the owner who acts himself as driver and does not include another person who might act as driver for him—and the driver cannot be said to be "using" the carriage within the meaning of the proviso when he is driving for the owner. The fact that for ten or twelve years *first* class carriage drivers have not been required to take out a license cannot alter the case. The only exception in favour of a *first* class carriage driver is that he is not required to carry any badge. A carriage which is engaged by a person for a month or any fixed period exclusively for his own use is by that very fact taken out of the category of "hackney carriages" and does not nor does its driver require to be licensed. REGINA v. ISMAIL & ANOR. - - - - - - - - 234

HARBOURING—*see* LABOUR.

HEARING OF APPEAL—Not necessary for an appellant from the decision of a Magistrate to be present at— - 638

see ARMS AND AMMUNITION. 2.

————ORDER OF—*see* ORDER OF HEARING - - - - - 345

HEIR—Where an interest or estate vests in a person, as the "heir" of a deceased, prior to Act 20 of 1837, the fact,—that such "heir" did not insist on his rights, and was dead, [at the time the question arose between his descendants and others] so that he could not personally be deprived of such estate—does not prevent the case falling within the second proviso of the Act, and the property [lands and shops, which were still in the same condition as they were at the time the deceased died] cannot, even at this date, be treated as chattels real. *Query*. Is Act 20 of 1837, retrospective? *In the goods of* MUCKDOOM NINA MERICAN - - - - - 119

HINDU CUSTOM—*see* LIBEL - 364
——— HUSBAND AND WIFE—The terms on which a Hindu husband and wife should separate might be the subject of reference to arbitration; and this Court has jurisdiction to order an award—which directs the wife to return to her husband, or in default, that she or her parents and relatives who joined in the reference should restore to the husband certain jewelry which were given by the husband to the wife at the time of marriage to be filed in Court with a view to execution in so far as it orders the restoration of the jewelry. *In re* ARMOOGUM & ORS. - - - - 327
HONEST BELIEF—*see* POLICE. 2. 240
HOUSE—Promise to build on marriage - - - - - - - - 463
see PROMISE. 1.
—— *also* LOTTERY. 3. - 668
HURT—*see* GRIEVOUS HURT - 337
HUSBAND AND WIFE—Desertion—property - - - - - - 376
see WIFE.
—— *also* HINDU HUSBAND AND WIFE - - - - 327
——— LOTTERY. 3. - 668
——— MAHOMEDAN MARRIAGE ORDINANCE. 1. 98
——— MARRIED WOMAN. 1. 2. 3. - 122, 124, 225
——— MARRIED WOMAN. 1. 2. - - - 85, 162
——— PROMISSORY NOTE. 1. 6
IGNORANCE—*see* NEW TRIAL. 1. 186
——— OF LAW—Negligence—Inadvertence - - - - - - - 279
see BILL OF SALE. 3.
2. ——Inadvertence—Registration 399
see BILL OF SALE. 4.
ILLEGAL CONTRACT—*see* EXECUTOR. 2. - - - - - - - 409
——FEE—*see* CONVEYANCER - 286
ILLICIT ARTICLE—Forfeiture - - 321
see EXCISE.
—— *also* ARMS AND AMMUNITION. 2. - - 638
——— CHANDU
——— SPIRITS - - 54
——INTERCOURSE—*see* MARRIED WOMAN. 2. - - - - - - 162
IMMIGRANT—*see* IMMIGRATION 604
see LABOUR.
—— MAGISTRATE. 18. - 606
—— RECEIVING STOLEN PROPERTY. 2. - - 388
IMMIGRATION—An immigrant whose passage-money has been paid to the ship-owner by another person, is not an immigrant "whose passage-money has not been paid" within Section 14 of the Chinese Immigration Ordinance 4 of 1880, and a person cannot under such circumstances, be convicted under that section for inducing such an immigrant to go elsewhere than the depôt in which the Protector has placed him. FOX *v.* TAN HENG WEE - 604
see also LABOUR.
IMPORT OF GOODS—Tender—Fraud - - - - - - - - 481
see CONTRACT. 8.
IMPROVEMENTS—Action for recovery of Land—Ejectment - - - 353
see RELIEF.
2. ——Compensation for - - 409
see EXECUTOR. 2.
—— *also* REPLY - - 416
INADVERTENCE—Ignorance of law—Negligence - - - - - - 279
see BILL OF SALE. 3.
2. ——Ignorance of law—Registration - - - - - - - 399
see BILL OF SALE. 4.
INCREASED RENT—Failure to quit—notice - - - - - - - 78
see RENT. 1.
INDEMNITY—Loss—agreement 158
see CONTRACT. 3.
INDIAN ACT—*see* ACTS.
INFANT—Native laws and customs—Charter of 1855 - - - - 329
see GUARDIANSHIP.
INFECTIOUS DISEASE—*see* CATTLE DISEASE - - - - - - 666
INFORMATION—Writ of Summons—Crown Suits Ordinance - - 680
see CROWN CONTRACT. 2.
INFORMER—Evidence—accomplice 597
see LOTTERY. 2.
—— *also* LOTTERY. 3. - 668
INJUNCTION—*see* CONTRACT. 9. 484
see TRADE-MARK.
——TRESPASS. 1. - - 443
INJURY—*see* RIPARIAN PROPRIETOR 4
INSOLVENCY—*see* BANKRUPTCY.
INTEREST—Estate—Chattels real - 119
see HEIR.
2. ——CAPITAL - - - 491
see PARTNERSHIP. 2.
3. ——Personal Property—Loan—Security - - - - - - 620
see BILL OF SALE. 9.
—— *also* BILL OF SALE. 5. 471
——— NEW TRIAL 186
——IN ADVANCE—*see* CREDITOR. 2. - - - 559
——IN LAND—Tender—lease—re-entry - - - - - - - 446
see CONTRACT. 7.
——*also* WAKOFF. 2. - 568
INTERPLEADER—Distress warrant—claim to goods - - - - - 97
see DISTRESS.
2. ——Execution-creditor - 399
see BILL OF SALE. 4.
——*also* BILL OF SALE. 7. 530

INTERROGATING PRISONER—Magistrate no power—such power conferred on Supreme Court only - - 472
see PROPER CHARGE. 2.
INTESTACY—*see* TESTATOR. 3. 608
INTESTATE—Where there are descendants, but no children living of an Intestate, on the proper construction of the Statute of Distributions [29 Car. II. c. 3, Section 7] the estate is to be divided into as many shares as there were *children* who had left living descendants and not according to the number of the descendants themselves. The descendants of each such child take as together representing such child and the share only of such child. *Re* Ross' Trusts, 13 L. R. Eq. 290, followed. The contrary opinions expressed in Text Books of authority must be considered incorrect and this Court is bound by the above decision. In distributing the estate of a person dying intestate domiciled here and leaving property here, the Statute of Distributions is the only rule, and the exclusion of females in sharing in such estate according to Chinese Law and Custom will not be recognised. LEE JOO NEO *v.* LEE ENG SWEE - - - - - - - - 325
see also WIDOWS - - 380
IRREGULARITY—Admission of evidence—Magistrate - - - - - 230
see LABOUR. 1.
2. ——Magistrate's Court—Case heard in private—conviction quashed 350
see MAGISTRATE. 8.
——*also* CROWN CONTRACT. 2. - - 680
JOINT ADMINISTRATION—Chinese widows—intestacy - - - 380
see WIDOWS.
——EARNINGS—Husband and wife—separate estate - - - - - 124
see MAHOMEDAN MARRIED WOMAN. 2.
——TENANCY—*see* PARTITION 74
——TENANTS—*see* LEASEHOLD PROPERTY - - - - - - - 584
JUDGE—A Judge is not liable in the form of an action for damages for acts done or words spoken in his judicial capacity unless such acts or words are done or uttered without jurisdiction and with knowledge of such want of jurisdiction. The principle also covers things omitted to be done—special plea—defence - - - - - 437
see CONSULAR COURT. 2.
—— *also* CHARITY. 2. - 500
JUDGMENT—Arrest before—security—mesne process - - - - - 1
see SECURITY. 1.
2. ——Recovery of—plaintiff—action for malicious prosecution—non-payment of damages by defendant - - - - 433
see MALICIOUS PROSECUTION.
JUDGMENT—*continued.*
3. ——Certificate of—proof—seal 570
see FOREIGN COURT.
4. ——Respondeat Ouster - 651
see PLEA IN BAR.
see also CROWN SUITS - 688
JUDICATURE ACTS—*see* CONTRACT 4. - - - - - - - - 251
JUDICIAL NOTICE—Treaty—foreign power - - - - - - - 346
see EXTRADITION. 3.
JURISDICTION—Defendant—arrest—security - - - - - - - 1
see SECURITY. 1.
2. ——Probate Division of the High Court of Justice in England—Common law—Equity - - - - - - 251
see CONTRACT. 4.
3. ——Consular Court at Bangkok—power of Supreme Court—writ of mandamus - - - - - - - - 274
see CONSULAR COURT. 1.
4. ——Supreme Court—detention of prisoners—Magistrates' Courts - - 287
see HABEAS CORPUS. 1.
5. ——Separation of husband and wife—arbitration - - - - - 327
see HINDU HUSBAND AND WIFE.
6. ——Husband and Wife—desertion 376
see WIFE.
7. ——Magistrate—Recognizance to keep the Peace - - - - - - 389
see RECOGNIZANCE TO KEEP THE PEACE. 2.
8. ——Suit for recovery of land—customary land-holder - - - - - 413
see LAND. 9.
9. ——Agreement that disputes thereunder be referred to arbitration—jurisdiction of Court not ousted without express words - - - - - - - 596
see ARBITRATION. 3.
—— *also* ARMS AND AMMUNITION. 2. - - 638
——— CONSULAR COURT. 2. 437
——DIVORCE. 2. - 602
——FOREIGN COURT. 570
——HABEAS CORPUS. 2. 685
——RECOGNIZANCE TO KEEP THE PEACE. 1. - 276
JURY—A Judge has power under Section 55 of the Criminal Procedure Ordinance 6 of 1873 on amending a charge, to order the Jury to be discharged, and a new trial had. The words "new trial" in the section mean a new trial in its ordinary legal acceptation; and is not bound to be had before the same Jury. REGINA *v.* SUPRAYEN - 258
see also MISAPPROPRIATION 441
——PIRACY JURE GENTIUM - - - 169
——PLEA IN BAR - 651
JUSTICE OF THE PEACE—A Justice of the Peace sitting in a preliminary enquiry

JUSTICE OF THE PEACE—*continued.*
has [notwithstanding Ordinance 3 of 1878, Section 1, which makes his sitting a "Court"] a discretion, whether such enquiry should be had in private or public: such a discretion however should be exercised only with a view to the interests of the public and not in reference to the religious scruples of any class of the Community. *Query.* Have Advocates and Solicitors under the combined operation of Sections 1, 51, and 55, of the Courts' Ordinance 3 of 1878, a *right* to appear before Justices? HAJEE SHAIK ABDUL CADER *v.* AISHA & ORS. *In re* KYNNERSLEY - - - 151
see also POLICE. 2. - 240
KALI—Entry in marriage book—promise in consideration of marriage - 583
see MARRIAGE SETTLEMENT.
KNOWLEDGE—*see* CONTRACT. 12, 13 - - - 544, 561
KONGSI—*see* CHARITY. 2. - 500
KUNDURI—*see* DEVISE - - 212
LABEL—*see* TRADE-MARK.
LABOUR—The requirement towards the end of Section 13 of Ordinance 3 of 1887, of a notice in writing, applies *only* to the *last* of the alternative offences mentioned in that section, viz., the retaining of the men in service. A Magistrate might after the case for the prosecution has closed and the prisoner has addressed the Court in his defence, allow a further witness to be called by the prosecution, provided he gives the prisoner an opportunity to explain away or rebut by evidence or otherwise, such further evidence. *Ong How* v. *Abdulrahman*, Straits L. R. 354, and *Chooashary* v. *Cassim*, 3 Kyshe, 98, followed. But even if it were irregular and improper for the Magistrate to have done so, still it is no ground for quashing a conviction, unless there is not sufficient other evidence to support it, or injustice has thereby been done. Whether there is that sufficient other evidence or not, and whether injustice has been done or not, is for this Court on appeal to determine, under Section 33 of the Appeals Ordinance 12 of 1879, and not for the Magistrate. *Query.* Whether Ordinance 5 of 1870 applies to the Police Courts? The words "knowingly" and "so bound" in Section 13 of Ordinance 3 of 1877, apply only to the contract of service, and not to the period of the contract—so held by the Court of Appeal. TEO ANG BOI *v.* HIA MA LAI - - - - - 230
2. ——It is not sufficient for the prosecution in the case of a charge against a prisoner under Section 13 of the Crimping Ordinance 3 of 1877 to shew that he seduced or attempted to seduce a labourer under contract of service to leave his employer and seek for *employment generally*; before
LABOUR—*continued.*
there can be a conviction under that section it must be shewn that the labourer was seduced or attempted to be seduced in order to serve *some particular person.* In prosecutions under the said section, the contract for service should itself be produced; and it is not sufficient to give extrinsic evidence of its terms. RAMSAMY *v.* LOW - 396
3. ——The mere enticing of a labourer from the service of his employer is no offence under Section 13 of Ordinance 3 of 1877, and it is necessary for the prosecution to shew by evidence that the labourer was being enticed in order to enter into service elsewhere. It is *not* however necessary to shew that it was to enter the service of any particular person either by name or designation—[*per Pellereau & Goldney*, J.J., *Wood*, Acting C.J., dissenting.] *Ramsamy* v. *Low*, corrected and approved of. BROWN *v.* VENGADASHELLUM - - - 524
4. ——A Magistrate has no power on conviction of an employer for an assault on his servant to order the contract for service to be cancelled. - - - - - 606
see MAGISTRATE. 18.
——*also* IMMIGRATION - 604
——RECEIVING STOLEN PROPERTY. 2. - 388
LAND—A memorandum of purchase of lands, at public auction, which does not on its face shew what the conditions of sale are,—or at least something connecting it with conditions of sale on a separate paper—is not a sufficient contract within Section 4 of the Statute of Frauds, 29 Car. II. c. 3. It is the duty of a plaintiff, before he sues upon a contract for the sale of land, to satisfy himself that there is a sufficient contract under the Statute of Frauds—and although the defendant may not plead the Statute as required by Section 175 of the Civil Procedure Ordinance, but at the trial is allowed with the plaintiff's consent to amend his defence, by doing so—he [plaintiff] will be ordered to pay the costs of the action, even if the case goes off solely on account of the Statute. NANA EBRAMSAH *v.* KAT BAWA & ANOR. - - - 82
2. ——A testator, being possessed of a large piece of land which as a fact were five lots comprised in *five* grants, but believing the whole piece was comprised in *four* grants, by his Will declared, that "of the *four* grants of lands situate in Toh Kramat, I have converted *one* grant into a Wakoff to bury my children and grand children and relations, and the *three* grants are the portions of my ten children [whom he designated]—they will take the produce thereof, and divide and take in equal shares, but they shall not sell nor mortgage the land." *Held*, the gift of the lands to

LAND—*continued.*

the children, was not void on the ground of uncertainty—that the testator did not die intestate as to the lot comprised in the *fifth* grant, but such lot passed with the "portion" for the children. That the whole clause was not void as tending to a perpetuity, but the restraint on alienation alone was void—and the ten children [to the exclusion of all his other children] took as estate in fee, as tenants in common, in the lands referred to as their "portion" *inclusive* of the lot in the *fifth* grant. MAHOMED GHOUSE *v.* HAJEE MAHOMED SAIBOO & ANOR. - - - - - 101

3. ——Principles of assessment—machinery—enhanced value—buildings. - 103
see ASSESSMENT.

4. ——Malay document—registration—deed. - - - - - - - 178
see DECLARATION OF TRUST.

5. ——In a suit relating to title to land where the equities are otherwise equal, the Court considers the party who has possession of the Title Deeds as having the better equity. *Lloyds Banking Co.* v. *Jones*, 29 L. R. Ch. Div. 221, followed. LANGAN & ORS. *v.* LEE CHENG KEAT & ORS. - 154

6. ——The custom in Malacca for a cultivator of land to pay a tenth of the produce to the proprietor of the land in lieu of rent—and as long as the cultivator does so he cannot be ejected—is a good and reasonable custom, and one this Court will recognise and uphold. ABDULLATIF *v.* MAHOMED MEERA LEBE - - 249

7. ——Action for recovery of—Ejectment - - - - - - - - 353
see RELIEF.

8. ——Purchase of—notice—title defective—compensation—improvements - 409
see EXECUTOR. 2.

9. ——The Malacca Land Ordinance 9 of 1886, does *not* make registration under Section 6 thereof, conclusive proof that the person whose name is so registered, is the owner of the land therein referred to. To oust therefore, the jurisdiction of the Supreme Court by Section 9 of the Ordinance from entertaining a suit for the recovery of the land, it must be shewn that the party objecting to the jurisdiction is a "customary land-holder" in respect of the land, and that the Collector of Land Revenue had, on his application, and after due publication of notice and due enquiry, made an order declaring that the applicant was so entitled, and such order had been registered under Section 6 by his directions, and a copy thereof furnished to the applicant. The mere production of the Register, shewing that the party objecting to the jurisdiction is therein registered as the owner of the land—such registration being

LAND—*continued.*

undated and unsigned—is not sufficient. JAYAH BIN KACHI & ANOR. *v.* SAHBIA & ORS. - - - - - - - 413

10. ——A person who is turned out of possession of lands on which he under the belief the lands were his, has made improvements, is entitled to sue as *plaintiff* in equity for compensation on account of such improvements - - - - - - 416
see REPLY.

11. ——A party entitled to land is entitled to the Title Deeds thereof, and the proper person to sue in detinue for their detention is the person entitled to the legal interest in the land - - - - - - - 444
see ADMINISTRATION. 3

12. ——The plaintiffs put up several lots of land for sale by public auction, subject to certain conditions of sale which were in English. The seventh condition was as follows: "The purchaser of each shall be satisfied with the execution of a conveyance by the vendors having the effect of conveying the fee simple in possession free from incumbrances by buying the residue of a term of years and the reversion expectant on the expiration thereof, and shall not require any title to be shewn of the term of years other than the production of such of the leases and counterparts as are in the possession of the vendors, nor make any objection with grounds of defect or want of title to the several terms of years. Intending purchasers or their Solicitors may see the deeds of the vendors' title on any day before the sale at the office of the vendors' Solicitors, and each purchaser shall be deemed to have bought with notice of the state of the title." Twelve of these lots were purchased by defendant who partly in consequence of the discovery that there were outstanding leases over the land, and partly because certain of the lots were adversely claimed by one M. refused to complete the purchase. The plaintiffs tendered the defendant a Conveyance of the twelve lots [which adjoined each other] as one whole piece, and on the defendant refusing to complete the purchase, the plaintiffs sued him for specific performance. *Held* firstly, the seventh condition did not clearly shew there were outstanding leases, and was misleading; 2ndly, that it being in English only, a language the defendant did not understand, he could not be taken to have known it or be bound by it; thirdly, that the sale though in twelve lots was really of one whole piece and that as certain of the lots were adversely claimed, and the plaintiffs at most could make title of only some of the lots, the defendant was justified in refusing to complete the purchase and this Court would not decree the same to be

LAND—*continued.*
specifically performed. *Held on appeal* [reversing the decision of the Court below] that the condition being in the English language merely, was no ground for not holding the defendant bound, as it was his duty to get it explained to him in any other language, if he so wished it; that the adverse title set up by M. which was not admitted by the plaintiffs, and had not been established at law, was also no ground for excusing the defendant; that the sale was not of one whole piece, but of twelve lots, and the inability of the plaintiffs to make a title to some lots did not excuse the defendant from accepting the others; and that a possessory title of over 12 years was a sufficiently good title and one that this Court would force on a purchaser—per *Pellereau & Goldney*, J.J., the seventh condition did not clearly shew there were outstanding leases and was misleading—per *Wood*, J., that it did shew some leases were outstanding and was not misleading. ISMAIL BIN SAVOOSAH & ORS. *v.* HAJEE ISMAIL - - - - - - 453

13. ——The defendant, as Collector of Land Revenue, under Ordinance 4 of 1886, caused certain lands and house of the plaintiff to be attached for arrears of rent. Sometime before the attachment, he had made search in the Land Office to find out who was the owner of the lands and house, but he made no further search immediately before proceeding to a sale. In the interval, the plaintiff, the owner, had registered her title, but she was not aware the defendant intended selling the property. The owner not having been found, the defendant sold the property. *Held*, [reversing the judgment of the Court below] that he was not guilty of negligence. *Held also*, that as the owner could not be found, the defendant was not guilty of negligence for not addressing the notice to her, but to the "present occupier" of the house. *Held also*, that as the owner could not be discovered, it was not possible to discover her "last residence," and therefore, there was no negligence on the part of the defendant in not putting up the notice [under Section 5 of the above Ordinance and Rule III. made in pursuance of the Ordinance] on such residence, but, *Held further* [reversing the judgment of the Court below] that "his house," mentioned in Rule III. was not the last residence of the owner, but the house with reference to which the claim for arrears is made, and a notice placarded on that house was a notice "published in the prescribed manner" within Section 5. It is not sufficient in a memorandum of appeal simply to state that the appeal is for "wrong determination in point of

LAND—*continued.*
law," but the grounds of the appeal should be set forth. SHERIFA SHAIKA *v.* HAUGHTON - - - - - - 533

see also FOREST RANGER 76
——— LIMITATION. 1. - 311
——— MAHOMEDAN MARRIED WOMAN. 3. - 225
——— MARRIED WOMAN. 1. - 85
——— PROMISE. 1. - 463
——— RIPARIAN PROPRIETOR - 4
——— SEA SHORE - 10
——— TESTATOR. 3. - 608
——— TRESPASS. 1. 2. 443, 459
——— WAKOFF. 2. 3. 568, 675

LAND—INTEREST IN—
see CONTRACT. 7. - - 446
—— WAKOFF. 2. 568
——— SPECULATION—Company—Directors—Purchase - - - 193
see COMPANY. 1.

LANDLORD—No power by mere notice to raise rent on failure of quitting premises—distress - - - - - 78
see RENT. 1.

LANGUAGE—Sale of lands—Conditions in English - - - - - 453
see LAND. 12.
—— *also* CATTLE DISEASE - 666
——— LAND. 13. - 533

LARCENY—*see* EXTRADITION. 4. 368

LAW—RULE OF—Mercantile Contracts - - - - - - - 512
see CONTRACT. 11.

LEASE—*see* CONTRACT. 7. - - 446
—— *also* PRIVITY OF CONTRACT - - - 338

2. ——Covenant—seal—limitation - 587
see RENT. 5.

LEASEHOLD PROPERTY — Bequests of leasehold property "to T. C. H. and to his male child or children," and in case of his dying without issue, gift over to his brother. At the date of the Will T. C. H. had no child. *Held* [by *Goldney*, J. and by Court of Appeal] that the rule in *Wild's Case*, 6 Coke's Rep. 17 was not applicable, and T. C. H. took only a life estate with remainder to his sons born [at date of action] or to be born, as joint tenants, and living at time of his death. The weight of authority preponderates in favour of the proposition that the rule in *Wild's Case* is not applicable to personal property. TAN CHIN HOON *v.* TAN BOON TAY & ORS. 584

LEAVE TO AMEND—*see* STATUTE OF FRAUDS - - - - - - - 344

——TO APPEAR—*see* CROWN SUITS 688

——TO DEFEND—Summons in Chambers—Crown Suits - - - - - 680
see CROWN CONTRACT. 2.

LEGACY—A legatee does not lose his right to a legacy, by voluntarily intimating without any valuable consideration that he never intends to take it, and even dies without changing his mind on the point, but without having actually executed a release thereof—and his executor or administrator is entitled after his death to claim payment of the legacy. It makes no difference that such legatee is the executor of the testator, and he always refused to credit himself with the legacy. A testator bequeathed "to my brother Vapoo Merican Noordin whom I appoint the executor and trustee of this my Will" a legacy of $4,000 "for his own use absolutely." *Held*, the legacy was annexed to the office of executor, and the executor was not entitled to charge the usual executor's commission in addition to the legacy. *Calvert* v. *Sebbon*, 4 Beav. 222, followed. *Compton* v. *Bloxham*, 2 Coll. Ch. Rep. 201, distinguished. NOOR MAHOMED MERICAN & ANOR. *v.* NACODAH MERICAN & ANOR. 88

see also ADMINISTRATION.

——— COMMISSION. 1. 558

——— EXECUTOR.

LEGAL CUSTODY—Escape of prisoner when not in—conviction under Section 221 of the Penal Code cannot be sustained 615

see POLICE. 4.

LEGATEE—*see* LEGACY - - 88

LESSEE—*see* SEA SHORE - - 10

LETTERS OF ADMINISTRATION—Revocation—power of attorney - 191

see ADMINISTRATION. 1.

2. ——Detention of - - - 444

see ADMINISTRATION. 3.

LIBEL—The defendants, certain Hindu headmen or Panchayet, to whom a charge against the plaintiff, one of their caste, had been submitted for enquiry and decision, found the charge proved and decided that unless the plaintiff underwent purification he was to be excommunicated from their temple and caste: the plaintiff failed to purify himself and was thereupon formally excommunicated. Thereafter the defendants as such headmen, procured a *tom tom* to be beaten in public, and the other members of the temple or caste publicly informed of the decision and excommunication, and warned from associating with, or selling to, or buying from, the plaintiff. The plaintiff sued the defendants for libel and slander. *Held*, the publication of the decision and excommunication was privileged by the occasion, and in the absence of express malice, the action was not maintainable. *Held* further, that the plaintiff also had no cause of action as regarded the alleged slander by publicly announcing the decision and excommunication, as in so far as it was made to members of the temple or caste, it was privileged, and in so far as it was made

LIBEL—*continued.*

to outsiders [who neither were prevented nor had in fact refused to associate with, or buy from, or sell to, the plaintiff] he had sustained no special damage. COOPANG CHETTY *v.* VEERA PADIACHEE & ORS. 364

LICENSE—In a prosecution for keeping an unlicensed ale-house, the prosecution must shew the house was *kept* by the prisoner; evidence of her acts which are consistent with that fact, or with her being merely a *servant* in the place will not suffice. *Semble.* The *onus probandi* on such charge, is on the prosecution, to shew the prisoner had not a license. *Municipal Commissioners* v. *Chuah Seng & ors.*, 3 Kyshe, 140, considered. REGINA *v.* GREEN - 401

2. ——On a charge of keeping an unlicensed brothel under Section 10 of Ordinance 14 of 1888, it is for the *accused* to prove he has a license and *not* for the prosecution to shew he has not. Although the fact of having such a license is not peculiarly within the knowledge of the accused, yet, as it is so conveniently within his knowledge and so easily produced by him, it is for him to produce it. REGINA *v.* MAT AKIB & ANOR. - - 665

see also HACKNEY CARRIAGE 234

———SPIRITS - - 546

LIFE ESTATE—Remainder—Wild's Case - - - - - - - 584

see LEASEHOLD PROPERTY.

——— INTEREST—Lands—alienation—issue - - - - - - - 608

see TESTATOR. 3.

LIMITATION—The words "cause of action arose" in the Limitation Act 14 of 1859 imply that there must be a person *in esse* capable of suing before the Act can begin to run. Where therefore a person takes possession of land *after* the death of the rightful owner and holds the same for *over* twelve years he acquires *no* title under Section 1, Clause 12 of the Act if administration has *not* been taken out, and the Act only begins to run in such a case from the date of the grant of such administration. The rule is the same in this respect as to pure personalty and chattels real; but such land even in the hands of the person so in possession is of the nature of chattels real under Act XX. of 1837, and the administration of the rightful owner may maintain ejectment for it at any time *within* twelve years of the *grant* of administration. The Statute 3 & 4 Wm. IV. c. 27, Section 6, has no application to such a case as it is covered by the language of Section 1, Clause 12 of the aforesaid Act 14 of 1859. *Jemalah* v. *Mahomed Ali & ors.*, 1 Kyshe, 386, over-ruled. The passage and Indian decisions cited in *Thompson on Limitation* [2nd Ed.] 150, to the effect that the plain-

LIMITATION—*continued.*
tiff must shew actual possession within twelve years have no authority here inasmuch as they rest on the provisions of the Procedure Act 8 of 1859, Sections 32, 525, Clause 4, and such Act [Section 385], is expressly confined to Bombay, Bengal and Madras, and is not in force in this Colony. Those decisions are also no authorities here on the words "cause of action rose," in the Limitation Act 14 of 1859, but the English authorities on Statute 21, Jas. I. c. 16, and the old law of Limitation prior to 3 & 4 Wm. IV. c. 27. are. *Query.* [*Per Wood*, J.] Whether the rule in England in respect to the Court not acting on the uncorroborated but uncontradicted statement of a living claimant against the estate of a deceased person is so general, fixed, and inflexible as declared by *Jessel*, M.R. and *Baggallay*, L.J. in *re* Finch, 23 L. R. Ch. Div. 267? ISMAIL BIN SAVOOSAH *v.* MADINASAH MERICAN & ANOR. - - - - 311
2. ——Action for rent—covenant—lease - - - - - - - - 587
see RENT. 5.
see also ACTS.
——— AGREEMENT. 1. 136
——— MAHOMEDAN MARRIED WOMAN. 3. - 225
——— RIPARIAN RIGHTS 450
——— STATUTES.
LIMIT OF CHARGES—*see* OFFENCES 188
LIQUIDATION—*see* FOREIGN COURT 570
LIST OF CASES—Supreme Court—Order of trial - - - - - - - 345
see ORDER OF HEARING.
LOAN—Personal property—Interest—security - - - - - - - 475, 620
see BILL OF SALE. 6. 9.
—— *also* NEW TRIAL. 1.- 186
LOCUS STANDI—*see* CROWN. 1.- 238
—— MAGISTRATE. 18. - 606
LORD CAIRNS' ACT—*see* CONTRACT. 4. - - - - - - - - 251
——— TENDERDEN'S ACT—9 Geo. IV. c. 14, is not in force in this Colony - 136
see AGREEMENT. 1.
—— *also* STATUTES.
LOSS—*see* BILL OF LADING - - 677
—— CHEATING. 2. - 430
—— CROWN CONTRACT. 1. 2. - - 648, 680

LOTTERY—A sale of Manila *Lottery* tickets does not constitute the "keeping, using, permitting to be used, caring, managing or assisting in the business of a lottery" within the Gambling Ordinance 13 of 1879. A contract made in this Colony between residents here, for the sale of tickets in a lottery in a Foreign State where the lottery is lawful, is *not* an illegal contract as contravening public policy, and will be enforced by the Courts of this Colony—*Aliter*—where the lottery is illegal in the Foreign State. There is no difference in principle between such a contract and the case of *money lent* for the purpose of gambling in the Foreign State where gambling is legal. *Quarrier* v. *Colston*, 1 Phil. 147, and *King* v. *Kemp*, 8 L. T. 255, applied. D'ALMEIDA *v.* D'MENZIES - - 126

2. ——A "*Weisang* lottery" is a "lottery" within the meaning of the Common Gaming House Ordinance 5 of 1888. The evidence of the Informer is admissible in a charge under the above Ordinance, and he is not an "accomplice" within the meaning of the rule of law that requires the evidence of an accomplice to be corroborated. Evidence that the prisoners sold lottery tickets is not evidence of their "*assisting* in the management of a public lottery," and in a charge for so *assisting*, evidence of such sale merely ought to be rejected. The mere fact that quantities of lottery tickets are found in the prisoners' house or in their possession, is not sufficient evidence that they were "assisting or managing a public lottery." The presumption raised by Section 14 from the mere fact of finding of the tickets in the prisoners' possession, or house occupied by them, only applies to a charge under Section 5, Clause [*a*]. This presumption however, is an arbitrary presumption, and the smallest particle of evidence is sufficient to put the prosecution to prove their case. On the conviction being quashed, the Crown was ordered to pay the appellants' costs of the appeal. The effect of Clauses 2 and 8 of Section 34 of the Appeals Ordinance, 1879, is to make it the duty of this Court, on quashing a conviction, to consider whether on the facts, there is not a proper charge on which the accused might not be charged, and if there is, to direct that he be tried on such proper charge. REGINA *v.* CHONG AH PYE & ANOR. - - - - - - - 597

3. ——The mere finding of instruments or appliances for gaming in a house, does not justify a Magistrate in convicting all the persons living in the house as assisting in the gaming—but the case of each person must be considered separately, according as the evidence connects him or not with the gaming or lottery. A married woman supported by her husband and living in a house rented by him is not "the occupier" of the house within the Gaming House Ordinance 5 of 1888, although the husband may be absent from the Settlement. The husband is the occupier. The warrant [omitting the name of the Informer, if any] under authority of which the Police enter a house under the Gaming Ordinance, ought to be produced in evidence before the Ma-

LOTTERY—*continued.*

gistrate,—and on appeal, sent up with the stated case,—so that the Magistrate or Court of Appeal can judge whether it be issued under the Ordinance or not so as to give rise to the presumption in Section 14 thereof. REGINA *v.* TAN YOK LAN & ORS. - - - - - - - - 668

see also GAMING.

MAGISTRATE—It is irregular for a Magistrate on investigating into a charge against a prisoner for an offence, during the course of the investigation to place a witness who has given evidence before him, in the dock, and to enter a charge against him for the offence, and to proceed therewith and convict him thereon. Such a conviction will be quashed. An order to try a prisoner on a charge *de novo*, does not prevent a fresh and different charge—but of the same class—being entered against him and enquired into. An amended charge must be read or explained to a prisoner under Section 53 of the Criminal Procedure Ordinance 6 of 1873, whether the prisoner be defended by Counsel or not; an omission to do so renders a conviction on the amended charge, liable to be quashed. Though it may not be actually illegal for a Magistrate who has once tried a case and convicted a prisoner to try the prisoner *de novo*, on an order by the Supreme Court directing a trial *de novo*, still it is highly objectionable that he should do so. He should allow the trial *de novo* to be had before another Magistrate. LIM TUAN HONG *v.* HERMANN JEBSEN & Co. - 79

2. ——A Magistrate who dismisses a charge of extortion has no power to order the return of the property or re-payment of the money alleged to be extorted - 85

see EXTORTION.

3. ——The Court of Appeal has power under Section 25 of the Appeals Ordinance 12 of 1879, to reduce a sentence passed by a Magistrate - - - - - 161

see COURT of APPEAL.

4. ——A Magistrate might after the case for the prosecution has closed and the prisoner has addressed the Court in his defence, allow a further witness to be called by the prosecution provided he gives the prisoner an opportunity to explain away or rebut by evidence or otherwise such further evidence - - - - - - - - 230

see LABOUR. 1.

5. ——The Crown though not a party to an appeal from the decision of a—nevertheless has a right to be heard on the Appeal - - - - - - - - 238

see CROWN. 1.

6. ——The simple fact that one of two Magistrates who have decided a case under the Dangerous Societies Ordinance 19 of 1869 is a member of the Executive Council

MAGISTRATE—*continued.*

and as such had under Section 3 seen and considered the evidence afterwards adduced by the prosecution in the case, is no ground for quashing the conviction although the Court fully recognises the impropriety of his having sat to adjudicate upon the case - - - - - - - - 238

see CROWN. 1.

7. ——The Supreme Court has jurisdiction to issue a writ of *Habeas Corpus* and discharge a prisoner thereon either absolutely or on bail as the facts might warrant, where the charge pending against him before a Magistrate is adjourned from time to time over such a period of time combined with the absence of evidence as would make it a serious wrong to him to be longer detained, but the exercise of this jurisdiction is entirely in the discretion of the Court and will not be exercised except in cases of an unusual nature - - - - - 287

see HABEAS CORPUS. 1.

8. ——A Magistrate sitting in a case within his *summary* jurisdiction, cannot take the case in his Chambers, but is bound to hear it in open Court. There cannot be convictions under Sections 162 and 163 of the Penal Code under one and the same state of facts. REGINA *v.* DORASAMY PILLAY - - - - - - - - 350

9. ——A Magistrate has no power to order under Section 62 of Ordinance 13 of 1872, a person to be bound over to be of good behaviour, without any evidence as to his character. Where, therefore a Magistrate considered a charge of receiving stolen property had not been proved against a prisoner and ordered his discharge and the property to be returned to him, but having reason to suspect him of not being of good character, at the same time without any evidence as to character, ordered him under the aforesaid action to be bound over to be of good behaviour, *Held*, on appeal, he had no jurisdiction to make the latter order, and the same was quashed. REGINA *v.* VONG AH HOON - 375

10. ——The Court having on an appeal remitted [under Ordinance 12 of 1879, Section 25] the case "to the Magistrate" for further evidence, "and for such amendment of the conviction as is consistent with the evidence," *Held*, the order could be carried out only by the convicting Magistrate from whose decision the appeal was made—and the mere fact that he was absent from the Colony did not authorise another Magistrate to take the further evidence. *Query*. In remitting a case for further evidence under Section 25 aforesaid, has this Court power to remit it to any Magistrate other than the convicting Magistrate? REGINA *v.* KOOMAT - 386

MAGISTRATE—*continued.*

11. ——Appeal Court—Power to send case back to other than the convicting Magistrate - - - - - - 392
see GAMING. 3.

12. ——A Magistrate in amending a charge under Section 53 of the Criminal Procedure Ordinance 6 of 1873 even if he substitute a different charge for a wholly different offence from that original charge, does not thereby pronounce a judgment on such original charge, nor does the amendment and substitution operate as an acquittal on the original charge, so as to be a bar to a fresh prosecution on such charge on the same facts. REGINA *v.* DORASAMY PILLAY - - - - - - - - 405

13. ——Case remitted for hearing on a *fresh* charge need not necessarily be sent to or be heard by the same Magistrate who heard the original charge. - - 407
see FRESH CHARGE. 1.

14. ——When a case is remitted to a Magistrate under Section 25 of the Appeals Ordinance 12 of 1879, it is the duty of the Magistrate to take all the evidence tendered by both sides and to return the further evidence to the Supreme Court for that Court to decide on the evidence. It is no part of the duty of the Magistrate to pronounce an opinion on such further evidence nor is he justified in refusing to take further evidence because he is satisfied. ETAM *v.* BABOO - - - - - 445

15. ——A Magistrate has no power to interrogate a prisoner. That power is conferred on the Supreme Court only - 472
see PROPER CHARGE. 2.

16. ——A prisoner was charged before a Magistrate with using threats in order to induce persons to become members of a Secret Society. The Magistrate ordered the Court to be cleared and proceeded with the case in private. *Held*, the proceedings were irregular and the conviction bad; and under Section 33 of the Appeals Ordinance 12 of 1879, the proper form of procedure in this Court was to quash it. REGINA *v.* CHIN AH CHI - - - - - - 589

17. ——On an appeal against a Magistrate's decision and where the conviction was quashed, Crown ordered to pay appellant's costs of the appeal - - 597
see LOTTERY. 2.

18. ——On a rule being made absolute under Section 20 of the Appeals Ordinance 12 of 1879, for a Magistrate to state a case, the Court awarded costs *against the Magistrate*, there being no circumstances for departing from the ordinary rule that "costs follow the event." When a case has been stated under Section 18, the only parties to the appeal are the appellant and respondent; the committing Magistrate has therefore no *locus standi* to appear and support his conviction. A Magistrate has no power on conviction of an employer for an assault on his servant to order the contract for service to be cancelled. The Court being satisfied that an excessive sentence imposed by a Magistrate had caused a failure of justice, reduced the sentence, though the sentence was not larger than legally awardable to the offence. THUM CHEE *v.* HO AH FAH - - - - - - - - 606

19. ——Not necessary for appellant to be in Court or within the jurisdiction at hearing of an appeal from the decision of a— - - - - - - - - 638
see ARMS AND AMMUNITION. 2.

20. ——The mere finding of instruments or appliances for gaming in a house does not justify a Magistrate in convicting all the persons living in the house as assisting in the gaming - - - - - 668
see LOTTERY. 3.

MAGISTRATES—Where two Magistrates, sitting as a Court of two Magistrates under Ordinance 13 of 1872, Section 1, as amended by Ordinance 17 of 1876, Section 3, disagree as to their finding, they have no power to commit the accused for trial at the Assizes. REGINA *v.* LEE KAN & ORS. 560

2. ——Where two Magistrates, sitting as a Court of two Magistrates under Ordinance 13 of 1872, Section 1, as amended by Ordinance 17 of 1876, Section 3, disagree, they have no right to discharge the accused: their proper course is to refrain from giving their verdict and to let the case go before other two Magistrates for trial *de novo*. VANJOOR *v.* KALIAPAH CHETTY - 592

see also CONVICTION. 4. - 493
——— EVIDENCE. 10. - 515
——— EXTRADITION. 1. 2. 3. 4. 150, 221, 346, 368
——— GAMING.
——— JUSTICE OF THE PEACE 151
——— LABOUR. 1. - - 230
——— PLEA IN BAR - 651
——— PRINCIPAL. 1. - 118
——— RECOGNIZANCE TO KEEP THE PEACE. 1. 2. 276, 389
——— SPIRITS - - 546
——— WITNESSES. 1. - 317

MAHOMEDAN MARRIAGE ORDINANCE—Section 27, of the Mahomedan Marriage Ordinance 5 of 1880 is not retrospective so as to affect an Estate which has been commenced to be administered *before* the coming into operation of the Ordinance. When one of the parties to a suit refuses to consent to the section being applied, the Court cannot grant leave that it should, if the suit is one that was commenced *after* the coming into operation of the Ordinance. The right of a husband to administer to the

MAHOMEDAN MARRIAGE ORDINANCE—*continued.*

Estate of his wife under the aforesaid circumstances is therefore untouched. *In the goods of* SHERIFFA ESSAH - - - 98

2. ——A testator [a Mahomedan] after bequeathing certain specific personalty, directed that "the rest" and "remainder" of his personalty should be divided into five equal shares among certain persons whom he named. In another portion of the same Will, after devising certain specific realty, he directed that "the rest and residue" of his real estate should be held in trust by his Executors for twenty-one years, who during that time were to divide the income thereof into six equal shares among the same persons as above, and another; and after that period his Executors were to realise and sell the said "rest and residue" of the real estate and divide the proceeds thereof into six equal shares among the same persons. There was no general residuary clause. One of the persons [the wife of the testator] who was to have a fifth of the residue of the personalty and a sixth of the income and proceeds of the residue of the realty, died in the testator's lifetime. *Held*, that her one-fifth and one-sixth shares in the residuary, personalty, and realty respectively, did not go to the survivors of the persons aforesad, but had lapsed and was undisposed of, and was distributable among the testator's next-of-kin according to the Statute of Distributions, as modified by the Mahomedan Marriage Ordinance 5 of 1880. TENGAH CHEE NACHIAR *v.* NACODAH MERICAN & ORS. - - - - - 265

see also MAHOMEDAN MARRIED WOMAN.

MAHOMEDAN MARRIED WOMAN—Although by the Mahomedan Marriage Ordinance 5 of 1880, a Mahomedan married woman's property is her "separate" property, yet she cannot notwithstanding Section 27, Clause 12 of that Ordinance, prosecute her husband for theft of such property or cheating. The Common Law Rule that a wife or husband cannot, except in certain cases, give evidence *against* each other is not touched by any Ordinance, Act, or Statute in force in this Colony as regards *criminal* matters; and their evidence is, subject to those exceptions, still inadmissible in criminal cases *against* each other. The fact that the husband and wife are both Mahomedans, and the wife's property is her "separate" estate by the aforesaid Ordinance 5 of 1880, does not affect the rule of evidence, inasmuch as that Ordinance has not rendered their evidence admissible in criminal matters *against* each other. *Regina* v. *Brittleton*, 12 L. R. Q. B. Div. 266, s. c. 50 L. T. [N.S.] 276, followed. If a stranger

MAHOMEDAN MARRIED WOMAN—*continued.*

be charged jointly with the husband of a *criminal* offence in respect of such "separate" property, the evidence of the wife being inadmissible *against* the husband is also inadmissible *against* the stranger. *Regina* v. *Thompson*, 1 L. R. C. C. R. 377, followed. REGINA *v.* OJIR & ANOR. 122

2. ——A Mahomedan married woman cannot maintain an action against her husband whether divorced or not, for a share of their *joint* earnings. *Such* earnings are not the wife's "separate" estate under the Mahomedan Marriage Ordinance 5 of 1880, Section 27, but belong to the husband by English law. TIJAH *v.* MAT ALLI 124

3. ——The Court will not presume in favour of polyandry, but of marriage. *Semble*. There is not that unity between a Mahomedan husband and wife as disables a wife conveying land to her husband or *viec versâ*. A Mahomedan married woman, however, must prior to the Mahomedan Marriage Ordinance 1880, have acknowledged her Deed of Conveyance of realty under Act 31 of 1854, and until she had done so, it would be inoperative in law, and not binding either on her or her representatives. *Kader Meydin* v. *Shatomah*, Straits L. R. 260, followed. Ordinance 5 of 1880, the "Mahomedan Marriage Ordinance" is not retrospective in all respects, for by the proviso in Section 18, past contracts and rights are expressly saved. Where, therefore, a Mahomedan married woman conveyed her lands by deed in 1859, which she omitted to acknowledge under Act 31 of 1854, such property not being *settled* to her separate use, *Held*, notwithstanding the question arose subsequently to the Mahomedan Marriage Ordinance, and that Ordinance [Section 18] applied to cases of marriages solemnized before as well as after the Ordinance, and by that Ordinance a Mahomedan married woman's property is declared to be her separate property and her Deed of Conveyance need not be acknowledged,—the conveyance was inoperative and not binding on her administrators. Under the Limitation Act 14 of 1859, *adverse* possession is necessary before a plaintiff's claim to realty can be considered barred. "Adverse possession" is a possession in denial of the plaintiff's claim and cannot exist where the defendant [or those through whom he claims], however long before, came in with the consent or permission of the plaintiff [or those through whom he claims], unless it can also be proved that something was done by the defendant [or those through whom he claims] to shew he or they held no longer under such consent or permission. A conveyance before administration taken out

MAHOMEDAN MARRIED WOMAN—*continued.*

by a person who, as a next-of-kin, has a share in lands forming the estate of a deceased is *not* valid and binding even for the share of such person therein, as land in this Colony on the death of its owner is to be considered as chattels real, and until the estate is administered and debts paid, it would be impossible to say if there would be any estate to share or divide. *Abdulrahim* v. *Drahman & anor.*, 1 Kyshe, 171, followed. FATIMAH & ANOR. *v.* ARMOOTAH PULLAY 252

see also BIGAMY. 1. - - 513

——— MARRIED WOMAN.

MAHOMEDANS—

see also DECLARATION OF TRUST - - 178

——— DEVISE - - 212

——— GUARDIANSHIP - 329

——— LAND. 2. - - 101

——— MARRIAGE SETTLEMENT - - 583

MAINTENANCE—Husband and Wife - 6

see PROMISSORY NOTE. 1.

—— *also* MAHOMEDAN MARRIED WOMAN. 2. - 124

———DEVISE - - 212

———WIFE - - 376

MALACCA LANDS—Customary landholder—tenth—rent - - - 249

see LAND. 6.

2. ——Registration—proof of ownership - - - - - - - 413

see LAND. 9.

see AGREEMENT. 3. - 181

MALAY DOCUMENT—Declaration of Trust - - - - - - - 178

MALICE—Reasonable and probable cause - - - - - - - 484

see CONTRACT. 9.

see also LIBEL - - 364

———POLICE. 2. - 240

MALICIOUS PROSECUTION—A plaintiff who has recovered judgment in an action for a malicious prosecution is entitled under the joint operation of Ordinance 22 of 1870, Section 3, Clause 7 and the Civil Procedure Ordinance 5 of 1878, Section 425, if he desire it, without any application to the Court, to issue a *Ca. Sa.* for the arrest and imprisonment of the defendant for the non-payment of the judgment and costs. *Abud* v. *Riches*, 2 L. R. Ch. Div. 529, and *Ferguson* v. *Ferguson*, 10 L. R. Ch. Div. 662, distinguished. CHONG AH NAI *v.* PUTEH - - - - - - 433

MANAGEMENT—*see* BILL OF LADING - - - - - - - 677

see also WRONGFUL DISMISSAL 91

MANDAMUS—WRIT OF—*see* CONSULAR COURT. 1. - - - - - - 274

MANDATORY INJUNCTION—*see* TRESPASS, 1. - - - - - - 443

MARGINAL NOTES—The marginal notes to sections in our local Ordinances, being in this Colony always read with the Bill, are part and parcel of the Ordinance. The Municipal Commissioners have no authority by a general direction, to confer on their President the power of exercising the powers and discretions vested in them by Ordinance 9 of 1887, *e.g.* the directing of prosecutions for offences under the said Ordinance. CASHIN *v.* MURRAY - 435

MARKET—*see* TRADE-MARK.

—— STALLS—*see* CONTRACT. 7. - 446

—— VALUE—*see* COMPANY. 1. - 193

MARRIAGE SETTLEMENT—The entry of a marriage in a Kali's book, in consideration of which marriage, a promise is made, which promise appears in the entry and is signed, and thereafter sought to be enforced, is a "marriage settlement" within the Stamp Ordinance, 1885, and must be stamped before it can be admitted in evidence. A contract to build a "suitable house" is too vague and uncertain, and cannot be specifically enforced by this Court nor can damages be awarded. AHAMED MEAH & ANOR. *v.* NACODAH MERICAN 583

see also PROMISE. 1. - 463

MARRIED HUSBAND AND WIFE—*see* HINDU HUSBAND AND WIFE - 327

——— WOMAN—A person who deals with a woman, is bound fully to enquire whether she is a married woman or not, and he is not excused from such enquiry, simply because she represented herself to be a widow, although she may have in so representing herself intended to mislead and defraud him and did in fact do so. The husband of a married woman, on discovering his wife had purchased some lands, [although the money for such purchase was raised on mortgage of the land by her to a third party, by means of a misrepresentation that she was a widow]—is entitled to recover possession of the land, and have the Mortgage Bond to such third party cancelled notwithstanding he neither offers to, nor in fact recoups the mortgagee—the amount he had lent. NAIN BOON KEOW *v.* LETCHMAN CHETTY & ANOR. - 85

2. ——A person who entices away a married woman with intent *himself* to have illicit intercourse with her, is liable to be punished under Section 198 of the Penal Code—and the words "any person" in that section may include himself, and not necessarily refer to another person. *Regina* v. *Kadir*, 2 Kyshe, Cr. Rulings, 105, overruled. REGINA *v.* DORASAMY - 162

3. ——Acknowledgment of Deed of Conveyance by—constructive notice - 416

see REPLY.

—— *also* MAHOMEDAN MARRIED WOMAN. 3. - 225

MARRIED WOMAN—*continued.*

4. ——A married woman supported by her husband and living in a house rented by him is not "the occupier" of the house within the Gaming House Ordinance 5 of 1888, although the husband may be absent from the Settlement The husband is the occupier - - - - - - 668

see LOTTERY. 3.

MASTER—Ship-owner's credit—authority —credit - - - - - - - 679

see SHIPPING.

——— AND SERVANT—*see* BILL OF LADING - - - - - - - 677

see also LABOUR.

——— MAGISTRATE. 18. 606

MATERIAL FACT—Power of Attorney—Principal—Agent - - - - - 319

see AGENT. 1.

MEMORANDUM OF APPEAL—*see* LAND. 13. - - - - 533

MERCANTILE CONTRACTS—Rule of law—Silence gives consent - - 512

see CONTRACT. 11.

——— FIRM—*see* WRONGFUL DISMISSAL - - - - - - - 91

——— LAW—*see* TRADE-MARK.

MESNE PROCESS—Arrest on—defendant—security—liberty to leave jurisdiction - - - - - - - 1

see SECURITY. 1.

2. ——Writ—arrest of defendant - 71

see BOND.

MINING SHARES—*see* CONTRACT. 11. - - - - - - - 512

MINISTER OF STATE—British Resident of Perak—official seal—authentication - - - - - - 150, 221

see EXTRADITION. 1. 2.

MINOR—Custody of female—by mother—prostitution - - - - - 385

see PROSTITUTION. 1.

MISAPPROPRIATION—Misappropriation itself or mere user of money or goods is not a crime—to be so it must be done *dishonestly*. To decide the question whether it was dishonest or not, the Jury should take into consideration whether the accused had the *intention* of returning the money and *the power and the means* of doing so, or whether he intended making an unlawful gain of property, or had no grounds for believing that he would be able to return it when required. REGINA *v.* BATTY - - - - - - - 441

see also SHERIFF - - 614

MISCHIEF—The mere laying of a pole, twenty-five feet in length, across the lines of a steam tramcar, which is stopped on the obstruction being seen, does not constitute "mischief" under Section 426 of the Penal Code, but only an "attempt" to cause "mischief" within Sections 426 and 511. A conviction for "mischief" was therefore

MISCHIEF—*continued.*

amended by altering it to one for the "attempt," and the sentence reduced accordingly by virtue of Section 34, Clause 6 of the Appeals Ordinance 12 of 1879. LI AH CHEW & ORS. *v.* PENANG TRAMWAY CO. - - - - - - - 250

MISREPRESENTATION—Sale of shares —fraud - - - - - - 544

see CONTRACT. 12.

—— *also* MARRIED WOMAN. 1. 85

——— TRADE-MARK.

MONEY LENT—*see* LOTTERY. 1. 126

MORTGAGE—*see* BILL OF SALE.

see MARRIED WOMAN. 1. 85

—— MORTGAGEE.

MORTGAGEE—A mortgagee cannot be deprived of his costs of defending an action at the suit of the mortgagor, unless he has been guilty of misconduct or fraud, and he is entitled to deduct such costs out of any balance that may be in his hands as payable to the mortgagor after satisfying his claim even if the mortgagor is suing as a *pauper*. BEEBEE SAMSOO *v.* WRIGHT - 199

2. ——A mortgagee in exercising his power of sale is not a trustee for the mortgagor; and however recklessly and imprudently he may exercise the power short of actual fraud, and however disadvantageous the sale might be, he is not answerable to the mortgagor for it nor will this Court interfere with the sale. *Jones* v. *Matthie*, 11 Jur. [o.s.] 504 and *Warner* v. *Jacob*, 20 L. R. Ch. Div. 220, followed. Where a purchaser from a mortgagee at an auction held under the power of sale, prevents [without the knowledge of the mortgagee] third parties from purchasing and thereby obtains the property at a great undervalue, *Held*, he could not be allowed to avail himself of his purchase, but on payment to him by the mortgagor of his purchase-money and cost of conveyance—he was, in Equity a trustee of the property for the mortgagor. *Fuller* v. *Abrahams*, 3 Bro. and Bing. 116, followed. JENAIBOO *v.* NARAINEN CHETTY & ANOR. - - - - - 359

3. ——Sub-section 2 of Section 24 of the Conveyancing and Law of Property Ordinance, 1886, has not materially altered the law as declared in *Jenaiboo* v. *Narainen Chetty and anor.*, supra, as to the right of a mortgagor to sue a mortgagee who exercises his power of sale under the mortgage in a careless and negligent manner. *Semble*. The right given to a mortgagor by that sub-section against a mortgagee for an "unauthorised, improper or irregular sale," is a right which exists only where the mortgage is a Statutory Mortgage, and the mortgagee cannot shew he has a right of sale under Sections 22 and 23 of the Ordinance, and the "notice" re-

MORTGAGEE—*continued.*
ferred to in that sub-section, is notice "requiring payment" under Section 23, and not notice advertising the property for sale. The mortgagor must also shew he is damnified by the sale before he has a right of action under that sub-section. SHENAYAH CHETTY & ANOR. *v.* VEYNA SULTAN MAHOMED - - - - - - 663
see also BILL OF SALE.
——— WAKOFF. 2. 3. 568, 675
MORTGAGOR—*see* MORTGAGEE.
MUNICIPALITY—The Municipal Commissioners have no authority by a general direction, to confer on their President the power of exercising the powers and discretions vested in them by Ordinance 9 of 1889, *e.g.* the directing of prosecutions for offences under the said Ordinance - 435
see MARGINAL NOTES.
2. ——Scenery—Town Hall—Theatre 484
see CONTRACT. 9.
3. ——The elected Municipal Commissioners under Section 32 of the Municipal Ordinance 9 of 1887 have power to resign and *to accept their own* resignation. HUTTENBACH *v.* MUNICIPAL COMMISSIONERS - - - - - - 551
4. ——A person is liable to be convicted under Section 124 of the Municipal Ordinance 9 of 1887, although the Commissioners have not done their duty in providing under Section 126, convenient places for the deposit of filth, &c. The language of Section 124 is clear, and there is nothing in the other sections of the Ordinance to neutralise it. LEE QUEH SENG *v.* MUNICIPAL COMMISSIONERS - - 554
see also ASSESSMENT - 103
——— CONTRACT. 7. 9. 446, 484
——— RIPARIAN RIGHTS 450
——— VERANDAH - 431
NATIVE LANGUAGE—Conditions of Sale - - - - - - - 453
see LAND. 12.
—— *also* LAND. 13. - 533
——— CATTLE DISEASE 666
———LAWS AND CUSTOMS—Charter of 1855 - - - - - - 329
see GUARDIANSHIP.
see also CHINESE LAW AND CUSTOM.
——— GAMING. 5. - 615
——— MAHOMEDANS.
——— WAKOFF.
———STATES—*see* EXTRADITION.
see also FOREIGN COURT - 570
NAVIGATION—*see* BILL OF LADING 677
see COLLISION - - 478
——DERELICT VESSEL - 638
——SALVAGE - - - 200
——SHIPPING - - 679
NECESSARIES—*see* SHIPPING - 679
NEGLECT—Responsibility - 337
see GRIEVOUS HURT.
—— *also* BILL OF LADING 677
NEGLIGENCE—*see* BILL OF SALE. 3. 4. - - - - - - - 279, 399
see also LAND. 13. - - 533
NEW TRIAL—Where a party to an action does not offer himself as a witness, but calls his witnesses who are examined, he is not entitled to a new trial on the ground that his evidence was not taken. It makes no difference that his not offering himself was done to ignorance of the procedure in the Court of Justice, and the Judge trying the case omitted to tell him of his right to so offer himself. A person who for a loan pledges goods to another who is not a Pawnbroker does nothing illegal and commits no offence punishable under the Pawnbroker's Ordinance 7 of 1872, and after tender of a loan with interest [if any] he may maintain an action against the other for recovery of the goods. *Armstrong* v. *Lewis*, 2 Cr. & M. 27, distinguished. TIJAH *v.* MILAH 186
2. ——Amendment of charge—Judge—Jury - - - - - - - 258
see JURY.
NISI—RULE—Habeas Corpus - 221
see EXTRADITION. 2.
NOTES—Marginal—as to—in Ordinances being part and parcel of Ordinance 435
see MARGINAL NOTES.
NOTICE—Purchaser of land—title defective—improvements—compensation 409
see EXECUTOR. 2.
2. —— Obstructions—arcades—removal - - - - - - - - 431
see VERANDAH.
3. ——Language - - 453, 533
see LAND. 12. 13.
—— *also* CATTLE DISEASE 666
———COMPANY. 1. - 193
———HABEAS CORPUS. 2. 685
———MORTGAGEE. 2. 3. 359, 663
———IN WRITING—*see* LABOUR. 1. 230
see POLICE. 2. - - 240
———TO QUIT—*see* RENT. 1. - 78
NUISANCE—PUBLIC—*see* RIPARIAN PROPRIETOR - - - - 4
OBSTRUCTION—Removal—arcades—notice - - - - - - - 431
see VERANDAH.
—— *also* RIPARIAN PROPRIETOR - - 4
OCCUPIER—*see* LOTTERY. 3. - 668
OFFENCES—Offences though committed on different dates may be tried together under Sections 59, 60 and 61 of the Criminal Procedure Ordinance 6 of 1873, if the offences are of the same kind; but must be limited to three and such as have been committed within one year of each other. A conviction in the alternative is bad; but

OFFENCES—*continued.*
it may be altered by the Court under Section 25 of the Appeals Ordinance 12 of 1879 provided the evidence shews clearly which of the alternative statements should be sustained. A conviction imposing one sentence for two offences is good, but at all events it may be amended under Sections 25, 32 and 33 of the Appeals Ordinance aforesaid. Those sections apply to objections of substance as well as of form. *Opium Farmer* v. *Koh Boo Ann*, Straits L. R. 278; *Regina* v. *Ooi Tim*, 3 Kyshe, 119; and *Cartan* v. *Meenachee*, 3 Kyshe, 151, over-ruled. OPIUM FARMER v. CHUA AH TONG - - - - - - - 188
see also BANKRUPTCY. 3. 670
OFFERING GRATIFICATION—Convictions under one and same state of facts - - - - - - - - 350
see MAGISTRATE. 8.
—— *also* FOREST RANGER - 76
OFFICIAL ACT—*see* FOREST RANGER - - - - - - - - 76
——— LIQUIDATOR—*see* FOREIGN COURT - - - - - - - - 570
——— SEAL—Authentication of document - - - - - - - - 150
see EXTRADITION. 1.
ONUS PROBANDI—Prosecution—unlicensed house - - - - - 401, 665
see LICENSE. 1. 2.
OPEN COURT—*see* JUSTICE OF THE PEACE - - - - - - - - 151
see also MAGISTRATE. 8. 16. 350, 589
OPIUM—*see* CHANDU.
ORDER—Certificate of Judgment - 570
see FOREIGN COURT.
———OF HEARING—Section 322 of the Civil Procedure Ordinance, 1878, is merely permissive and the Court in the exercise of its discretion may refuse a case to be withdrawn, or postponed, or shifted down the list, notwithstanding both parties consent, and are desirous to do so. SYED MAHOMED ATTAS *v.* TEK LEE & ANOR. - - - - - - - - 345
ORDINANCES—Marginal Notes to sections in—part and parcel of the Ordinance - - - - - - - - 435
see MARGINAL NOTES.
5 of 1868, s. 29 - - - - 136
see AGREEMENT. 1.
19 of 1869 - - - - - 500
see CHARITY. 2.
——— s. 1 - - - - 238
see CROWN. 1.
4 of 1870, s. 3 - - - - 648
see CROWN CONTRACT. 1.
——— s. 5. - - - - 527
see CHANDU. 1.
——— s. 13 - - - - 557
see CHANDU. 2.

ORDINANCES—*continued.*
4 of 1870, s. 25 - - - - 546
see SPIRITS.
——— s. 48 - - - - 321
see EXCISE.
5 of 1870 - - - - - 230
see LABOUR. 1.
20 of 1870, s. 26 - - - - 176
see EVIDENCE. 2.
——— s. 41 - - - - 281
see BANKRUPTCY.
22 of 1870 - - - - - 675
see WAKOFF. 3.
——— s. 3, cl. 7 - - - 433
see MALICIOUS PROSECUTION.
——— s. 18 - - 120, 183
see BILL OF SALE. 1. 2.
4 of 1871, s. 5 - - - - 323
see BREACH OF TRUST. 1.
——— s. 41 - - - - 323
see BREACH OF TRUST. 1.
——— s. 159 - - 84, 346
see AFFRAY. BROTHEL.
——— ss. 162, 163 - - 350
see MAGISTRATE. 8.
——— s. 165 A. - - 76
see FOREST RANGER.
——— s. 174 - - - 156
see SUBPŒNA.
——— s. 198 - - - 162
see MARRIED WOMAN. 2.
——— s. 221 - - - 615
see POLICE. 4.
——— s. 323 - - - 337
see GRIEVOUS HURT.
——— s. 325 - - - 337
see GRIEVOUS HURT.
——— s. 352 - - - 389
see RECOGNIZANCE TO KEEP THE PEACE. 2.
——— s. 373 - - - 385
see PROSTITUTION. 1.
——— s. 379 - - - 349
see THEFT. 2.
——— s. 409 - - - 441
see MISAPPROPRIATION.
——— s. 411 - - - 388
see RECEIVING STOLEN PROPERTY. 2.
——— s. 415 - - - 430
see CHEATING. 2.
——— s. 417 - - 335, 430
see CHEATING. 1, 2.
——— s. 426 - - - 250
see MISCHIEF.
——— s. 494 - - 513, 630
see BIGAMY. 1. 2.
——— s. 511 - - - 250
see MISCHIEF.
15 of 1871 - - - - 648
see CROWN CONTRACT. 1.
1 of 1872, ss. 42—48 - - 214
see POLICE. 1.

ORDINANCES—*continued.*
1 of 1872, s. 42, cl. 1, 2. - - 240
see POLICE. 2.
——— ss. 43, 44 - - 240
see POLICE. 2.
——— s. 44 - - 484
see CONTRACT. 9.
6 of 1872, s. 9 - - - 357
see BREACH OF THE PEACE.
——— s. 15 - - - 291
see POLICE. 3.
7 of 1872 - - - - 186
see NEW TRIAL. 1.
8 of 1872, s. 53 - - - 615
see POLICE. 4.
13 of 1872, s. 1 - - 560, 592
see MAGISTRATES. 1. 2.
——— s. 32, cl. 5 - - 84
see BROTHEL.
——— s. 60 - - - 389
see RECOGNIZANCE TO KEEP THE PEACE. 2.
——— s. 61, cl. 5 - - 276
see RECOGNIZANCE TO KEEP THE PEACE. 1.
——— s. 62 - - - 375
see MAGISTRATE. 9.
6 of 1873, s. 53 - - 79, 405
see MAGISTRATE. 1. 12.
——— s. 55 - - - 258
see JURY
——— s. 59 - - - 188
see OFFENCES.
—— *also* BREACH OF TRUST. 1. - - - 323
——— ss. 60, 61 - - 188
see OFFENCES.
——— s. 63 - - - 260
see FALSE EVIDENCE.
——— s. 64 - - - 118
see PRINCIPAL. 1.
——— s. 69 - - - 651
see PLEA IN BAR.
——— s. 71 - - - 472
see PROPER CHARGE. 2.
14 of 1876 - - - - 97
see DISTRESS.
15 of 1876 - - - - 459
see TRESPASS. 2.
——— s. 2, cl. 7 - 648, 680
see CROWN CONTRACT. 1. 2.
——— s. 3—Form C 1. - 680
see CROWN CONTRACT. 2.
——— s. 4, cl. 5 & 8 - - 688
see CROWN SUITS.
17 of 1876, s. 3 - - - 560
see MAGISTRATES. 1.
19 of 1876, ss. 3, 4, 5 - - 666
see CATTLE DISEASE.
3 of 1877, s. 13 - 230, 396, 524
see LABOUR. 1. 2. 3.
5 of 1877 - - - - 291
see POLICE. 3.

ORDINANCES—*continued.*
3 of 1878, ss. 10, 13, 14 - - 251
see CONTRACT. 4.
—— DIVORCE. 2. - - 602
——— ss. 18, 19 - - 136
see AGREEMENT. 1.
——— ss. 1, 51, 55 - - 151
see JUSTICE OF THE PEACE.
——— s. 83 - - - 329
see GUARDIANSHIP.
4 of 1878 - - - - - 329
see GUARDIANSHIP.
——— s. 1, sub-ss. 4 & 6 - - 353
see RELIEF.
——— s. 3 - - - 596
see ARBITRATION. 3.
——— s. 6 - - - 269
see TRADE-MARK. 1.
5 of 1878 - - - - - 329
see GUARDIANSHIP.
——— s. 26 - - - 286
see CONVEYANCER.
——— s. 31 - - - 268
see DISCOVERY OF DOCUMENTS.
——— s. 66 - - - 511
see CONTRACT. 10.
——— s. 153 - - - 416
see REPLY.
——— s. 175 - - - 82
see LAND. 1.
—— STATUTE OF FRAUDS. 1. 344
——— s. 207 - - - 416
see REPLY.
——— s. 229 - - - 677
see BILL OF LADING.
——— s. 289 - - - 268
see DISCOVERY OF DOCUMENTS.
——— s. 322 - - - 345
see ORDER OF HEARING.
——— s. 422 B. - - 1
see SECURITY. 1.
—— *also* BOND - - 71
——— s. 425 - - - 433
see MALICIOUS PROSECUTION.
——— s. 454 - - - 204
see ARBITRATION. 1.
——— s. 493 - - - 594
see SECURITY. 3.
6 of 1878 - - - - 329
see GUARDIANSHIP.
3 of 1879, s. 2 - - - 103
see ASSESSMENT.
5 of 1879, ss. 11, 21 - - 234
see HACKNEY CARRIAGE.
12 of 1879 - - - - 638
see ARMS AND AMMUNITION. 2.
——— ss. 18, 20 - - 606
see MAGISTRATE. 18.
——— s. 25 - - - 161
see COURT OF APPEAL. 1.
—— CROWN. 1. - - 238
—— MAGISTRATE. 10. 14. - 386, 445
—— OFFENCES. - - 188

ORDINANCES—*continued.*
12 of 1879, ss. 32. 33 - - 230
see LABOUR. 1.
—— MAGISTRATE. 16. - 589
—— OFFENCES. - - 188
———— s. 34 cl. 2, 8 - - 597
see LOTTERY. 2.
—— PROPER CHARGE. 2. 472
———— s. 34 cl. 4 - - 407
see FRESH CHARGE. 1.
—— GAMING. 3. - - 392
———— s. 34 sub-s. 2 - 357
see BREACH OF THE PEACE.
———— s. 34 cl. 6 - - 250
see MISCHIEF.
—— SPIRITS. - - - 546
13 of 1879 - - - - 126
see LOTTERY. 1.
———— ss. 8, 12, 13 - - 240
see POLICE. 2.
15 of 1879, s. 11 - - - 237
see GAMING. 1.
4 of 1880, s. 14 - - - 604
see IMMIGRATION.
5 of 1880 - - - - - 265
see MAHOMEDAN MARRIAGE ORDINANCE. 2.
———— s. 18 - - - 225
see MAHOMEDAN MARRIED WOMAN. 3.
———— s. 27 - - - 98
see MAHOMEDAN MARRIAGE ORDINANCE. 1.
—— MARRIED WOMAN. 2. 124
———— s. 27 cl. 12 - - 122
see MAHOMEDAN MARRIED WOMAN. 1.
8 of 1880 - - - - 71
see BOND.
—— DISCOVERY OF DOCUMENTS - - - 268
2 of 1881, sec. 1. - - - 6
see PROMISSORY NOTE. 1.
———— s. 11 - - - 475
see BILL OF SALE. 6.
10 of 1883, s. 11 - - - 76
see FOREST RANGER.
6 of 1885 - - - - 291
see POLICE. 3.
10 of 1885 - - - - 583
see MARRIAGE SETTLEMENT.
4 of 1886, s. 5, Rule 3 - - 533
see LAND. 13.
6 of 1886, ss. 33, 34 - - 497
see TRUST. 2.
9 of 1886, s. 6. - - - 413
see LAND. 9.
12 of 1886 - - - - 568
see WAKOFF. 2.
———— s. 5. - - - 530
see BILL OF SALE. 7.
———— s. 5 cl. 4, 7 - - 568
see WAKOFF. 2.

ORDINANCES—*continued.*
12 of 1886, s. 8 - - - 471, 475
see BILL OF SALE. 5. 6.
———— s. 10, sub-s. 1, 2 - 620
see BILL OF SALE. 9.
———— s. 14 cl. 1 & 2 - 399
see BILL OF SALE. 4.
———— s. 16 - - - 399
see BILL OF SALE. 4.
3 of 1887, s. 13 - - - 230
see LABOUR. 1.
9 of 1887 - - - - - 435
see MARGINAL NOTES.
———— ss. 56, 259 - - 484
see CONTRACT. 9.
———— ss. 124, 126 - - 554
see MUNICIPALITY. 4.
———— s. 129 - - - 431
see VERANDAH.
18 of 1887 - - - - 638
see ARMS AND AMMUNITION. 2.
———— s. 10 - - - 515
see EVIDENCE. 10.
2 of 1888, s. 26 - - - 569
see BANKRUPTCY. 2.
———— s. 28, sub-s. 2. - 670
see BANKRUPTCY. 3.
5 of 1888, ss. 3, 14. - - - 518
see GAMING. 4.
—— LOTTERY. 2. 3. - 597, 668
———— s. 5 cl. [a] - - 597
see LOTTERY. 2.
14 of 1888, s. 4 sub-s. 1 cl. 1 - 493
see CONVICTION. 4.
———— s. 6 - - - 685
see HABEAS CORPUS. 2.
———— s. 10 - - - 665
see LICENSE. 2.
———— s. 15 - - - 685
see HABEAS CORPUS. 2.
5 of 1889 - - - - 570
see FOREIGN COURT.

OUTSTANDING LEASE—Sale of land by public auction—conditions—refusal to purchase - - - - - 453
see LAND. 12.

OWNER—*see* SALVAGE - - 200
—— SEA SHORE - - 10
—— SHIPPING - - 679

PANCHAYET—Hindu Headman—slander - - - - - - 364
see LIBEL.

PART HEARD CRIMINAL TRIAL—Court will adjourn to enable prosecution to obtain further evidence where no harm done to prisoner. - - - 630
see BIGAMY. 2.

PARTIES—WANT OF—*see* CONTRACT. 13. - - - - - 561

PARTITION—A decree for partition although it has never been carried out, operates as a severance of a joint tenancy, even if such joint tenancy be only for life, and notwithstanding the decease of one of

PARTITION—*continued.*
the joint tenants for life after the date of the decree the Court will carry out the decree and effect the partition. KHOO SEOKE HAING *v.* CHEAH KHAY PIN & ANOR - - - - - - - - 74

PARTNERSHIP—Where a partner on being sued by a sub-partner for partnership accounts, wilfully abstained from suing *his* partners for an account as he might have done, and merely alleged his partners refused to render him an account whereby he was unable to render the plaintiff, his sub-partner any, *Held*, the Registrar might presume everything against him, and award what the evidence before him would justify, even a percentage by way of profits, in absence of a more satisfactory mode of ascertaining the profits. LEE CHIN POO *v.* LEE CHYE HOON - - - - 380

2. ——The defendant and his deceased partner prior to the death of the latter stated an account between them shewing $1,200 odd were in the firm belonging to the deceased partner. After the death of the deceased partner, the defendant, who was his Executor, made use of the money in the business of the firm and continued doing so for several years. The plaintiff, a next-of-kin of the deceased, sued the defendant for accounts and claimed that the deceased's estate was entitled to share in the profits of the business, to date of action. *Held*, he was entitled to have the accounts of the business taken and a proportion of the profits credited to the deceased's estate and not merely to interest on the $1,200 as for money lent. *Held further* that both profits and interest could not be charged on the amount of capital, nor interest on the profits. SHAIK PAREETHO *v.* EBRAMSAH - - - - - - - 491

see also ACCOUNTS - - 492

——— COMPANY. 1. - 193

PART PAYMENT—Action on a Promissory Note—defence - - - - 587

see PROMISSORY NOTE. 3.

——— PERFORMANCE — *see* PROMISE. 1. - - - - - - - - - 463

PASSAGE MONEY — *see* IMMIGRATION - - - - - - - - 604

PAWNBROKER—*see* NEW TRIAL. 1. 186

PEACE — BREACH OF THE — *see* BREACH OF THE PEACE - - 357

——— JUSTICE OF THE—*see* JUSTICE OF THE PEACE - - - - - 151

see also POLICE. 2. - 240

——— PRESERVATION OF THE—*see* POLICE. 3. - - - - - 291

——— RECOGNIZANCE TO KEEP THE—*see* RECOGNIZANCE TO KEEP THE PEACE. 1. 2. - - - - 276, 389

PENAL CODE—*see* ORDINANCES [4 of 1871] - - - - - - - - 740

PERAK—British Resident of—authentication of document—seal - - 150

see EXTRADITION. 1.

PERCENTAGE—*see* COMMISSION. 1. 558

see PARTNERSHIP. 1. - 380

PERJURY—*see* FALSE EVIDENCE 260

PERMIT—Removal of Spirits—time 546

see SPIRITS.

PERPETUITY—*see* LAND. 2. - 101

PERSONAL CHATTEL—*see* WAKOFF. 2. - - - - - - - - - 568

PERSONAL PROPERTY — Loan — Interest—security - - - - 475, 620

see BILL OF SALE. 6. 9.

PERSONALTY—*see* LIMITATION. 1. 311

see MAHOMEDAN MARRIAGE ORDINANCE. 2. - - - 265

2. ——Estate Tail - - - 608

see TESTATOR. 3.

PERSONATION—*see* COLLISION - 478

PETITION OF RIGHT—*see* CROWN CONTRACT. 1. 2. - - - - 648, 680

see SEA SHORE - - - 10

—— TRESPASS. 2. - - 459

PILOTAGE—*see* BILL OF LADING 677

see also SALVAGE - - 200

PIRACY JURE GENTIUM—In order to constitute the offence of piracy *jure gentium* it is not necessary that there should be any throwing off of the authority of the State to which the vessel belongs, but it is sufficient if there is a taking of the ship on the High Seas or the jurisdiction of the Lord High Admiral, from the possession or control of those who are lawfully entitled to it and carrying away the ship itself or any of its goods, tackle, apparel or furniture, under circumstances which would have amounted to robbery if the act had been committed on land. Definition of piracy *jure gentium* in STEPHENS' Digest of the Criminal Law, p. 64, approved of. Definition of same in WHEATON'S International Law, p. 122 a., disapproved of. Piracy *jure gentium* is still punishable by death in this Colony; and a prisoner charged with that crime must therefore be tried before a Special Jury. Where therefore the prisoners had been tried for piracy *jure gentium* and convicted by a Common Jury, the Court treated the proceedings and verdict as a nullity and discharged the prisoners. REGINA *v.* NYA ABU & ORS. - - - - - - 169

see also SALVAGE - - 200

PLAGUE—*see* CATTLE DISEASE - 666

PLAINTIFF—Firm — residence — debt — jurisdiction - - - - - - 136

see AGREEMENT. 1.

2. ——Right to sue as—compensation for improvements - - - - - 416

see REPLY.

PLAINTIFF—*continued.*

3. ——Recovery of judgment—action for malicious prosecution—arrest and imprisonment of defendant - - - 433
see MALICIOUS PROSECUTION.

4. ——Agreement—part payment on a promissory-note - - - - 587
see PROMISSORY-NOTE. 3.

5. ——Liability of defendant to—on misappropriation by Sheriff of amount claimed and costs before execution - - 614
see SHERIFF.

PLEA IN BAR—The mode of raising a plea of *autrefois acquit or autrefois convict*, under Section 69 of the Criminal Procedure Ordinance 6 of 1873, is by formal plea, in Bar, and if the Crown does not admit the facts stated in the plea, it must put in a formal reply and a Jury will be impanelled to try the issue of fact raised by the plea and reply. On the trial of such an issue, neither the depositions taken before the Magistrate on the former or the subsequent charge are admissible in evidence as of the facts in question in each trial. If the Jury by their verdict, find the plea is not proved the Court will not thereupon convict the prisoner of the offence charged and pass judgment on him,—but will give judgment *respondeat ouster*, and the prisoner will be tried for the offence charged, in the usual way. REGINA *v.* SYED MAHOMED ALSAGOFF - - - - - - - - 651

PLEADINGS—Amendment of defence 344
see STATUTE OF FRAUDS. 1.
—— *also* REPLY. - - 416

PLEDGE—*see* NEW TRIAL. 1. - 186

POLICE—Sections 42 to 48 [both inclusive] of the "Police Force Ordinance" 1 of 1872, do not apply to any action against a Police Officer for the return of specific property. *Selmes* v. *Judge*, 6 L. R. Q. B. 724, and *Midland Railway Co.* v. *Local Board of Wittington*, 11 L. R. Q. B. Div. 788, distinguished A Police Officer has no right, after a reasonable time from the discharge of a prisoner, to detain property taken from him; and the prisoner's possession of such property is sufficient, without proof of title, to enable him to maintain an action against such Officer for the return of it. Judgment of *Pellereau*, J., affirmed on appeal. TASERIP *v.* RICCARD - 214

2. ——The words "or otherwise" in Clauses 1 & 2 of Section 42 of the "Police Force Ordinance" 1 of 1872 are not unmeaning, but include not only laws in force at the date of that Ordinance, but also future laws of whatever kind under which Police Officers and those aiding them might be called upon to act. *Chawana Mahomed Hussein* v. *Mahomed Mustan*, infrà, p. 1, followed. *Bayson* v. *Russell*, 14 L. R. Q. B. Div. 720, distinguished. Sections 42 and 44 of the said Police Force Ordinance are not to be read together, and before it is necessary for a plaintiff to prove malice under Section 44 against a Police Officer, the case must fall within Section 43, and before it is necessary for a plaintiff to give a month's notice under Section 43, the case must fall under Section 42. The words "anything done . . . . . in the execution of his duty as such Police Officer" in said Section 42, do not only mean an act within the scope of his duty as a Peace officer, but also an act done in excess of his duty, under a reasonable or honest belief it was within his duty. Where an Inspector of Police and a Justice of the Peace entered a Common Gaming House under a warrant issued under Section 8 of the "Gaming House Ordinance" 13 of 1879, for the search of the premises for "appliances" of gaming [such as cards, dice, &c.,] and arrest of all persons found therein,—but after making such entry and finding no gambling on or "appliances" of gaming, but discovering that the place was fitted up with the "contrivances" [such as heavy doors and trap-doors, bars, bolts, &c,] mentioned in Section 12, with the object of testing Section 13 of the Ordinance, they broke down, demolished, and carried away such "contrivances" whereupon they were sued by the occupier of the premises for trespass in removing such fixtures, but without having been first served with a month's notice under Section 43 of the aforesaid Ordinance 1 of 1872 or at the trial the plaintiff attempting to prove malice on their part, *Held*, that as by Section 13 it was plain, and the defendants could not but have seen that it was only a Magistrate who could order a demolition of the "contrivances" and that, only after summoning the parties before him to shew cause and judically enquiring into the matter—they could not be said to have had either a reasonable or honest or *bonâ fide* belief [within Section 42 of the said Ordinance 1 of 1872] that they were acting within the scope of their duty, and were therefore not entitled to a notice under Section 43 nor was the plaintiff bound to prove they acted maliciously under Section 44. Judgment of *Pellereau*, J. affirmed on appeal. Section 47 of the said Ordinance 1 of 1872 applies only to cases where a Police officer does an act in "good faith" and the act is done under *that* Ordinance and not some other. *Ko Bo An* v. *Punghulu Shaik Beenan*, 1 Kyshe, 273, distinguished. LIM SENG EE *v.* WRAY AND ANOR - - - - - - - 240

3. ——The expression "the Chief Police Officer" in the Preservation of the Peace

POLICE—*continued.*
Ordinance 6 of 1872, Section 15 [as amended by Ordinances 5 of 1877 and 6 of 1885] might mean according to circumstances the Inspector-General of Police of this Colony, but is not confined to that officer, and includes the Principal Officer of Police of whatever rank for the time being in the Settlement from which the information proceeds. *In re* TAN TUA KOW - 291
4. ——A Police officer cannot legally arrest a person for breach of a mere bye-law, such as over-loading a passenger boat contrary to Rule 36 [for passenger boats] made under Section 53 of the Harbour Ordinance 8 of 1872. A conviction for the offence of allowing a person in lawful custody to escape under Section 221 of the Penal Code cannot be sustained when that person is not legally in custody or is punishable with a mere fine. REGINA *v.* SAHID - - - - - - - - 615
COURTS—As to the application of the Criminal Procedure Ordinance 5 of 1870 to— - - - - - - - - 230
see LABOUR. 1.
—— *also* MAGISTRATE. 8.- 350
POLYANDRY—MARRIAGE - - 225
see MAHOMEDAN MARRIED WOMAN 3.
PORT—*see* SHIPPING - - - 679
POSSESSION—Title Deeds—Equity 154
see LAND. 5.
—— *also* LIMITATION. 1.- 311
POSSESSORY TITLE—*see* LAND. 12. 453
POSTPONEMENT—*see* ORDER OF HEARING - - - - - - - - 345
see also HABEAS CORPUS. 1. 287
POWER OF ATTORNEY—Principal—Agent - - - - - - - - 319
see AGENT. 1.
—— *also* CONSULAR COURT. 2. 437
——— OF SALE—*see* BILL OF SALE. 9. - - - - - - - - 620
see also MORTGAGEE. 2. - 359
POWERS AND DISCRETIONS—*see* MARGINAL NOTES - - - - 435
PRACTICE—Crown Witnesses—Counsel for the defence - - - - - 317
see WITNESSES. 1.
PRELIMINARY ENQUIRY—*see* JUSTICE OF THE PEACE - - - - 151
see also MAGISTRATES. 2.- 592
PRESERVATION OF THE PEACE—No conviction without evidence of warning on the occasion of riotous assembly 357
see BREACH OF THE PEACE.
—— *also* POLICE. 2. - 240
PRESUMPTION—*see* GAMING 1. 3. 237, 392
see also LOTTERY. 3. - 668
PREVENTION OF DISEASE—*see* CATTLE DISEASE - - - - - 666
PRINCIPAL—A prisoner who is charged with the commission of an offence as a principal, cannot be convicted of an abetment of the offence without the charge being first amended by charging him with the abetment. Section 64 of the Criminal Procedure Ordinance 6 of 1873 does not include such a case. ABDULRAHMAN & ORS. *v.* MANNAR ASARY - - - - - 118
2. ——Agent—power of attorney 319
see AGENT. 1.
3. ——Accessory—amendment of charge - - - - - - - 546
see SPIRITS.
—— *also* CONVICTION. 4.- 493
PRISONER—ESCAPE OF—Conviction for allowing—cannot be sustained—when not legally in custody - - - 615
see POLICE. 4.
PRIVATE COUNSEL—Crown prosecution—right of reply - - - 605
see ATTORNEY-GENERAL. 1.
PRIVATE HOUSE—*see* GAMING. 4. 5. - - - - - - - 518, 615
PRIVILEGED PUBLICATION—*see* LIBEL - - - - - - - - 364
PRIVITY OF CONTRACT—The defendant being the lessee of certain brick fields belonging to the Government, by one of the clauses of the lease agreed if required to make and supply to, and for the use of, the Government, bricks of a given size and quality at a fixed rate per 10,000. The plaintiff thereafter became a contractor to the Government for the building of a wall for the Public Works Department and was to provide all necessary materials for the work. The Government arranged with the plaintiff that he should procure his bricks from the defendant, the cost of which should be deducted from the contract price to be paid the plaintiff. The Government thereupon gave the plaintiff orders on the defendant for bricks of the requisite dimensions, which the plaintiff handed to the defendant and obtained from him the right quantity of bricks. The plaintiff afterwards found a large portion of the bricks so supplied by the defendant were of smaller size and brought the fact to the notice of the Government. The Government however, on the defendant presenting his bill against them for full size bricks paid him his bill in full and thereafter deducted the amount from the amount they had to pay the plaintiff for the wall. The plaintiff thereupon sued the defendant for his loss by reason of the defendant's supply of the smaller size bricks. *Held*, on appeal [reversing the judgment of the Court below, *Goldney*, J. dissenting] that there was no privity of contract between the plaintiff and the defendant nor any duty which the defendant owed the plaintiff, and the plain-

PRIVITY OF CONTRACT—*continued.*
tiff could not therefore recover. SAMMUGUM *v.* FRASER - - - - 338
PRIVY COUNCIL—Appeal—Power and authority of Court of appeal to impose terms for time within which appeal to be lodged - - - - - - - - 204
see ARBITRATION. 1.
PROBATE—The Probate Act 20 & 21 Vict. c. 77 does not extend to this Colony - 187
see ADMINISTRATION BOND.
—— *also* STATUTES.
2. ——High Court of Justice in England —powers and jurisdiction—Common Law—Equity - - - - - - - - 251
see CONTRACT. 4.
—— *also* DECLARATION OF TRUST - - - - - - - - 178
PROCEEDINGS—Magistrate's Court—irregularity—Case heard in private—conviction quashed - - - 350, 589
see MAGISTRATE. 8. 16.
—— *also* JUSTICE OF THE PEACE - - 151
——— MAGISTRATES. 1. 2. - - - 560, 592
2. ——Evidence on Commission - 677
see BILL OF LADING.
PROCEEDINGS IN REM—Forfeiture—Crown - - - - - - - - 688
see CROWN SUITS.
PROCESS—Non-service of—co-defendant —effect - - - - - - - - 409
see EXECUTOR. 2.
—— *also* ABUSE OF PROCESS. 628
——— SUBPŒNA. - - 156
PROCLAMATION—*see* ARMS AND AMMUNITION. 2. - - - - - 638
PROFITS—Share—Firm—Executor 491
see PARTNERSHIP. 2.
—— *also* ——— 1. - 380
PROGRESS OF SUIT—Non-service of process on co-defendant - - - 409
see EXECUTOR. 2.
PROHIBITED PORT—*see* ARMS AND AMMUNITION. 2. - - - - 638
PROMISE—The defendant, on the marriage of his daughter to the plaintiff promised in writing, *inter aliâ* to "build and give" to the plaintiff "a suitable house." He afterwards built a house and the Court was satisfied on the evidence he did it for the plaintiff and had let plaintiff into possession of it in pursuance of the promise. After residing there some years, the plaintiff fell out with the defendant and quitted the house, and some time after brought a suit for specific performance by the defendant of his promise by "building and giving" him "a suitable house." *Held*, though the promise was void under the Statute of Frauds for uncertainty as to the house intended, and the Court could not say what was "a suitable house," yet the parties had
PROMISE—*continued.*
by their acts pointed out the house intended and the letting plaintiff into possession thereof, was a part performance which took the case out of the Statute. *Held also*, the house being ascertained, the promise to build and give a "house," necessarily implied the gift of the *land* on which it was to be built, with such curtilage as was proper for the due enjoyment of the house. MAHOMED SALLEH & ANOR. *v.* NACODAH MERICAN. - - - - - - 463
2. ——Marriage consideration—entry in Kali's book—stamp - - - - 583
see MARRIAGE SETTLEMENT.
PROMISE TO PAY—Ability—revival of debt - - - - - - - - 136
see AGREEMENT. 1.
PROMISSORY-NOTE—The provision in Schedule 1 of the Stamp Ordinance, 1881, as to Promissory-notes not being payable after sixty days, has no application to a Promissory-note made before that Ordinance, though sued on after that Ordinance became law. *Palaniapah Chetty* v. *Lim Poh*, Civil Cases, Vol. 1 of these Reports, 548, distinguished. A Promissory-note given by a husband to a wife, is not enforceable by the wife, either against the husband in his life time, nor against his Executors after his decease: and this, though the note be given in consideration of the husband having neglected to maintain the wife for many years. CHEAH BOON EAN *v.* CHEAH CHONG BENG & ANOR. - - 6
2. ——A document which is encumbered with conditions or puts a person on enquiry to ascertain whether any uncertain event has happened is not a Promissory-note 181
see AGREEMENT. 3.
—— *also* CREDITOR. 2. - 559
3. ——It is no defence in law to an action on a Promissory-note, that when the amount became due the defendant paid a part thereof to account, and the plaintiff agreed to accept a new note for the balance, which note the defendant was always ready and offered to give. SHEDUMBRUM CHETTY *v.* KENG CHEOW & Co - - - - 587
PROMOTER—*see* COMPANY. 1. 193
see also CONTRACT.
PROPER CHARGE—Case remitted to Magistrate - - - - - - 357
see BREACH OF THE PEACE.
2. ——The power to direct an accused person to be tried again on a proper charge when the Court is of opinion that he has been convicted on a wrong charge [Clause II. Section 34 of Ordinance 12 of 1879] is discretionary and will not be exercised in all cases. The Court refused to exercise such power when the charge had been hanging over the appellant for over two and a-half years, and there was a probability

PROPER CHARGE—*continued.*
that it would be difficult to get the witnesses for the prosecution as well as the defence. The appellant could not plead *autrefois acquit* to such new charge should it be hereafter preferred. A Magistrate has no power under Section 71 of Ordinance 6 of 1873 to interrogate a prisoner. That power is conferred on the Supreme Court only. REGINA *v.* MAH AH CHOON - - - - 472
3. ——The effect of Clauses 2 and 8 of Section 34 of the Appeals Ordinance, 1879, is to make it the duty of the Court on quashing a conviction to consider whether on the facts there is not a proper charge on which the accused might not be charged and if there is to direct that he be tried on such proper charge - - - - 597
see LOTTERY. 2.
—— *also* COURT OF APPEAL.
——— MAGISTRATE.
——— PRINCIPAL. 1. 118
——— SPIRITS - - 546
PROPERTY—Return of—action for 214
see POLICE. 1.
PROSECUTION—Witnesses called on behalf of - - - - - - - - 317
see WITNESSES. 1.
2. ——Onus probandi — unlicensed house - - - - - - - 401, 665
see LICENSE. 1. 2.
PROSTITUTION—The mother of a minor under sixteen years of age who has always had charge of the minor, cannot be convicted under Section 373 of the Penal Code, although she brings up and employs the minor for the purpose of prostitution. The words " or otherwise obtains possession of" in the said Section 373 are *ejusdem generis* with the preceding words "buys" and "hires" and cannot apply to a mother who always has had the custody and possession of her child. REGINA *v.* QUAK AH SAH - - - - - - - - 385
2. ——Purchase of girl—age—harbouring - - - - - - - - 493
see CONVICTION. 4.
—— *also* HABEAS CORPUS. 2. 685
——— LICENSE.
PROTECTOR OF CHINESE—Register under Dangerous Societies Ordinance—Evidence - - - - - - 500
see CHARITY. 2.
—— *also* HABEAS CORPUS. 2. 685
——— IMMIGRATION. 604
PUBLIC—Class of—Club—feast 518, 615
see GAMING. 4. 5.
2. ——Native habits and customs 615
see GAMING. 5.
———AUCTION—purchase of land 82
see LAND. 1
—— *also* LAND. 12. - 453
——— MORTGAGEE. 2. 359
PUBLIC CHARITIES—*see* CHARITY.
see LAND. 2. - - - 101
—— TRUSTEE. 1. - - 100
—— WAKOFF.
———NUISANCE—*see* RIPARIAN PROPRIETOR - - - - - 4
———OFFICER—*see* CONSULAR COURT. 2. - - - - - - - - 437
see also LAND. 13. - - 533
—— POLICE. 1. 2. 214, 240
—— SUBPŒNA - - 156
———PASSAGE—*see* VERANDAH 431
———PLACE—*see* AFFRAY - 346
see also BROTHEL - - 84
PUBLICI JURIS—*see* TRADE-MARK. 2. - - - - - - - - 394
PURCHASE—Land—public auction—conditions of sale—Statute of Frauds 82
see LAND. 1.
2. ——Contract for—forfeiture of deposit—breach by purchaser - - 251
see CONTRACT. 4.
3. ——Notice—title defective—compensation for improvements- - - 409
see EXECUTOR. 2.
4. ——Refusal to complete—discovery—specific performance - - - 453
see LAND. 12.
PURCHASE MONEY—*see* MORTGAGEE. 2. - - - - - - - - 359
QUARANTINE—*see* CATTLE DISEASE 666
QUARTER SESSIONS—*see* MAGISTRATES. 1. 2. - - - - 560, 592
QUAY—*see* SEA SHORE - - 10
—— *also* RIPARIAN PROPRIETOR 4
RATING—Principles of—buildings—interest on capital - - - - 103
see ASSESSMENT.
REALTY—*see* MAHOMEDAN MARRIAGE ORDINANCE. 2. - - - - - 265
see also MAHOMEDAN MARRIED WOMAN. 3. - - 225
REASONABLE AND PROBABLE CAUSE—Malice - - - - - 484
see CONTRACT. 9.
———BELIEF—*see* POLICE. 2. - 240
———TIME—Delivery—mining shares 512
see CONTRACT. 11.
REBATE OF INTEREST—*see* CREDITOR. 2. - - - - - - 559
RECEIVING STOLEN PROPERTY—Security to be of good behaviour - 375
see MAGISTRATE. 9.
2. ——The prisoner, a tindal on a Sugar Estate in Province Wellesley, one night at 9 o'clock in the presence of several persons, received some planks from four coolies of the Estate and proceeded to cut them and nail them down as a flooring for a cow-shed belonging to the Estate which he had the use of for his cows; the planks belonged to the Estate and the coolies had had no permission to remove them. The Magistrate convicted the prisoner of receiving

RECEIVING STOLEN PROPERTY—*continued.*
stolen property. *Held*, on appeal that on these facts there was no satisfactory evidence of guilty knowledge on the part of the prisoner and the conviction was quashed. *Query*. Could the planks under the circumstances be said to be "stolen" property within the meaning of the Penal Code? SHELLAPEN *v.* GORDON - 388
RECLAMATION—*see* SEA SHORE 10
RECOGNIZANCE—Good behaviour—Evidence of character - - - 375
see MAGISTRATE. 9.
———TO KEEP THE PEACE—Where a Magistrate binds over a person to keep the peace and that person appeals against the order, the proper mode for the Magistrate to adopt in sending up the papers is to send with them a formal order of his order binding over the appellant and not to send it up in the form of a conviction, as the binding over is not a "conviction" but an "order." A Magistrate has power where a person is charged with an offence, to dispense with a summons to shew cause under Ordinance 13 of 1872, Section 61, Clause 5, and on the evidence before him if threats of violence appear therein, to bind the accused over to keep the peace under Section 61. But before a Magistrate can bind a person over under Section 61, there must be evidence that that person is likely to commit a breach of the peace or to do some act that may probably occasion such a breach; otherwise he has no jurisdiction and his order will be discharged. Actual words of threat are not necessary; but looks, gestures and conduct may express them if testified to. *Regina* v. *Dunn*, 12 Ad. & E. 617, 619, followed. HAJEE MAT ALLEE *v.* MANAH & ANOR - 276
2. ——A Magistrate, apart from Ordinance 13 of 1872, Section 60, has no power on convicting a person of an offence, to order him to give security to keep the peace; and that section only enables him to require security *in addition* to some other punishment provided for the offence of which the person is convicted. Where, therefore a Magistrate convicted a prisoner of an assault under Section 352 of the Penal Code, but did not inflict a fine or imprisonment, and only ordered him to give security to keep the peace for six months, *Held*, the order was bad for want of jurisdiction. MAN & ANOR *v* LEHAH 389
RECOVERY OF GOODS—*see* NEW TRIAL. 1. - - - - - - 186
———OF JUDGMENT—Action for malicious prosecution—non-payment of damages—arrest and imprisonment of defendant - - - - - - - 433
see MALICIOUS PROSECUTION.
RECOVERY OF LAND—Suit for registration—jurisdiction of the Supreme Court—customary land-holder - - 413
see LAND. 9.
REDUCTION OF SENTENCE—*see* COURT OF APPEAL. 1. - - - 161
see MAGISTRATE. 18. - 606
——MISCHIEF - - - 250
RE-ENTRY—*see* CONTRACT. 7. 446
REIMBURSEMENTS—Costs - 638
see DERELICT VESSEL.
REGISTRAR—*see* CROWN SUITS - 688
REGISTRAR'S REPORT—Accounts—matters of detail—point of fact - 492
see ACCOUNTS.
——*also* COLLISION - - 478
———PARTNERSHIP. 1. 380
REGISTRATION—*see* BILL OF SALE. 7. - - - - - - - - 530
———OF LAND—Proof—ownership—jurisdiction of Supreme Court 413
see LAND. 9.
RE-HEARING—Fresh charge—power to direct—discretionary - - - 472
see PROPER CHARGE. 2.
RELEASE—*see* LEGACY - - 88
RELIEF—The effect of Sub-sections 4 and 6 of Section 1 of the Civil Law Ordinance 4 of 1878 is, that if in any suit which might have been instituted before that Ordinance was passed, a Court of Equity would have given relief or recognised an equitable claim, whether on the part of a plaintiff or defendant, this Court, under that Ordinance, is to give the same relief, or recognise the same rights, in all and any suits or proceedings before it, irrespective of the nature of the suit or proceeding, and who is or would formerly have been plaintiff or defendant therein. Where, therefore in an action for the recovery of land, in the nature of an action of ejectment under the Common Law, the Court considered the plaintiff was entitled to recover possession, but was also satisfied that the defendant had, *bonâ fide*, in the belief that the land was his, expended money in making improvements to it, which improvements the plaintiff would obtain the benefit of, on getting possession of the land, the Court, in giving judgment for the plaintiff for the recovery of the land, ordered that he pay the defendant a sum of money [which the Court then assessed] for the improvements so made. KHOO HOCK LEONG *v.* LIM ANG KEE - - 353
REMAINDER—Life Estate—Wild's Case - - - - - - 584
see LEASEHOLD PROPERTY.
REMOVAL OF SPIRITS—*see* SPIRITS 546
RENEWAL—COVENANT FOR—*see* SEA SHORE - - - - - - 10
RENT—A landlord has no power by a mere notice to raise his tenant's rent in failure of his quitting the premises, or in default

RENT—*continued.*
of payment of such increased rent to distrain therefor. In order to support the claim for such increased rent or to justify the distress therefor, the landlord must shew the tenant agreed to pay such increased rent or facts from which such assent on the part of the tenant might be inferred by the Court. JENABBOO & ANOR *v.* VYTILINGUM. - - - - - 78
2 ——Distress for—Wayang—Chinese theatrical costumes - - - 97
see DISTRESS.
3. ——Assessment—tenant - 103
see ASSESSMENT.
4. ——Tenth—customary land-holder 249
see LAND. 6.
5. ——The period of limitation for an action for rent founded on a covenant in a lease is twelve years under Act 14 of 1859, Section 1, Clause 11, and not three years under Clause 8. Clause 8 of Section 1 applies only to actions for rent where there is no lease under seal. CRANE *v.* YEOH HONG GHEE - - - - - - 587
see also LOTTERY. 3. - 668
REPLY—Although by the joint effect of Sections 153 and 207 of the Civil Procedure Ordinance 5 of 1878, a plaintiff who makes default in delivering his reply to the defendant's statement of defence thereby closes the pleadings and is deemed to admit the facts stated in the statement of defence, the Court has power under Sections 8 and 153 of the Ordinance even at the trial of the case and long after the expiration of the time within which such reply should have been delivered, to extend the time to enable the plaintiff to file and deliver his reply on payment of defendant's costs incident to such default. *Eaton* v. *Storer*, 22 Ch. Div. L. R. 91, followed. A person who is turned out of possession of lands on which he under the belief the lands were his, has made improvements, is entitled to sue *as plaintiff* in equity for compensation on account of such improvements. The right to claim compensation for improvements is *not limited* to a claim by a defendant against a plaintiff who is seeking equity. *Edlin* v. *Battaby*, 2 Lev. 152, followed. *Story's Eq. Jur.* Sections 799 b. [n] and 1238, not followed. The fact that such plaintiff [in a previous suit brought against him by the defendant and who was then a plaintiff seeking equity to have certain conveyances of the land declared void and inoperative] did not claim compensation for the improvements as he might have done and had an opportunity of doing does not estop him from subsequently as plaintiff suing in equity for such compensation. Ignorance that the Statute Law of the Colony requires a Deed of Conveyance by
REPLY—*continued.*
a married woman to be acknowledged before it can be operative, does not amount to constructive notice of the Deed being inoperative. The maxim *Ignorantia juris non excusat* has no application to such a case. *Seaton* v. *Seaton*, 36 W. R. 865, followed. The Court does not generally act on the uncorroborated though uncontradicted evidence of a plaintiff against the estate of a deceased person. ARMOOTAH PILLAY *v.* FATIMAH BEE & ANOR. - - 416
see also PLEA IN BAR - 651
——RIGHT OF—*see* ATTORNEY-GENERAL. 1. - - - - - - - 605
RESIDENCE—Plaintiff or firm—debt—jurisdiction - - - - - - 136
see AGREEMENT. 1.
RESIDENT—British—of Perak—*see* EXTRADITION. 1. - - - - - 150
RESIGNATION—*see* MUNICIPALITY. 3. - - - - - - - - 551
RES JUDICATA—*see* CONTRACT. 13. 561
RESPONDEAT OUSTER—Judgment 651
see PLEA IN BAR.
RESPONSIBILITY—*see* GRIEVOUS HURT - - - - - - - 337
REST AND RESIDUE—*see* MAHOMEDAN MARRIAGE ORDINANCE. 2. - - 265
RESTRAINT—Alienation—Wakoff—bequest - - - - - - - 101
see LAND. 2.
——OF TRADE—*see* CONTRACT. 3. 158
see also TRADE-MARK.
RETURN OF PROPERTY—Action for—damages - - - - - - 214
see POLICE. 1.
REVIVAL OF DEBT—Promise to pay—ability - - - - - - - 136
see AGREEMENT. 1.
REVOCATION OF LETTERS OF ADMINISTRATION—Power of attorney. 191
see ADMINISTRATION. 1.
RIGHT—*see* TRADE-MARK.
——OF ACCESS—*see* SEA SHORE 10
——OF REPLY—*see* ATTORNEY-GENERAL. 1. - - - - - - - 605
——OF SALE—*see* BILL OF SALE. 9. 620
see also MORTGAGEE. 2. - 359
——PETITION OF—*see* PETITION OF RIGHT.
——TO LEGACY—*see* LEGACY. 88
RIOTOUS ASSEMBLY—*see* BREACH OF THE PEACE - - - - - - 357
see also AFFRAY - - 346
RIPARIAN PROPRIETOR—If a riparian proprietor erects an embankment on his own land as a protection to his land against the river, and thereby causes injury to the land of his opposite neighbour, he is liable in damages to such neighbour for the loss sustained by the injury. A riparian proprietor finding his land was being washed away by the river, which was gradually

RIPARIAN PROPRIETOR—*continued.*
leaving its old channel and was encroaching on his land, drove in piles in the river, in a line which was his original boundary by grant prior to the washing away of his land, with a view to reclaiming his land, but in so doing obstructed the free use of the new channel by adjoining riparian proprietors, who, in consequence, sustained special damage by being put to extra expense in bringing their goods by another route to their land in removing the piles. *Held*, he was liable to them for such special damage, although the obstruction may have also been a public nuisance. KHAN MAHOMED *v.* KATZ BROTHERS - - - - 4

RIPARIAN RIGHTS—Riparian rights may be acquired on an *artificial* water-course by user, where the water-course is made or intended to be made for a *permanent* purpose. *Aliter* where the purpose was only a *temporary* one. Where a water-course was made in 1808 off a natural stream and by means of a dam in this stream, carried a large portion of its water down the course, and supplied a large reservoir which supplied a town and its shipping with water, and the plaintiff [and his predecessors] having built in 1840 a flour-mill midway between the artificial course above, and the natural stream below, and by means of a lead or aqueduct diverted a portion of the water in the artificial course on to his mill, which after overshooting the water-wheel by which the mill was worked, passed on to the natural stream; *Held*, that in the absence of evidence that the artificial water-course was originally made for a temporary object, the presumption was that it was made for a *permanent* purpose and the plaintiff and his predecessors in title *had acquired* riparian rights on the artificial course which entitled him to recover damages against the defendants who in 1878, diverted the water higher up the natural stream and thereby discontinued the water-course and prevented the mill from being worked. *Held further*, the continuing of the diversion from 1878 down to this date was a *continuing* trespass and the plaintiff therefore barred by the three months' limitation under the Conservancy Act XIV. of 1856, Section 126. TAN KIM TENG & ANOR. *v.* MUNICIPAL COMMISSIONERS - - - - - - - - 450

RULE—Wild's Case—life estate - 584
see LEASEHOLD PROPERTY.

———ABSOLUTE—Magistrate on being ordered to state case—costs follow the event - - - - - - - - 606
see MAGISTRATE. 18.

———NISI—Habeas Corpus - - 221
see EXTRADITION. 2.

———OF LAW—Mercantile Contracts 512
see CONTRACT. 11.

RULES AND ORDERS OF COURT—Rules made in 1867 for the guidance of the Sheriff are still in force - - - - 614
see SHERIFF.

SALE—Land—Contract—plaintiff—Statute of Frauds - - - - - 82
see LAND. 1.
- - - *also* LAND. 13. - 533

——POWER OF—*see* BILL OF SALE. 9. - - - - - - - - - 620
see MORTGAGEE. 2. - - 359

SALVAGE—A person who renders salvage services to a ship at the request of the crew thereof, [the servants of the owner] has a claim for such services on the ship; and the owner who has had the benefit of his services cannot deny such claim. In order to constitute services rendered in navigating a ship out of port *salvage* services, it is sufficient if at the time they are rendered the ship has encountered a misfortune [such as an attack in such port by pirates who have murdered some of her officers and carried away the captain and others as prisoners] which *might possibly* expose her to destruction if such services had not been rendered. Such services cannot be considered as mere *pilotage* services. THE HOK CANTON - - - - - - 200

SCENERY—Town Hall—Theatre—Municipality - - - - - - 484
see CONTRACT. 9.

SCRIPS—Certified transfers—shares—transferee - - - - - - 465
see BREACH OF CONTRACT. 3.

2. ——Transfer—Bearer—Warrant 512
see CONTRACT. 11.

SEAL—Authentication of document 150, 221
see EXTRADITION. 1. 2.

2. ——Municipality—Scenery for theatre - - - - - - - - 484
see CONTRACT. 9.

3. ——Certificate of Judgment—Proof - - - - - - - - 570
see FOREIGN COURT.

4. ——Covenant—Lease—Limitation 587
see RENT. 5

SEA SHORE—The owner or lessee of land adjoining the sea shore has a private right of access to the sea, and any person even the Crown interfering with such access, as by raising an embankment in front of his land, so as to deprive him thereof, is liable to him in damages. *Lyon* v. *Fishmongers' Company*, 1 L. R. App. Ca. 662, considered and applied. A lessee of land with its easements and appurtenances for a term of years with a covenant for a renewal at his option by giving six months' previous notice, within the six months' gave the notice and claimed the renewal. Some time after the expiration of the lease he and the lessor arranged that the new lease should contain several further and different covenants and

SEA SHORE—*continued.*
include portion only of the lands in the former lease together with additional lands which had been excepted from the old lease, with certain rights in specific terms over the sea frontage. The new lease was accordingly made and was declared to be a renewal and made in pursuance of the covenant for renewal. The lessor, subsequently to the receipt of the aforesaid notice, but prior to making the aforesaid arrangement and executing such new lease, made an agreement with the Crown the effect of which was to give up all rights he had to object to the Crown reclaiming a mud bank in front of the lands by which his access to the sea might be cut off. The Crown under this agreement proceeded to reclaim the bank and erect a quay, and for so doing, was sued by the lessee for depriving him of his access to the sea. The Crown objected that the new lease was not in law or equity, a renewed lease made in pursuance of the covenant for renewal and the notice,—and that the agreement they held being prior in point of date to the new lease, the lessee had no rights against them. *Held*, by the Court of Appeal affirming the judgment of the Court below, that although the lessee could not have compelled his lessor to grant a renewal of a lease in terms with such new lease, yet as the lessor had executed such new lease intending it should be a renewed lease made in pursuance of the covenant for renewal, the Crown had no right to dispute such new lease as not being a renewal, and that such new lease was a renewal made in pursuance of the covenant and the alterations in parcels and conditions and verbiage as to the easements and appurtenances did not prevent it being so. Judgment of the Court of Appeal affirmed by the Privy Council. WEMYSS *v.* ATTORNEY-GENERAL - - - - - 10

——— WATER—Flooding of lands—action in damages - - - - 459
see TRESPASS. 2.

— CHARITY. 2. - - 510

SECRET SOCIETY—*see* MAGISTRATE. 16. - - - - - - - 589

SECURITY—A defendant who has been arrested on mesne process, under Section 422 B. of the Civil Procedure Ordinance 5 of 1878, and given security that he will not leave the jurisdiction without the permission of the Court, is at liberty to leave without such permission immediately after the plaintiff has obtained judgment in the action. The security bond is at an end no sooner such judgment is pronounced, and the sureties therein, cannot be made liable thereon for the departure of the defendant after the date of such judgment. The words "either..... or otherwise" in

SECURITY—*continued.*
the aforesaid section, have no meaning, or at least do not extend the "prosecution" of the action beyond final judgment, and though they are not found in the corresponding section of the English Debtors' Act [32 & 33 Vict., c. 62, s. 6] the effect of the two sections is the same, and the English cases on the latter, are authorities on the construction of the former. *Yorkshire Engine Co.* v. *Wright*, 21 W. R. 16 [*dictum* of Bramwell, B.] approved of and followed. CHAWANA MAHOMED HUSSEIN *v.* MAHOMED MUSTAN - - - - - 1

2. ——Void Bill of Sale of goods—discharge of surety - - - - - 475
see BILL OF SALE. 6.

3. ——The Court has power notwithstanding Section 493 of the Civil Procedure Ordinance, 1878, to dispense with security for the due administration of an estate; and in a case of special circumstances will exercise the power, and exempt the administrator from furnishing security. *In the goods of* DUMSHEAH - - - - 594

SECURITY TO BE OF GOOD BEHAVIOUR—Order to furnish—without evidence as to character—no jurisdiction 375
see MAGISTRATE. 9.

SECURITY TO KEEP THE PEACE—*see* RECOGNIZANCE TO KEEP THE PEACE. 1. 2. - - - - - - - 276, 389

SEH—Tribal—kongsis - - 500
see CHARITY. 2.

SELANGOR COURT—Competent Court—decisions recognised—notice - 570
see FOREIGN COURT.

SENTENCE—Reduction of—Magistrate—Court of Appeal—powers - - 161
see COURT OF APPEAL. 1.

2. ——Alternative—one sentence for two offences - - - - - - 188
see OFFENCES.

3. ——Conviction altered to one of attempt—sentence reduced - - 250
see MISCHIEF.

4. ——Alternative—Court of Appeal may amend conviction - - - - 493
see CONVICTION. 4.

5. ——Reduction of—Failure of Justice - - - - - - - - 606
see MAGISTRATE. 18.

SEPARATE ESTATE—*see* MAHOMEDAN MARRIED WOMAN. 1 2. 3. - 122, 124, 225

——— USE—Husband and Wife 376
see WIFE.

SEPARATION—*see* HINDU HUSBAND AND WIFE. - - - - - - 327

SERVANT—Wrongful dismissal—action in damages - - - - - - 91
see WRONGFUL DISMISSAL.
—— *also* LABOUR.
—— MAGISTRATE. 18. - 606

SERVICE—Process - - - 156
see SUBPŒNA.
—— *also* LABOUR. 3. - 524
SETTLEMENT—Desertion of wife by husband—Court—jurisdiction - - 376
see WIFE.
2. ——Marriage—entry in Book - 583
see MARRIAGE SETTLEMENT.
SETTLEMENT OF CASE Summons for assault withdrawn—on his discharge prisoner cannot be tried a second time - 556
see ACQUITTAL.
SEVERAL OFFENCES—*see* OFFENCES - - - - - - - 188
SHAREHOLDER—*see* COMPANY. 1. 193
SHARES—Duty of Vendor—vendee—damages—specific performance - - 465
see BREACH OF CONTRACT. 3.
2. ——Broker—principals - - 561
see CONTRACT. 13.
—— *also* CONTRACT 11.
12. - - - 512, 544

SHERIFF—The Sheriff has no authority to receive from a defendant the amount claimed in an action, and costs, *before* execution is issued therefor. A defendant therefore who pays the amount claimed and costs, to the Sheriff on service of the writ of summons and without the plaintiff's consent, will be liable to pay it a second time to the plaintiff should the Sheriff misappropriate the amount. The Rules made in 1866 for the guidance of the Sheriff are still in force. VEERAPPAH CHETTY *v.* KHO SOON LIAT & ANOR. - - - 614

SHIPPING—A Captain of a ship has no authority to pledge his owner's credit at a port where the ship is lying and where the the ship has an Agent authorised and ready to supply the ship's requirements. *Gunn* v. *Roberts*, 9 L. R. C. P. 331, followed. It makes no difference that the Master was not aware at the time he purported to pledge his owner's credit that the ship had such an Agent at the port. THE THERMOPYLÆ. SOLOMON & ANOR. *v.* GUTHRIE & Co. - - - - - 679

see also BILL OF LADING.
——— CHANDU.
——— COLLISION - 478
——— CONTRIBUTION - 528
——— DERELICT VESSEL - 638
——— PIRACY JURE GENTIUM - - - 169
——— SALVAGE - - 200
SIAM—British Consular Court - 274, 437
see CONSULAR COURT. 1. 2.
2. ——Contract in Bangkok—plaintiff resident in Singapore - - - 511
see CONTRACT. 10.
SILENCE GIVES CONSENT—Rule of law—Mercantile contracts - - 512
see CONTRACT. 11.
SINGAPORE—Plaintiff resident in—Foreign Contract - - - - 511
see CONTRACT. 10.
2. ——Company — Selangor — liquidation—proof - - - - - 570
see FOREIGN COURT.
SLANDER—*see* LIBEL - - - 364
SMALL CAUSE—*see* Discovery of documents - - - - - - - 268
SOLE TRUSTEE—*see* TRUST. 2. 497
SOLICITOR-GENERAL—Witnesses for defence—right of reply - - - 605
see ATTORNEY-GENERAL. 1.
SPECIAL JURY—*see* PIRACY JURE GENTIUM - - - - - 169
———PLEA—Defence—Judge—action in damages - - - - 437
see CONSULAR COURT. 2.
SPECIFIC PERFORMANCE—Decree for—damages—Statute of Frauds - 251
see CONTRACT. 4.
2. ——Refusal to purchase - 453
see LAND. 12.
——*also* PROMISE - - 463

SPIRITS—The Spirit Farmer has authority under Section 25 of the Excise Ordinance 4 of 1870, to limit by the permit he issues for the removal of spirits, the hours within which the removal shall be made, and any removal outside of those hours is a removal without a permit, and an offence under the section. The Court of Appeal has power to amend a charge by charging a person as a principal who was formerly only charged as an accessory; and also by substituting a proper charge under Section 34, Clause 6, even when the appeal is from an order of a Magistrate *discharging* the accused. SPIRIT FARMER *v.* TOK KIM TONG - - 546

see also CROWN CONTRACT. 1. 2. 648, 680
STAMP—*see* MARRIAGE SETTLEMENT 583
—— PROMISSORY NOTE. 1. 6
STATED CASE—*see* CASE STATED.
STATEMENT—Corroborative evidence 349
see THEFT. 2.

——— OF CLAIM — An amendment which will amount to a different state of facts from those in the statement of claim and disclosing a new cause of action, such fresh facts being admittedly intended to be inserted without reference to the plaintiff who is out of the jurisdiction, will not be allowed - - - - - - - 437

see CONSULAR COURT. 2.

——— OF DEFENCE — Default in delivering reply to—pleading—extension of time. - - - - - - - 416

see REPLY.
STATUTE OF DISTRIBUTIONS—*see* INTESTATE - - - - - - 325
see also MAHOMEDAN MARRIAGE ORDINANCE. 2. - - 265

STATUTE OF FRAUDS—Although the Statute of Frauds if intended to be relied

STATUTE OF FRAUDS—*continued.*
on must, by Section 175 of the Civil Procedure Ordinance, 1878, be specially pleaded, yet there is nothing to prevent the Court in the exercise of its discretion even at the trial of a case, giving leave to the defendant to amend his defence by pleading the Statute. SHAYNA MUSTAN ROWTER *v.* KANA SHAIK IBRAHIM - - 344
2. ——Uncertainty - - - 463
see PROMISE.
—— *also* BILL OF SALE. 6. 475
——CONTRACT. 4. - 251
——INTESTATE - - 325
——LAND. 1. - - 82
STATUTE OF LIMITATIONS—Rule—defendant - - - - - 136
see AGREEMENT. 1.
—— *also* LIMITATION. 1. - 311
——RENT. 5. - - 587
STATUTES:
21 James 1. c. 16 - - - 136
see AGREEMENT. 1.
—— LIMITATION. 1. - 311
29 Car. II. c. 3, s. 4 - - 82
see LAND. 1.
——s. 7 - - - - - 325
see INTESTATE.
4 Anne, c. 16, s. 19 - - - 136
see AGREEMENT. 1.
9 Geo. IV. c. 14 - - - 136
see AGREEMENT. 1.
3 & 4 Wm. IV. c. 27, s. 6 - - 311
see LIMITATION. 1.
——c. 90, s. 33 - - 103
see ASSESSMENT.
20 & 21 Vict. c. 77 - - - 187
see ADMINISTRATION BOND.
21 & 22 Vict. c. 27 - - - 251
see CONTRACT. 4.
32 & 33 Vict. c. 62, s. 6 - - 1
see SECURITY. 1.
33 & 34 Vict. c. 52 - - 221, 346
see EXTRADITION. 2. 3.
36 & 37 Vict. c. 66, s. 56 - - 596
see ARBITRATION. 3.
46 & 47 Vict. c. 57 - - - 269
see TRADE-MARK. 1.
STIPULATED TIME—*see* BILL OF SALE. 9. - - - - - - - - 620
STEPHENS' DIGEST OF THE CRIMINAL LAW—Definition of piracy *jure gentium* approved of - - - - 169
see PIRACY JURE GENTIUM.
STOLEN PROPERTY—*see* RECEIVING STOLEN PROPERTY. 2. - - 388
STORY'S EQUITY JURISPRUDENCE—Sections 799b. [n] and 1238, not followed - - - - - - - 416
see REPLY.
STREAM—*see* RIPARIAN RIGHTS 450
SUB-PARTNER—*see* PARTNERSHIP 1. - - - - - - - - - 380
SUBPŒNA—A person cannot be punished under Section 174 of the Penal Code for disobeying a Subpœna, when the time between the service of the Subpœna and the time he is therein directed to appear, before the Magistrate, is not reasonably sufficient to enable him to appear. Any statement made at the time by the person serving the Subpœna to the person served, that the date mentioned in the Subpœna had been extended to enable him to appear, cannot alter the directions of the Subpœna, or legally bind the person served to appear at such extended date. *Query.* Can the public servant whose own order has been disobeyed, hear a charge against the accused under Section 174 for disobedience of that order, and punish him for it. *Query.* Can a person who is under Subpœna from both the Supreme Court and the Police Court and intending to obey the former, be punished for disobedience to the latter. REGINA *v.* TAN SIM HO - - 156
SUIT—Progress of—non-service of process on co-defendant - - - - - 409
see EXECUTOR. 2.
SUMMARY JURISDICTION—*see* MAGISTRATE. 8. - - - - - - 350
SUMMONS—Withdrawal of—discharge of prisoner—not liable to be re-tried - 556
see ACQUITTAL.
——Gross and scandalous claim—service set aside - - - - - 628
see ABUSE OF PROCESS.
——Writ of—service out of jurisdiction - - - - - - - 511
see CONTRACT. 10.
—— *also* RECOGNIZANCE TO KEEP THE PEACE. 1. - 276
—— WRIT OF SUMMONS.
SUMMONS IN CHAMBERS—Leave to defend—Crown Suit - - - - 680
see CROWN CONTRACT. 2.
SUPREME COURT—Gross and scandalous claim—writ taken off file—service set aside - - - - - - - 628
see ABUSE OF PROCESS.
2. ——Consular Court at Bangkok—jurisdiction - - - - - - 274
see CONSULAR COURT. 1.
3. ——Detention of prisoners in Magistrates' Courts—jurisdiction - - 287
see HABEAS CORPUS. 1.
4. —— Jurisdiction of—in action for recovery of land—customary land-holder. 413
see LAND. 9.
5. ——Power of interrogating a prisoner vested only in— - - - - - 472
see PROPER CHARGE. 2.
——*also* CROWN SUITS - 688
—— EXTRADITION. 2 221
—— ORDER OF HEARING 345

SURETIES—Writ on mesne—process before judgment—arrest of defendant—security not to leave jurisdiction—bond—writ held void - - - - - - 71
see BOND.

SUSPICION—*see* FRAUD. 3. - 590
see also CONTRACT. 12. - 544

TAXATION OF COSTS—Costs and expenses before action to perfect title 181
see AGREEMENT. 3.

TENANT—Failure to pay rent—notice to quit - - - - - - - 78
see RENT. 1.

———IN COMMON—*see* LAND. 2. 101

TENDER—Import of goods fraud—vendor - - - - - - - 481
see CONTRACT. 8.

2. ——Market—Bath House, &c.—Interest in land—lease—re-entry—*see* CONTRACT. 7. - - - - - - 446
see also CONTRACT. 13. - 561

TENTH—*see* LAND. 6. - - 249

TERM OF YEARS—*see* SEA SHORE 10

TESTATOR—Wakoff—Bequest - 101
see LAND. 2.

2. ——Purchase of property by Executor—trustee - - - - - - 590
see FRAUD. 3.

3. ——A testator who died in 1863 having given a life interest in certain lands to his widow, declared that after her death the said land should "go" to his daughter M. to be by her possessed, occupied, and enjoyed, without however any power of alienating the same, "and after her death to go to her issue, who should occupy, possess, and enjoy the same" without however any power of alienation, and in case if she or her issue should die without leaving issue, then the land was to go over to the plaintiffs. M. survived the testator, but died intestate without issue. Her administrator thereafter sold the land in fee to the defendant. The plaintiffs thereafter brought this suit to have it declared that M. had only a life interest under the aforesaid Will and her administrator could convey nothing thereof to the defendant—to have the conveyance cancelled—and the lands declared to belong to the plaintiffs under the clause of the gift-over on failure of issue. *Held*, that on the true construction of the whole clause, M. took an estate tail *eo instanti* the testator died; that under Act XX. of 1837 the lands and estate tail devolved on M. as personalty and as there could be no estate tail in personalty, M. took an absolute interest and the conveyance of the fee to the defendant by the administratrix of M. was good. *Held further*, that it was immaterial that M. died without issue, and without having barred the entail, and the

TESTATOR—*continued.*

gift-over was inoperative. *Roe d Dodson* v. *Grew*, 2 Wils. 322, followed. *Kitchee Pakirnah* v. *Syed Akil* [Penang Case—unreported] explained, and adhered to. MAHOMED MEERA NACHIAR & ANOR v. INCHE KHATIJAH - - - - 608
see also DEVISE - - 272
———MAHOMEDAN MARRIAGE ORDINANCE. 2. 265

TEXT BOOKS OF AUTHORITY—Passages followed or otherwise: Stephens' Digest of the Criminal Law, p. 64—definition of piracy *jure gentium* approved of - - - - - - - - 169
see PIRACY JURE GENTIUM.

Story's Equity Jurisprudence—§§ 799b [n.] and 1238, not followed - - - 416
see REPLY.

Thompson on Limitation [2nd. Ed.] 150—passage and decisions cited in—that plaintiff must shew actual possession within twelve years, are no authorities in this Colony - - - - - - - 311
see LIMITATION. 1.

Wheaton's International Law, p. 122a.—definition of piracy *jure gentium*, disapproved of - - - - - - - - 169
see PIRACY JURE GENTIUM.

Williams on Executors, 2 [8th Ed.] 1503, and the authorities there cited, disapproved of - - - - - - - - 325
see INTESTATE.
—— *also* CASES.

THEATRE—*see* CONTRACT. 9. - 484

THEFT—Mahomedan Husband and Wife - - - - - - - 122
see MAHOMEDAN MARRIED WOMAN. 1.

2. ——The prisoner seeing a hawker go past, called him and asked to see some of the sarongs he had for sale. The hawker handed him four, and it was eventually agreed he could have them for $3. The hawker then asked for payment, but the prisoner told him to come "another day"; thereupon they had words and the prisoner having struck the hawker, ran away with the sarongs. He could not be found nor the sarongs, till he was arrested on a later day on a warrant. *Held*, he was properly convicted of "theft" under Section 379 of the Penal Code. A statement made by a person to another at or about the time of the occurrence of the fact spoken to, is admissible as corroborative evidence by that other person under Section 31 of the Evidence Act II. of 1855. SAHID v. FU AH SEH - - - - - - - - 349
see EXTRADITION. 4. - 368

THIRD PARTIES—Land speculation—Company—Directors - - - 193
see COMPANY. 1.

THOMPSON ON LIMITATION—Indian decisions cited in—actual possession within twelve years—no authorities here - 311
see LIMITATION. 2.

THREATS—Secret Society—Case heard in private—Conviction held bad - - 589
see MAGISTRATE. 16.
—— *also* RECOGNIZANCE TO KEEP THE PEACE. 1. 2. 276, 389

TITLE DEEDS—Possession—Equity 154
see LAND. 5.

2. ——Detention of—party entitled to sue in detinue - - - - - 444
see ADMINISTRATION. 3.
—— *also* LAND. 5. 12. 154, 453
—— LIMITATION. 1. 311
—— TRUSTEE. 1. - 100

TODDY FARM—*see* CROWN CONTRACT. 1. 2. - - - - - - 648, 680
see also SPIRITS - - 546

TONGKANG—There is no rule or regulation in force in this Colony rendering it obligatory on tongkangs lying alongside vessels for purpose of discharging or relieving cargo to carry lights - - 478
see COLLISION.
—— *also* BILL OF SALE. 8. - 595

TOWN HALL—*see* CONTRACT. 9. 484

TRADE-MARK—The Court will not grant an *interim* injunction to restrain a person from using a trade-mark, unless the plaintiff by affidavit, establishes an exclusive right to the mark, as well-known to the public—*per Ford*, C.J. The Trade-Marks Act, 1883 [46 & 47 Vic. Cap. 57] is not in force in this Colony by virtue of Section 6 of Ordinance 4 of 1878; and no authority exists here from whom an exclusive right to a particular trade-mark can be obtained, —but such right is wholly dependant on the general principles of Commercial Law—*per Goldney*, J. By the principles of that law as soon as a trade-mark has been employed in the market so as to indicate to purchasers that the goods to which it is attached, is the manufacture of a particular firm, it becomes to that extent the exclusive property of that firm, and no one else has a right to copy it, if by so doing unwary purchasers may be induced to believe that they are getting the goods of the particular firm —*per Goldney*, J. The question how far the plaintiffs' exclusive right has been infringed depends upon how far the defendant's trade-mark bears such a resemblance to that of the plaintiffs, as to be calculated to deceive incautious purchasers: the introducing of one or two colourable variations will not make the copy the less an infringement—*per Goldney*, J. In such a state of facts, it is not necessary to the plaintiffs' success that the defendant should

TRADE-MARK—*continued.*
have intended to mislead—*per Goldney*, J. FRASER & CO. *v.* NETHERSOLE - 269

2. ——A label of a particular colour having printed on it the name of a firm or business and the place where it is carried on, followed by a description of the article on which the label is affixed and the use of such article and the mode of using it, is a trade-mark, the use of a colourable imitation of which this Court will restrain. A trade-mark does not become *publici juris* from the mere fact that it is also used by another person without objection for some years, concurrently with the user by the plaintiff of his mark. BLAZE *v.* MAYNARD & CO. - - - - - - 394

3. ——A person who having right to a particular trade-mark does not make use thereof for several years during which time another person uses the trade-mark and his manufactures thereby become known as such in the market, cannot afterwards come forward and use the mark or confer on a purchaser from him the right of so using it. The mere statement on the plaintiff's trade-mark that he carries on business in a particular place for the purpose of procuring the particular article—whereas he carries on the business in another place—is not such a false statement or misrepresentation as disentitles him to relief in this Court. SEAH LEE & ANOR. *v.* KIAN GUAN 403

TRADE—RESTRAINT OF—*see* CONTRACT. 3. - - - - - - 158
see also TRADE-MARK.

TRANSFER AND SCRIP—Bearer Warrant - - - - - - - 512
see CONTRACT. 11.

——OF SHARES—Company—Specific performance - - - - - - 465
see BREACH OF CONTRACT. 3.

TREATY—Foreign Power—Judicial Notice - - - - - - - 346
see EXTRADITION. 3.
—— *also* RIPARIAN RIGHTS 450

TRESPASS—A defendant who trespasses on the land of a plaintiff, *e.g.* by building a house thereon, has no right to insist that the plaintiff be merely awarded a sum of money for the value of the land taken in lieu of a mandatory injunction on him [defendant] for removal of the trespass. *Krehl* v. *Burrell*, 11 L. R. Ch. Div. 147, followed. MOSES *v.* LOW KIM PONG 443

2 ——Plaintiff proceeded by Petition of Right under the Crown Suits Ordinance 15 of 1876 to recover damages for flooding his lands with sea-water, by the removal of a sluice-gate—the damages were made up of four distinct items of which the value of the sluice-gate itself or damages for its

TRESPASS—*continued.*
mere removal was *not* one.—*Held*, the plaintiff having failed to prove that the flooding was the result of the removal of the sluice-gate, and so had failed in respect to the damages he sued for, was *not* entitled—though the removal of the sluice-gate was a trespass—even to a verdict for nominal damages for *that* trespass. BROWN *v.* ATTORNEY-GENERAL - - 459

TRIAL—Amendment of charge—Jury—New Trial - - - - - - 258
see JURY.
— *also* MAGISTRATES. 1. 2. 560. 592
——— NEW TRIAL. 1. 186
——— OFFENCES - - 188

TRIBAL KONGSI *see* CHARITY. 2. 500

TRUST—Declaration of—Malay testamentary document—Probate refused as Will - - - - - - - 178
see DECLARATION OF TRUST.

2. ——On the death of a sole trustee, the trust estate devolves on his legal personal representative as trustee *to carry on the trust* by virtue of Section 33 of the Conveyancing and Law of Property Ordinance 6 of 1886, and *not* merely for the *limited purpose* of his *appointing* a new Trustee. Section 34 of the Ordinance in no way controls Section 33. ATTORNEY-GENERAL *v.* HAJI ABDUL RAHMAN - - 497

3. ——Companies' Ordinance, 1889—Foreign State—equal distribution—assets - - - - - - - 570
see FOREIGN COURT.

TRUST ESTATE—Devolution - 497
see TRUST. 2.

———FUNDS—Illegal or fraudulent contract—breach of trust - - - 409
see EXECUTOR. 2.

TRUSTEE—Where the plaintiff was merely the sole survivor of numerous trustees of a Chinese burial ground charity, but had never acted except to bring this action in order to get possession of the deeds from the defendant who had no right to them, but who alleged that they had been entrusted to him by certain persons of the Chinese community for safe custody, and who alleged that the plaintiff intended to make improper use of the deeds, *Held*, the Court would not order the deeds to be given up to the plaintiff or even enter up judgment for him; but directed the Title Deeds to be deposited with the Registrar of the Court for safe keeping until further order. QUAH LOO MOYE *v.* LAW SEOW HUCK - - - - 100

2. ——Executor of a Will—character of Executor and - - - - - 409
see EXECUTOR. 2.
—— *also* FRAUD. 3. - 590
——— MORTGAGEE. 2. 359

UNASCERTAINED SUM—*see* CONTRACT. 2. - - - - - - 680

UNCORROBORATED EVIDENCE—The Court does not generally act on the uncorroborated though uncontradicted evidence of a plaintiff against the evidence of a deceased person - - - - 416
see REPLY.

——— STATEMENT—Uncontradicted statement—rule in England - - 311
see LIMITATION. 1.

UNDERVALUE—Public auction—power of sale - - - - - - - 359
see MORTGAGEE. 2.

UNLAWFUL ARREST—Escape of prisoner when not in legal custody, conviction under Section 221 of the Penal Code cannot be sustained - - - 615
see POLICE. 4.

———GAIN—*see* MISAPPROPRIATION - - - - - - - 441

UNLICENSED CONVEYANCER—*see* CONVEYANCER - - - - - 286

———HOUSE *see* LICENSE.

USER—Money—goods - - - 441
see MISAPPROPRIATION.

2. ——Artificial water-course - 450
see RIPARIAN RIGHTS.

VALID SECURITY—*see* BILL OF SALE. 6. - - - - - - 475

VALUABLE CONSIDERATION—*see* LEGACY - - - - - - 88

———————WITHOUT NOTICE—*see* COMPANY. 1. - - - - 193

VENDOR—*see* CONTRACT. 8. - 481

VERANDAH—The Municipal Commissioners have no power under Section 129 of the New Municipal Ordinance 2 of 1887, to issue a notice to an owner or occupier of a house to remove obstructions in open arcades or verandahs; and the mere non-compliance therefore with such a notice does not bring the owner or occupier within the section. The Municipal Commissioners have no power to enforce public passage over an arcade or verandah by requiring under Section 129, the removal of obstructions thereon, which obstructions have existed anterior to the old Conservancy Act XIV. of 1856. A conviction for "maintaining" such an obstruction by merely not complying with a notice as above, was therefore quashed. CHIN BENG LEANG AND ORS. *v.* MUNICIPAL COMMISSIONERS - - - - - - - 431

VERDICT—*see* PLEA IN BAR - 651

VESSEL—*see* BILL OF SALE. 8. - 595
——COLLISION - - 478
——DERELICT VESSEL 638
——*also* SHIPPING.

WAIVER—*see* CONTRACT. 11. - 512

WAKIL—Testamentary document—Probate refused as Will - - - 178
see DECLARATION OF TRUST.

WAKOFF—Testator—Bequest - 101
see LAND. 2.

2. ——A house built on "Wakoff land" though constructed of brick with its foundations in the ground, if assigned separately from the land itself, is a "fixture" and "personal chattel" within the meaning of Section 5, Clauses 4 and 7 of the Bills of Sale Ordinance 12 of 1886, and unless the assignment is registered, the same is void as against an Execution-creditor. MOOTYAH CHETTY *v.* YACOB. *In re* NYAH HAMZAH - - - - 568

3. ——A brick house built on Wakoff land with granite foundations buried under ground, is a "personal chattel" within the meaning of the Bills of Sale Ordinance 22 of 1870, [now repealed] and 12 of 1886. LETCHMAN CHETTY *v.* HASSAN KUDUS AND ORS. *In re* KHOO THEAN POH AND ANOR. 675
see also CHARITY.
——DEVISE - - 212

WANT OF PARTIES—*see* CONTRACT. 13. - - - - - - - 561

WARRANT—Distress—right of property—Interpleader - - - - 97
see DISTRESS.

2. ——Warrant on which Police act in Gaming Cases should be sent up with appeal - - - - - - 668
see LOTTERY. 3.

——OF COMMITMENT—Certificate—Judicial document - - - 150
see EXTRADITION. 1.

WATERCOURSE—*see* RIPARIAN RIGHTS - - - - - - 450

WAYANG—Chinese theatrical costumes not exempted from distress for rent 97
see DISTRESS.

WEISANG LOTTERY—*see* LOTTERY. 2. - - - - - - - 597

WHA WHEY—Lottery tickets - 237
see GAMING. 1.

WHARVES—Warehouses—Coal-sheds—assessment - - - - - 103
see ASSESSMENT.

WHEATON'S INTERNATIONAL LAW—Definition of piracy *jure gentium*, disapproved of - - - - - 169
see PIRACY JURE GENTIUM.

WHIPPING—As to power of Magistrate to inflict sentence of—when prisoner sentenced to imprisonment under Preservation of the Peace Ordinance - - 357
see BREACH OF THE PEACE.

WIDOW—Misrepresentation - 85
see MARRIED WOMAN. 1.

WIDOWS—A Chinaman having died intestate, leaving two widows, the Court

WIDOWS—*continued.*
granted joint administration to both. *In the goods of* ING AH MIT - - 380

WIFE—Where a wife has been deserted by her husband who leaves her quite unprovided for, this Court has jurisdiction to declare her equity to a settlement attaches to property acquired by her before as well as during coverture, and to direct a settlement of such property on her for her separate use. Such an order may be obtained on the *ex-parte* petition of the wife, where it is shewn the husband's whereabouts cannot be ascertained; it is unknown whether he be alive or dead *In re* KYLE 376
see also HINDU HUSBAND & WIFE 327
——— LOTTERY. 3. - 668
——— MAHOMEDAN MARRIAGE ORDINANCE. 1. 98
——— MAHOMEDAN MARRIED WOMAN. 1. 2. 3. 122, 124, 225
——— MARRIED WOMAN. 1. 85
——— PROMISSORY NOTE. 1. 6

WILD'S CASE—The weight of authority preponderates in favour of the proposition that the rule in—is not applicable to personal property - - - - - 584
see LEASEHOLD PROPERTY.

WILL—Administrator with Will annexed of a third person deceased—delegation of powers - - - - - - - 8
see EXECUTOR. 1.

2. ——Testamentary document—declaration of trust—Probate refused as a 178
see DECLARATION OF TRUST.

3. ——Drawing, in expectation of fee or reward—unlicensed Conveyancer - 286
see CONVEYANCER.

4. ——Executor of a—Trustee - 409
see EXECUTOR. 2.

5. ——The mere fact of a person being named in a Will as an Executor does not prevent him purchasing the Testator's property if he has never taken upon himself the duties of an Executor or Trustee unless he makes use of his position in order to commit a fraud - - - - 590
see FRAUD.
——— *also* CHILDREN. 1. - 128
——— MAHOMEDAN MARRIAGE ORDINANCE. 2. - 265
——— TESTATOR. 3. - 608

WITHDRAWAL OF CASE—Supreme Court—postponement - - - 345
see ORDER OF HEARING.

———SUMMONS—Discharge of prisoner—not liable to be re-tried - 556
see ACQUITTAL.

WITNESS—Arms and Ammunition—Exportation - - - - - - 515
see EVIDENCE. 10.

WITNESS—*continued.*

2. ——Occupation—description in affidavit - - - - - - - - 120
see BILL OF SALE. 1
—— *also* BANKRUPTCY. 2. 569
——LABOUR. 1. - 230
——MAGISTRATE. 1. 79
——NEW TRIAL. 1. - 186

WITNESSES—All witnesses called before the Magistrate on behalf of the prosecution should, as a general rule, be called for the prosecution in the trial at the Assizes, but the prosecuting Counsel has a discretion in the matter, and the Court will not interfere with such discretion. In future however, in all cases in which the prosecuting Counsel in exercise of his discretion omits to call such a witness, the witness should be produced in Court and the Counsel for the defence might, if he think proper, call him as his own witness. If he so call the witness, such witness will be subject to cross-examination by the Counsel for the prosecution in the same way as any other witness called for the defence. REGINA *v.* TEO AH HOO - - - - - 317

2. ——Defence—Right of reply 605
see ATTORNEY-GENERAL. 1.
—— *also* HABEAS CORPUS. 2. 685

WOMAN—*see* BIGAMY. 1. - - 513
——CHILDREN. 1. - 128
——GAMING. 5. - - 615
——HINDU HUSBAND AND WIFE - - - 327
——LOTTERY. 3 - - 668
——MAHOMEDAN MARRIAGE ORDINANCE.
——MAHOMEDAN MARRIED WOMAN.
——MARRIED WOMAN.
——PROMISSORY NOTE. 1. 6
——PROSTITUTION. 1. - 385
——REPLY - - - 416
——WIDOWS - - 380
——WIFE - - - 376

WOMEN AND GIRLS PROTECTION ORDINANCE—*see* CONVICTION. 4. 493
see also HABEAS CORPUS. 2. 685

WORDS—"Accomplice" - - 597
see LOTTERY. 2.
——— "Any person" - - 162
see MARRIED WOMAN. 2.
——— "Anything done.....in the execution of his duty as such Police Officer" - - - - - - - 240
see POLICE. 2.
——— "Buildings" - - - 103
see ASSESSMENT.
——— "Cause of action arose" - 311
see LIMITATION. 1.

WORDS—*continued.*

——— "Either.....or otherwise" 1
see SECURITY. 1.
——— "His house" - - - 533
see LAND. 13.
——— "Houses" - - - 103
see ASSESSMENT.
——— "Inadvertence" - - 279
see BILL OF SALE. 3.
——— "Knowingly" - - 230
see LABOUR. 1.
——— "Make himself a defendant" 688
see CROWN SUITS.
——— "Material fact" - - 319
see AGENT.
——— "Mutual dealing" - - 281
see BANKRUPTCY. 1.
——— "New Trial" - - - 258
see JURY.
——— "Or any other disease" - 666
see CATTLE DISEASE.
——— "Or otherwise" - - 240
see POLICE. 2.
——— "Or otherwise obtains possession of" - - - - - - - 385
see PROSTITUTION. 1.
——— "Other hands" - - 136
see AGREEMENT. 1.
——— "Present" - - - 136
see AGREEMENT. 1.
——— "Prosecution" - - 1
see SECURITY. 1.
——— "Public or a class of the public" - - - - - - - 518
see GAMING. 4.
——— "Public Place" - - 346
see AFFRAY.
——— "So bound" - - - 230
see LABOUR. 1.
——— "Suitable House" - - 463
see PROMISE. 1.
——— "The Court below" - 407
see FRESH CHARGE. 1.

WRIT OF MANDAMUS—*see* CONSULAR COURT. 1. - - - - - - 274

WRIT OF SUMMONS—Service out of jurisdiction - - - - - - 511
see CONTRACT. 10.

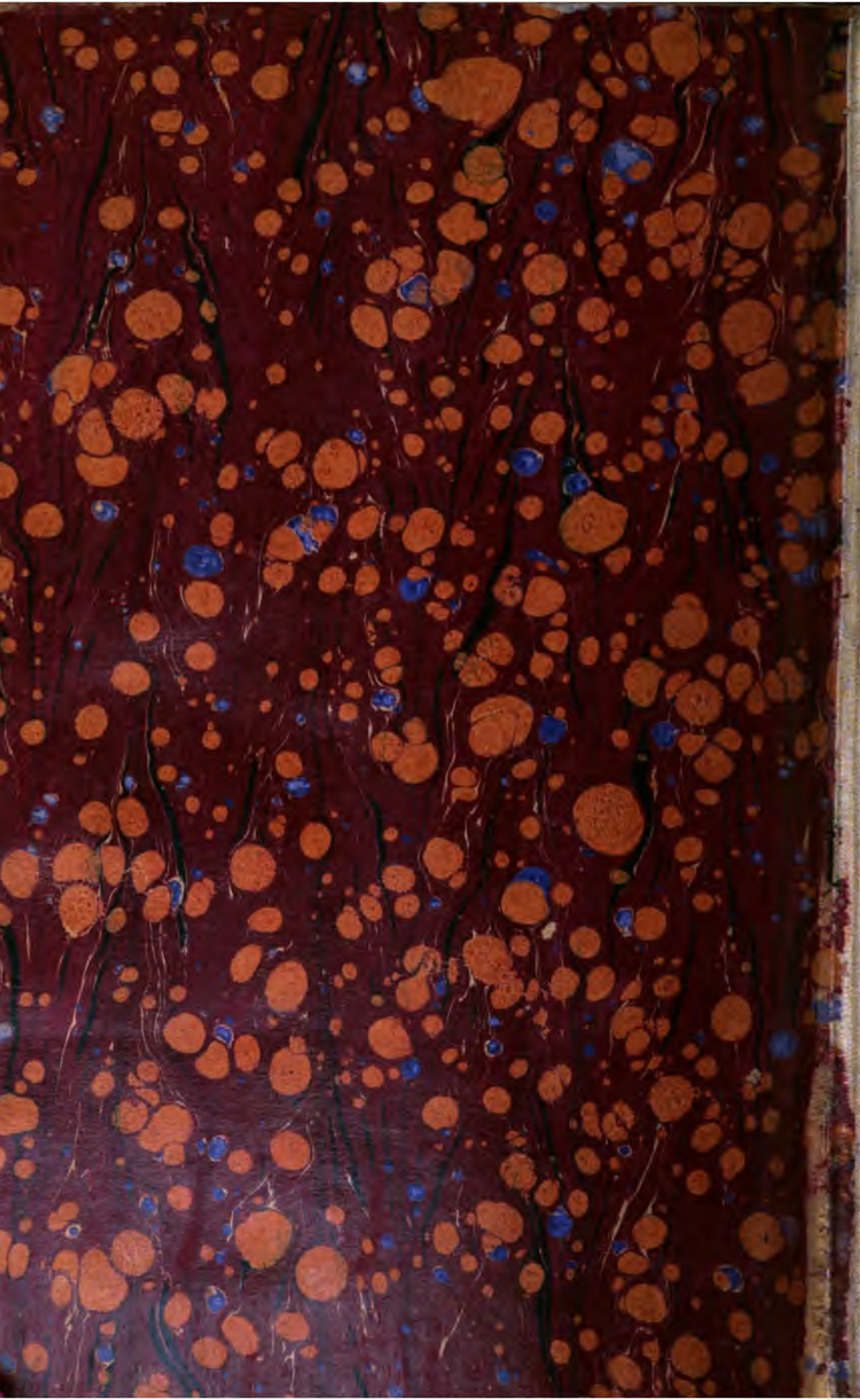
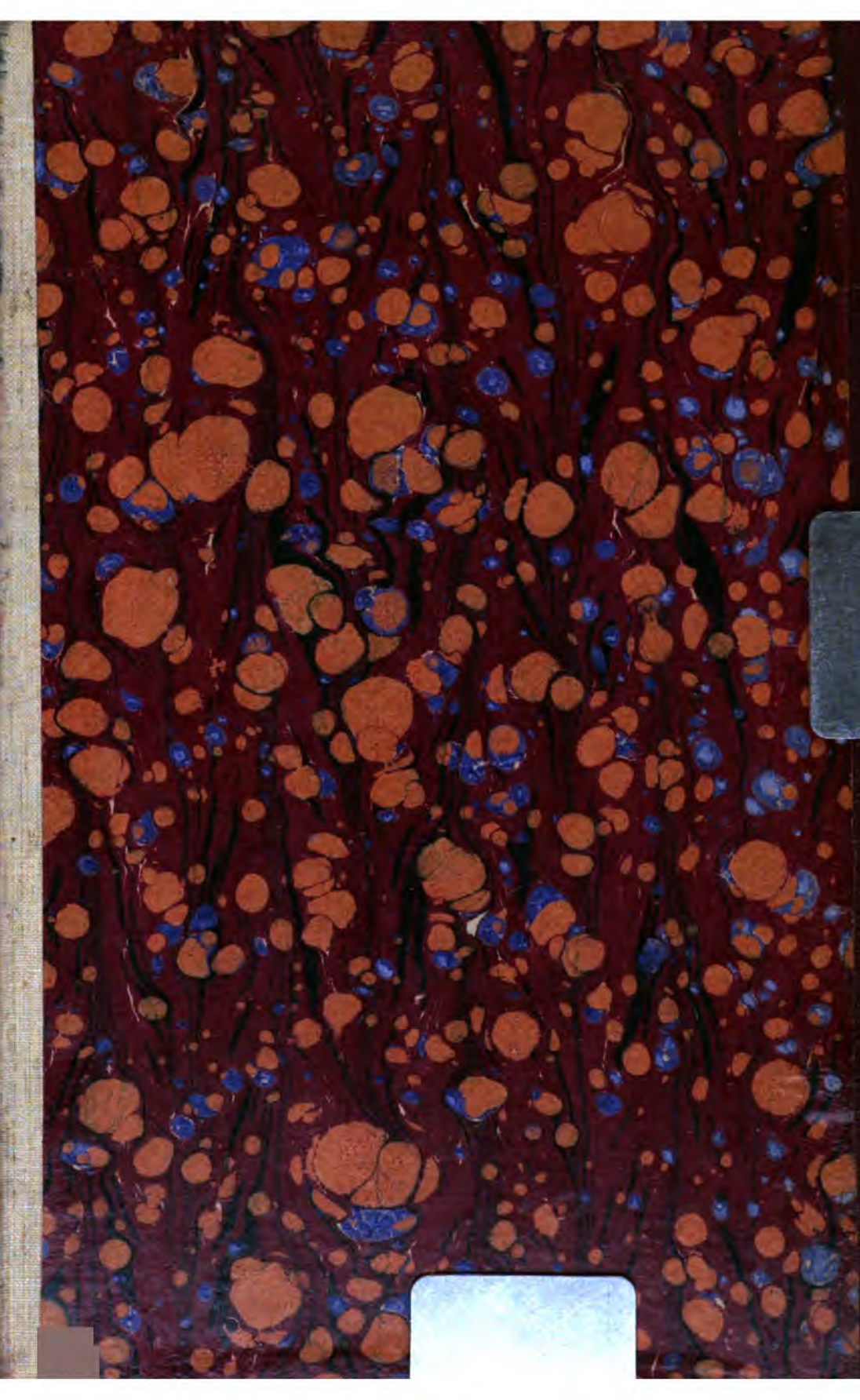
2. ——Payment by defendant on service to Sheriff—misappropriation—liability of defendant - - - - - - 614
see SHERIFF.
—— *also* CROWN CONTRACT. 2. 680
——— SUMMONS.

WRIT ON MESNE PROCESS—Arrest of defendant—imprisonment—security—writ declared void - - - - 71
see BOND.

WRONG CHARGE—*see* PROPER CHARGE. 2. - - - - - - - 472

WRONGFUL DISMISSAL—In order to justify the dismissal of a servant, it is not necessary that there should be any moral turpitude in any act done by him; it is a sufficient cause to dismiss him if he represent an untrue condition of things to his employer, though he thereby causes his employer no actual loss. Where therefore the Manager of a Mercantile firm had overdrawn his account and was requested by the firm to liquidate his debt as soon as possible and at the end of the half-year not having done so, but—in order to induce the firm to believe he had to a certain extent done it—in making up the balance sheet he entered a balance only as due by him, and the difference between his actual debt and the balance he entered into the firm's Suspense account and wrote to the firm enclosing the balance sheet and stating he had made payments to account of his debt, leaving only the balance shewn,— but a couple of months thereafter he paid off his whole debt to the firm, so that the firm lost nothing by his above conduct,—but the month following the firm discovered what he had done and considering it no longer possible to entrust its affairs in his hands, summarily dismissed him from their service, upon which he sued them for wrongful dismissal. *Held*, the firm was justified in dismissing him. TURNER *v.* MANSFIELD & Co. - - - - - 91

WRONGFUL DISMISSAL—*continued.*

Ex S.F.K
3/16/10

PRINTED AT THE "SINGAPORE AND STRAITS PRINTING OFFICE."